THE
"YEARLY DIGEST"
OF
Indian & Select English Cases

(ISSUED IN TWELVE MONTHLY AND ANNUAL PARTS)

Reported in all the important Legal Journals during the year

1941

BY

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Books Checked

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ABBREVIATIONS EXPLAINED.

Reports.

I.L.R. (1941) All.	Indian Law Reports, Allahabad Series.
A.L.J.	Allahabad Law Journal.
A.L.W.	Allahabad Law Weekly.
A.W.R.	Allahabad Weekly Reporter.
A.Cr.C.	Allahabad Criminal Cases.
A.I.R. 1941 All. or 1941 A.	All India Reporter, 1941 Allahabad.
A.M.L.J.	Ajmer-Merwara Law Journal.
I.L.R. (1941) Bom.	Indian Law Reports, Bombay Series.
Bom L.R.	Bombay Law Reporter.
A.I.R. 1941 Bom. or 1941 Bom.	All India Reporter, 1941 Bombay.
Bur.L.T.	Burma Law Times.
Bur.L.J.	Burma Law Journal.
B.R.	Bihar Reports.
I.L.R. (1941) Cal.	Indian Law Reports, Calcutta Series.
C.L.T.	Cuttack Law Times.
C.L.J.	Calcutta Law Journal.
Cr.L.J.	Criminal Law Journal.
C.W.N.	Calcutta Weekly Notes.
Comp.C.	Company Cases.
A.I.R. 1941 Cal. or 1941 Cal.	All India Reporter, 1941 Calcutta.
A.I.R. 1941 F.C.	All India Reporter, 1941 Federal Court.
Fed.L.J.	Federal Law Journal.
F.L.R.	Federal Law Reports.
I.A.	Law Reports, Indian Appeals.
A.I.R. 1941 P.C.	All India Reporter, 1941 Privy Council.
I.C.	Indian Cases.
I.T.R.	Income-tax Reports.
R.P.C.; R.A.; R.B.; R.C.; R.L.; R.M.; R.N.; R.O.; R.P.; R.R.; R.S.	Indian Rulings, Privy Council, All., Bom., Cal., Lah., Mad., Nag. Oudh, Pat., etc.
I.L.R. (1941) Lah.	Indian Law Reports, Lahore Series.
A.I.R. 1941 Lah. or 1941 Lah.	All India Reporter, 1941 Lahore.
Lah.L.T. or L.L.T.	Lahore Law Times.
L.B.R.	Lower Burma Rulings.
L.W.	Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
I.L.R. (1941) Mad.	Indian Law Reports, Madras Series.
(1941) M.L.J.	Madras Law Journal.
M.L.T.	Madras Law Times.
M.W.N.	Madras Weekly Notes.
A.I.R. 1941 Mad. or 1941 Mad.	All India Reporter, 1941 Madras.
Mys.H.C.R.	Mysore High Court Reports.
Mys.L.J.	Mysore Law Journal.
I.L.R. (1941) Nag	Indian Law Reports, Nagpur Series.
N.L.J.	Nagpur Law Journal.
A.I.R. 1941 Nag. or 1941 Nag.	All India Reporter, 1941 Nagpur.
A.I.R. 1941 Oudh or 1941 Oudh.	All India Reporter, 1941 Oudh.
O.A.	Oudh Appeals.
O.L.R.	Oudh Law Reports.
O.W.N.	Oudh Weekly Notes.
P.R.	Punjab Record.
P.L.R.	Punjab Law Reporter.
P.W.R.	Punjab Weekly Reporter.
Pat. or P.	Indian Law Reports, Patna Series.
A.I.R. 1941 Pat. or 1941 Pat.	All India Reporter, 1941 Patna.
Pat.L.J.	Patna Law Journal.
Pat.L.T.	Patna Law Times.
P.W.N.	Patna Weekly Notes.
A.I.R. 1941 Pesh.	All India Reporter, 1941 Peshawar.
R. or Rang.	Indian Law Reports, Rangoon Series.
1941 Rang.L.R.	Rangoon Law Reports.
A.I.R. 1941 Rang. or 1941 Rang.	All India Reporter, 1941 Rangoon.
R.D.	Revenue Decisions.
S.L.R.	Sind Law Reporter.
A.I..R 1941 Sind or 1941 Sind.	All India Reporter, 1941 Sind.
T.L.R.	Travancore Law Reports.
T.L.J.	Travancore Law Journal.
T.L.T.	Travancore Law Times.
U.B.R.	Upper Burma Rulings.
Co.L.J.	Cochin Law Journal.

Other Abbreviations.

Appl.	Applied.	Disc.	Discussed.	Foll.	Followed.	F.B.	Full Bench.
Appr.	Approved.	Diss.	Dissented from	Dist. or D.	Distinguished.	Ref. or R.	Referred.
Comm.	Commented.			P.C.	Privy Council.	Rev.	Revenue.
Cons.	Considered.	Doubt.	Doubted.	Rel.	Relied.		
Cr.	Criminal.	Expl.	Explained.	S.B.	Special Bench		

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19 I.A. 48=19 Cal. 253 (P.C.) Rel. 20 Pat. 162.
———191=20 Cal. 85 (P.C.) Ref. 1941 Rang.L.R. 14.
20 I.A. 155=21 Cal. 157 Ref. 67 I.A. 406=I.L.R. 1941 Bom. 8 (P.C.).
———160=21 Cal. 142 (P.C.) Ref. I.L.R. 1941 Nag. 474; 43 Bom.L.R. 225; (1941) 2 M.L.J. 866.
———176 Ref. 45 C.W.N. 987.
21 I.A. 171=22 Cal. 222 (P.C.) Rel. 20 Pat. 144.
22 I.A. 31 =17 All. 198 Rel. 45 C.W.N. 208.
———44=17 All. 106 (P.C.) Ref. 1941 Rang.L.R. 246.
———68=22 Cal. 434 (P.C.) Dist. I.L.R. 1941 Lah. 601.
———107=22 Cal. 788 Foll. I.L.R. (1941) 1 Cal. 499.
23 I.A. 32=19 Mad. 249 Dist. I.L.R. (1941) 1 Cal. 514=45 C.W.N. 530.
———45=23 Cal. 775 (P.C.) Rel. (1941) 2 M.L.J. 904 (F.B.
24 I.A. 170=25 Cal. 179 (P.C.) Rel. I.L.R. 1941 Nag. 356.
25 I.A. 34=25 Cal. 587 Ref. 45 C.W.N. 1047.
———95 Dist. (1941) 2 M.L.J. 939.
26 I.A. 45 Ref. 43 Bom.L.R. 225.
———58 Foll. 20 Pat. 115.
———216 Ref. 45 C.W.N. 240.
27 I.A. 103=27 Cal. 1004 Rel. I.L.R. 1941 Bom. 260=43 Bom.L.R. 194.
———110=27 Cal. 951 Rel. 20 Pat. 162.
———151=24 Mad. 147 Ref. (1941) 2 M.L.J. 972 (P.C.
27 I.A. 168 Ref. 45 C.W.N. 259 (P.C.).
7 I.A. 216=25 Bom. 337 Rel. I.L.R. 1941 Nag. 266. Ref. 22 P.L.T. 520.
28 I.A. 159=28 Cal. 621 Ref. I.L.R. 1941 Mad. 567=(1941) 1 M.L.J. 123.
———257 Ref. (1941) 2 M.L.J. 534.
29 I.A. 51 Ref. 16 Luck. 24.
———104=29 Cal. 518 Rel. 20 Pat. 497. Foll. I.L.R 1941 Nag. 655.
———196 Ref. 45 C.W.N. 420.
30 I.A. 54 Rel. 22 P.L.T. 230.
31 I.A. 38=26 All. 108 Ref. 1941 Rang. L.R. 258.
———71=31 Cal. 487 Disc. 16 Luck. 382.
———203=32 Cal. 129 Rel. I.L.R. (1941) 1 Cal. 309=45 C.W.N. 699.
32 I.A. 23=32 Cal. 296 (P. C.) Rel. I.L.R. 1941 Nag. 244.
———80 Ref. (1941) 2 M.L.J. 134.
———93=32 Cal. 605 Dist. 20 Pat. 373 (F. B.); Ref. I.L.R. 1941 Lah. 100.
———102=27 All. 334 Dist. (1941) 2 M.L.J. 1018.
32 I. A. 144=33 Cal. 116 Not appl. I.L.R. (1941) 2 Cal. 1.
33 I.A. 68 Rel. 16 Luck. 615.
———176=30 Bom. 431 Ref. I.L.R. 1941 Bom. 250=43 Bom.L.R. 114.
34 I.A. 9 Expl. (1941) 2 M.L.J. 248; Ref. (1941) 1 M.L.J. 116.
———37 Ref. 45 C.W.N. 987.
———41 Ref. 43 Bom.L.R. 250.
———46 Ref. I.L.R. 1941 Bom. 341=43 Bom.L.R. 126.
———65=29 All. 244 Rel. 16 Luck. 302.
———87=34 Cal. 329 (P.C.) Ref. I.L.R. 1941 Mad. 157.
———115 Ref. 45 C.W.N. 498.
———160=34 Cal. 902 Ref. I.L.R. 1941 Bom. 107=43 Bom.L.R. 1 (P.C.).
35 I.A. 22 Ref. (1941) 2 M.L.J. 72; 20 Pat. 261; 45 C.W.N. 50.
———98 Rel. 20 Pat. 780.
———130=32 Bom. 466 Cons. 45 C.W.N. 408.
36 I. A. 138=31 All. 497 Rel. I.L.R. 1941 Nag. 135.
———148=36 Cal. 1003 Ref. I.L.R. 1941 Bom. 202=22 P.L.T. 239.
———192 Foll. 1941 Rang.L.R. 445.
———203=31 All. 583 Rel. I.L.R. 1941 Lah. 353.
37 I.A. 191=14 C.W.N. 770 Ref. 45 C.W.N. 809.
38 I.A. 76 Ref. 22 P.L.T. 239.
———87=33 All. 356 Ref. I.L.R. 1941 Mad. 486.
39 I.A. 49=34 All. 213 (P.C.) Rel. I.L.R. 1941 Nag. 244.
———101=39 Cal. 915 Ref. I.L.R. 1941 Bom. 460=43 Bom.L.R. 581 (F.B.).
———121=34 All. 234 Ref. (1941) 1 M.L.J. 496.
39 I.A. 197=40 Cal. 20 Rel. 20 Pat. 561; (1941) 2 M.L.J. 529; Ref. 45 C.W.N. 181.
———218=35 Mad. 607 Rel. I.L.R. 1941 Bom. 415=43 Bom.L.R. 758.
40 I.A. 24=37 Bom. 198 Foll. I.L. R. 1941 Mad. 378.
———74=34 All. 227 Dist. I.L.R 1941 Bom. 260=43 Bom. L.R. 194.
———132=36 Mad. 295 Dist. I.L.R. 1941 Kar. 72.
41 I.A. 23 Ref. 45 C.W.N. 259 (P.C.).
———142 Ref. 1941 Rang.L.R. 141.
———149 Ref. 43 Bom.L.R. 631.
———180 Rel. I.L.R. 1941 Kar. 381.
———251=42 Cal. 72 Rel. I.L.R 1941 Nag. 356.
———258 Ref. (1941) 2 M.L.J. 529.
———314=38 Mad. 807 Cons. I.L.R. 1941 Bom. 488.
———314 Expl. 43 Bom.L.R. 615
42 I.A. 1 Ref. 45 C.W.N. 240.
———125=38 Mad. 406 Foll. I.L.R. (1941) 1 Cal. 137; Expl. 45 C.W.N. 105; Ref. 45 C.W.N. 998.
———208=37 All. 604 Ref. (1941) 1 M.L.J. 724; I.L. R. 1941 Nag. 598.
43 I.A. 56=40 Bom. 270 Ref. (1941) 1 M.L.J. 724.
———164 Rel. I.L.R. 1941 Kar. 89; Ref. 1941 Mad. 419=(1941) 1 M.L.J. 178.
———192=39 Mad. 617 Rel. I.L.R. 1941 Nag. 655.
———207 Ref. 45 C.W.N. 998.
———249 Foll. 22 .P.L.T. 239.
44 I.A. 6=40 Mad. 112 Rel. 20 Pat. 144.
———87=44 Cal. 388 Rel. I.L.R. 1941 Lah. 71; 601.
———98=40 Mad. 402 Rel. I.L.R. 1941 Lah. 632.
———104=44 Cal. 858 (P.C.) Rel. 20 Pat. 497.
———147=40 Mad. 709 Ref. 16 Luck. 626; Rel. I. L. R. (1941) 2 Cal. 258=45 C. W.N. 809; I.L.R. 1941 Nag. 135.
44 I.A. 163 Ref. 16 Luck. 484.
———166=40 Mad. 886 Expl. (1941) 1 M.L.J. 378.
———218 Ref. (1941) 2 M.L.J. 873.

44 I.A. 246=45 Cal. 87 Expl. 20 Pat. 13 (F.B.).
———261=40 Mad. 793 Ref. I.L.R. 1941 Nag. 543; Rel. 20 Pat. 373 (F.B.).
45 I.A. 35=22 C. W. N. 409 Affirm. 45 C.W.N. 40 (P. C.). Foll. 43 Bom.L.R. 141 (P.C.).
———73=45 Cal. 878 Ref. I. L. R. 1941 Mad. 760=(1941) 2 M.L.J. 548 Rel. 16 Luck. 302.
———148=41 Mad. 778 Foll. I.L.R. 1941 Lah. 546; Ref. (1941) 2 M.L.J. 972 P.C.
———156=41 Mad. 855 Expl. I.L.R. 1941 Nag. 178 Ref. 2 M.L.J. 134.
———265 Expl. (1941) 2 M.L.J. 798 (F.B.).
46 I.A. 1 Ref. (1941) 2 M.L.J. 222.
———33=46 Cal. 663 Appl. I.L.R. 1941 Mad. 513; (1941) 1 M.L.J. 441 (F.B.).
———52 Ref. 22 P.L.T. 202; I.L.R. (1941) 1 Cal. 90=45 C.W.N. 141; Dist. I.L.R. (1941) 1 Cal. 234.
———97=43 Bom. 778 Rel. I.L.R. 1941 Nag. 178.
———151=42 Mad. 813 Dist. I.L.R. 1941 Nag. 1 (F.B.).
———176=43 Mad. 146 Foll. I.L.R. 1941 Mad. 288=(1941) 1 M.L.J. 108; Dist. I.L.R. 1941 Nag. 397.
———259=47 Cal. 466 Rel. I.L.R. (1941) 1 Cal. 234=45 C.W.N. 141.
———272=24 C.W.N. 297 Ref. 45 C.W.N. 253 (P.C.). Rel. (1941) 2 M.L.J. 986.
———283 Dist. 20 Pat. 735.
———285 Ref. (1941) 2 M.L.J. 406; Rev. 20 Pat. 346.
47 I.A. 6=43 Mad. 541 (P.C.) Foll. I.L.R. 1941 Nag. 124.
———57=42 All. 368 Rel. I.L.R. 1941 Lah. 39.
———124 Rel. 1941 A.L.J. 508.
———202=47 Cal. 1012 (P.C.) Ref. I.L.R. 1941 Bom. 170.
———233=48 Cal. 100 Ref. I.L.R. (1941) 1 Cal. 234=45 C.W.N. 141.
48 I.A. 12 Rel. I.L.R. 1941 Kar. 204; Ref. 43 Bom.L.R. 706.
———49=48 Cal. 460 Dist. 45 C.W.N. 220.
———52 Ref. 45 C.W.N. 90.
———127=48 Cal. 509 Ref. 1941 A.L.J. 168.
———143=43 All. 291 Ref. (1941) 1 M.L.J. 488.
———195=43 All. 228 Ref. (1941) 2 M.L.J. 972 (P. C.).
———258 Ref. 45 C.W.N. 709=I.L.R. (1941) 2 Cal. 128.
48 I.A. 302=44 Mad. 831 Ref. I.L.R. 1941 Mad. 599=(1941) 1 M.L.J. 644 (F.B.).
———415=44 Mad. 864 Ref. (1941) 2 M.L.J. 159.
———513=49 Cal. 1 Ref. 43 Bom. L. R. 483. Rel. I.L.R. 1941 Bom. 170.
49 I.A. 37 Foll. 43 Bom.L.R. 622
———54=46 Bom. 481 (P.C.) Foll. I.L.R. 1941 Nag. 124.
———108 Ref. 45 C.W.N. 478.
———121=45 Mad. 320 Foll. (1941) 1 M. L. J. 408.
———129=45 Mad 320. Ref. I.L.R. 1941 Mad. 559=(1) 1941 M.L.J. 250.
———143 Ref. (1941) 1 M.L.J. Supp. 65.
———144=3 Lah. 127 Ref. I.L. R. (1941) 1 Cal. 477.
———312=1 Pat. 733 Foll. (1941) 2 M.L.J. 943.
———342=1 Pat. 741 (P.C.) Foll. I.L.R. 1941 Nag. 124; 135.
50 I.A. 1=2 Pat. 319 Ref. (1941) 2 M.L.J. 972 (P.C.).
———25=47 Bom. 335 Dist. I.L.R. 1941 Bom. 361=43 Bom.L.R. 293.
———41=46 Mad. 108 (P.C.) Dist. I.L.R. 1941 Mad. 767; Ref. (1941) 1 M.L.J. 788 (F.B.).
———69 Foll. 43 Bom.L.R. 800.
———77 Ref. 45 C.W.N. 129.
———183 Ref. 45 C.W.N. 498.
———196 Ref. 16 Luck. 626.
———212 Rel. 20 Pat. 561=22 P.L.T. 341 (S.B.)
———255 Ref. 45 C.W.N. 240.
———295=46 Mad. 751 Ref. 22 P.L.T. 239; I.L.R. 1941 Bom. 119; I.L.R. 1941 Lah. 429.
———324 Ref. 16 Luck. 79.
51 I.A. 83 Ref. 22 P.L.T. 239; 45 C.W.N. 240.
———208 Rel. 20 Pat. 280.
———241 Ref. 16 Luck. 421.
———293=51 Cal. 631 Expl. 20 Pat. 162.
———305 Ref. 45 C.W.N. 29 (P.C.).
———319=51 Cal. 969 Rel. 20 Pat. 459 (S.B.).
———381=46 All. 831 (P.C.) Foll. 20 Pat. 699 (S.B.).
52 I.A. 1=48 Mad. 280 Foll. (1941) 1 M.L.J. 22.
———40=52 Cal. 197 Ref. 1941 Rang.L.R. 258.
———61 Ref. (1941) 2 M.L.J. 105.
———73=3 Rang. 29. Ref. 1941 Rang.L.R. 285.
———79=52 Cal. 314 Foll. 20 Pat. 223.
———83=48 Mad. 254 Rel. I.L.R. 1941 Lah. 39; Foll. I,L,R. 1941 N. 124.
52 I.A. 100=47 All. 158 (P.C.) Dist. I.L.R. 1941 Lah. 331.
———145=47 All. 250 Foll. 20 Pat. 798.
———245=52 Cal. 809 Dist. I.L.R. (1941) 1 Cal. 309; Expl. 45 C.W.N. 85; Ref. 45 C.W.N. 699.
———262=47 All. 385 Ref. I.L.R R. 1941 Lah. 590.
———286 Rel. 16 Luck. 341.
———342 Foll. I.L.R. 1941 Nag. 418; Ref. 45 C.W.N. 253 (P.C.); 259 (P.C.).
———443 Expl. 20 Pat. 727.
53 I.A. 64=49 Mad. 249 Ref. 45 C.W.N. 470.
———92 Ref. (1941) 2 M.L.J. 571
———142=48 All. 443 Foll. I.L.R. 1941 Mad. 739=(1941) 1 M.L.J. 388.
———187 Ref. 16 Luck. 464 (F. B.); 43 Bom.L.R. 553.
———197=6 Pat. 24 Ref. I.L.R. 1941 Nag. 276; 20 Pat. 459 (S.B.).
———204=48 All. 518 Rel. I.L.R. 1941 Lah. 632.
———253 Dist. 22 P.L.T. 239.
———271=54 Cal. 338 Ref. I.L.R. 1941 Nag. 543.
54 I.A. 48=54 Cal. 166 Ref. I.L.R. 1941 Bom. 107 (P. C.); 45 C.W.N. 57.
———96 Ref. (1941) 2 M.L.J. 534.
———178=8 Lah. 573 Ref. 20 Pat. 115; I.L.R. 1941 Bom. 107 P. C.; Foll. 22 P.L.T. 721.
———190=54 Cal. 595 Foll. I.L.R. 1941 Nag. 559; I.L.R. 1941 M. 824=(1941) 2 M.L.J. 834.
———204 Rel. I.L.R. 1941 Bom. 460=43 Bom.L.R. 581 (F. B.)
———238 Ref. I.L.R. (1941) 2 Cal. 128=45 C.W.N. 709; 45 C.W.N. 420.
———248=50 Mad. 508 Ref. I.L.R. 1941 Bom. 306=43 Bom.L.R. 214.
———265=5 Rang. 451 (P.C.) Dist. (1941) 1 M.L.J. 784; Ref. 22 P.L.T. 282.
———289 (P.C.) Ref. (1941) 2 M.L.J. 972 (P.C.).
———338=51 Bom. 725 Rel. 2 Pat. 394 Ref. (1941) M.L.J. 968.
———421=9 Lah. 284 Rel. I.L.R. 1941 Nag. 588; 20 P. 561 (S.B.).
55 I.A. 7=6 Rang. 29 Foll. (1941) 1 M.L.J. 471.
———18=7 Pat. 221 Rel. I.L.R. 1941 Nag. 397; Not appl. I.L.R. (1941) 2 Cal. 1.
———96=55 Cal. 519 Dist. I.L.R. (1941) 1 Cal. 309.
———154=9 Lah. 510 (P.C.) Rel. I.L.R. 1941 Nag. 397; I.L.R. (1941) 2 Cal. 237.

55 I.A. 161=6 Rang. 302 (P.C.) Foll. I.L.R. (1941) 1 Cal. 536=I.L.R. 1941 Lah. 191 (F.B.); Rel. (1941) 1 M.L.J. 540.
———197 Ref. 20 Pat. 202 (F.B.)
———320=56 Cal. 1 Expl. 20 Pat. 13 (F.B.); Rel. 20 P. 96.
———360 Ref. 45 C.W.N. 837.
———390 =50 All. 722 Dist. 1941 Rang. L.R. 395.
56 I.A. 30 Foll. 43 Bom.L.R. 880.
———93=8 Pat. 516 Rel. I.L.R. 1941 Lah. 441.
———210=7 Rang. 227 Dist. 1941 Rang.L.R. 40.
———213=6 O.W.N. 483 (P.C.) Rel. 16 Luck. 93.
———232=10 Lah. 737 Ref. I.L.R. 1941 Nag. 344; Dist. 43 Bom.L.R. 475.
———290=57 Cal. 1 Reviewed, 20 Pat. 162.
57 I.A. 1=5 Luck. 1 Dist. I.L.R. 1941 Mad. 191 (F.B.)=(1941) 1 M.L.J. 77.
———49=54 Bom. 216 Ref. (1941)2 M.L.J. 993.
———56=53 Mad. 167 Ref. 20 Pat. 481 (S.B.).
———86=11 Lah. 199 Rel. I.L.R. 1941 Lah. 601.
———100 =57 Cal. 1148 Foll. I.L.R. 1941 Mad. 753; Ref. (1941) 1 M.L.J. 527.
———110 Ref. 20 Pat. 13 (F.B.).
———117=57 Cal. 1302 Dist. 1941 Rang.L.R. 316; Ref. (1941) 2 M.L.J. 827.
———177=54 Bom. 455 (P.C.) Foll. I.L.R. 1941 Nag. 124.
———194=54 Bom. 495 (P.C.) Dist. I.L.R. 1941 Nag. 1 (F.B.); I.L.R. 1941 Kar. 124.
———214=58 Cal. 301 Ref. I.L.R. (1941) 1 Cal. 409.
———228=58 Cal. 430 Rel. 20 Pat. 573 (S.B.).
———264=53 Mad. 597 Ref. 16 Luck. 626.
———296=10 Pat. 187 Ref. I.L.R. 1941 Bom. 170.
———305=53 Mad. 692 Dist. I.L.R. (1941) 1 Cal. 234=45 C.W.N. 141.
———325=11 Lah. 657 Ref. I.L.R. 1941 Bom. 8=(1941) 1 M.L.J.594 (P.C.); Rel. 45 C.W.N. 226.
58 I.A. 1 Ref. (1941) 2 M.L.J. 222.
———42=55 Bom. 243 Ref. I.L.R. 1941 Mad. 89 (P.C.)
———50 Ref. I.L.R. (1941) 1 Cal. 147; (1941) 1 M.L.J. 193.
———91 Ref. 20 Pat. 115.
———106 Dist. I.L.R. 1941 Lah Lah. 340.
———152=53 All. 183 Foll. I.L.R. 1941 All. 592 (F.B.).
58 I.A. 158=53 All. 103 Appl. I.L.R. (1941) 2 Cal. 434.
———169 =12 Lah. 280 Foll. 1941 Rang.L.R. 101.
———173 Ref. 45 C.W.N. 478.
———215=59 Cal. 1 Rel. I.L.R. 1941 Lah. 564.
———228=59 Cal. 80 Rel. 20 Pat. 96; Ref. 45 C.W.N. 797.
———239=54 Mad. 691 Expl. 1941 Rang.L.R. 181.
———254 Foll. I.L.R. (1941) 1 Cal. 536=45 C.W.N. 498.
———270=59 Cal. 142 Rel. 16 Luck. 414.
———299=11 Pat. 22 Reviewed 20 Pat. 162.
———323=59 Cal. 377 Ref. I.L.R. 1941 Bom. 136.
———392=59 Cal. 699 Foll. 20 Pat. 13 (F.B.).
———450=11 Pat. 227 (P.C.) Ref. I.L.R. 1941 Nag. 418.
59 I.A. 1 Rel. 16 Luck. 615.
———41 (P.C.) Appl. (1941) 2 M.L.J. 695.
———74=54 All. 93 Ref. 45 C. W.N. 226; I.L.R. 1941 Bom. 8 (P.C.).
———206 Ref. 20 Pat. 13 (F.B.); Rel. 20 Pat. 699 (S.B.).
———247=10 Rang. 322 Appl. I.L.R. (1941) 2 Cal. 434
———283=60 Cal. 1 Appl. 20 Pat. 1; Expl. 20 P. 513; I.L.R. 1941 Mad. 703; Dist. (1941) 1 M.L.J. 614; Foll. I.L.R. 1941 Nag. 199; Ref. 22 P.L.T. 202; 20 P. 735=22 P.L.T. 26; I.L.R. 1941 Mad. 599=(1941) 1 M. L. J. 644 (F.B.)
———290 Dist. 1941 Rang.L.R. 520; Foll. 1941 Rang.L. R. 529.
———331=59 Cal. 1399 Ref. (1941) 2 M.L.J. 972 (P.C.)
———376=7 Luck. 442 Dist. I.L.R. 1941 Kar. 124.
———376 Ref. 43 Bom.L.R. 553.
———405=63 M.L.J. 664 Ref. 22 P.L.T. 267.
60 I.A. 1=54 All. 827 Ref. I.L.R. 1941 Mad. 538=(1941) 1 M.L.J. 369.
———13 Ref. 16 Luck. 184; 45 C.W.N. 879.
———71 Disc. I.L.R. 1941 Kar. 79.
———76 Ref. 45 C.W.N. 1002.
———83=60 Cal. 662 Ref.(1941) 2 M.L.J. 66; Rel. 1941 A.L.J. 480.
———124 Ref. 45 C.W.N. 497 (P.C.) I.L.R. (1941) Mad. 599 (F.B.).
———133 Ref. (1941) 2 M.L.J. 682.
———167=56 Mad. 405 Dist. I.L.R. 1941 Nag. 1 (F.B.) Ref. 43 Bom.L.R. 724.
60 I.A. 183=11 Rang. 186 Ref. I.L.R. 1941 Lah. 353.
———196=60 Cal. 1029 Ref. 16 Luck. 159.
———203=56 Mad. 570 Foll. I.L.R. 1941 Bom. 42.
———242=12 Pat. 642 Rel. I.L. R. 1941 Nag. 178; Ref. (1941) 2 M.L.J. 134.
———263 8 Luck 351 Dist I L R (1941) 1 Cal 309; Ref. 45 C.W.N. 699.
———297 Foll. 43 Bom.L.R. 293.
———325 Ref. 20 Pat. 561 (S.B.)
61 I.A. 29=61 Cal. 221 Rel. I.L.R. 1941 Mad. 13 (F.B.)
———35=64 Cal. 313 Ref. I. L. R. (1941) 2 Cal. 128; 45 C. W. N. 709. Rel. 45 C.W.N. 665.
———78 Rel.(1941) 2 M.L.J. 255
———93 Ref. 45 C.W.N. 654.
———177 Rel. (1941) 2 M.L.J. 432.
———190=58 Bom. 306 Foll. (1941) 1 M.L.J. 374=I.L.R. 1941 Mad. 587. Rel. I.L.R. 1941 Lah. 632.
———200=57 Mad. 749 Rel. I.L.R. (1941) 1 Cal. 234.
———209=58 Bom. 317 Dist. I.L.R. 1941 Kar. 135.
———273=56 All. 376 Foll. I.L.R. 1941 Nag. 222; Reviewed 20 Pat. 130.
———286=56 All. 468 Ref. (1941) 2 M.L.J. 972 (P.C.)
———350=56 All. 548 Expl. I.L.R. (1941 Mad. 27.
———388 Ref. 43 Bom.L.R. 603.
———416=58 Mad. 181 Ref. I.L.R. 1941 Mad. 419=(1941) 1 M.L.J. 178.
62 I.A. 36=57 All. 156 Ref. I.L.R. 1941 Kar. 442.
———47 Ref. 22 P.L.T. 239; 45 C.W.N. 497 (P.C.).
———80=57 All. 242 Rel. I.L.R. 1941 Nag. 144; 563.
———161=59 Bom. 360 Rel. I.L.R. 1941 Nag. 178.
———207=14 Pat. 552 Rel. 20 Pat. 13 (F.B.).
———215=14 Pat. 623 (P.C.) Dist. (1941) 1 M.L.J. 262; 45 C.W.N. 647.
———224=14 Pat. 611 Appl. I.L.R. (1941) 2 Cal. 434.
63 I.A. 47 Reviewed 20 Pat. 429 (F.C.); (1941) 1 M.L.J. Supp. 49; Ref. (1941) 1 M. L.J. Supp. 65.
———74 Ref. 45 C.W.N. 681.
———99=60 Bom. 248 Rel. I.L.R. (1941) 1 Cal. 550.
———295 Ref. 43 Bom.L.R. 651.
———304 Ref. 45 C.W.N. 493.
———311=15 Pat. 567 Dist. I.L.R. 1941 Nag. 1 (F.B.).
———372=17 Lah. 629 Expl. I.L.R. 1941 Nag. 506; Rel. I.L.R. 1941 Kar. 281.

63 I.A. 384 Ref. (1941) 2 M.L.J. 311=45 C.W.N. 329 (F.B.)
———408 Rel. 20 Pat. 561 (S.B.)
———457=I.L.R. (1937) 1 Cal. 180 Ref. (1941) 2 M.L.J. 900 (F.B.).
64 I. A. 17=I.L.R. 1937 Mad. 263 Ref. I.L.R. (1941) 1 Cal. 477.
———28=I.L.R. (1937) 1 Cal. 653 Dist. I.L.R. 1941 Mad. 104 (S.B.).
———102=I.L.R. (1937) Nag. 191 Ref. I.L.R. 1941 Nag. 360.
———102 Disc. 16 Luck. 579.
———148=I.L.R. 1937 Bom. 711 Foll. I.L.R. 1941 Nag. 110.
———203 Rel. I.L.R. (1941) 2 Cal. 434.
———343 Dist. I.L.R. 1941 Bom. 42.
———363 Ref. I.L.R. 1941 Kar. 328.
65 I.A. 1 Ref. I.L.R. 1941 Nag. 360.
———66 Reviewed 20 Pat. 162; Ref. I.L.R. 1941 Nag. 474.
———158 Expl. I.L.R. (1941) 2 Cal. 319; Rel. I.L.R. 1941 Nag. 110.
———182 Appl. (1941) 1 M.L.J. 328; Ref. I.L.R. 1941 Bom. 415.
———198 Rel. I.L.R. 1941 Kar. 204; Ref. & Expl. 43 Bom.L.R. 706.
———219 Ref. (1941) 2 M.L.J. 1024.
———236 Rel. I.L.R. 1941 Kar. 135.
———332 Dist. (1941) 1 M.L.J. 99 (S.B.).
66 I.A. 50 Foll. (1941) 2 M.L.J. 53=20 Pat. 521 (P.C.).
———66=18 Pat. 234 Appl. I.L.R. 1941 Mad. 503=(1941) 1 M.L.J. 227; Expl. I.L.R. 1941 Kar. 292; Ref. I.L.R. 1941 Nag. 110; I.L.R. 1941 Bom. 333; 45 C.W.N. 269 (P.C.); I.L.R. 1941 Mad. 81 I.L.R. 1941 Kar. 257.
———84 Ref. I.L.R. 1941 Lah. 383 (F.B.).
———145 Foll. (1941) 1 M.L.J. 408.
———222 Ref. I.L.R. 1941 Nag. 397.
———241 Ref. I.L.R. 1941 All. 377; I.L.R. 1941 Mad. 862=(1941) 2 M.L.J. 148 (S.B.).
———258 Ref. (1941) 2 M.L.J. 711.
———293 Ref. 43 Bom.L.R. 603; 16 Luck. 191.
67 I.A. 25 Ref. (1941) 2 M.L.J. 115.
———64 Ref. (1941) 1 M.L.J. 130 (P.C.); 45 C.W.N. 232.
67 I.A 122 Ref. (1941) 2 M.L.J. 33 (F.C.).
———160 Ref. I.L.R. 1941 All. 291; Appl. I.L.R. 1941 Mad. 57; 1941 A.L.J. 50; Expl. (1941) 2 M.L.J. 848.
———222=I.L.R. 1940 Mad. 599 (P.C.) Foll. I.L.R. 1941 Mad. 850 (F.B.).
———251 Rel. 1941 A.L.J. 397.
———270 Rel. I.L.R. 1941 Bom. 177 (F.B.).
———394 Ref. (1941) 1 M.L.J. 776 (S.B.).
———464 Ref. I.L.R. 1941 Bom. 401.

I.L.R. ALLAHABAD SERIES.

1 All. 594 Rel. I.L.R. 1941 Nag. 437.
3 All. 60 Rel. 22 P.L.T. 80.
———229 (F.B.) Rel. I.L.R. 1941 Lah. 601.
———334 Dist. I.L.R. 1941 Kar. 99.
———585 Expl. 22 P.L.T. 809.
4 All. 532 Ref. 1941 A.L.J. 501.
5 All. 27 Ref. (1941) 2 M.L.J. 1024.
———60 Ref. I.L.R. 1941 Nag. 311.
———195 Ref. I.L.R. (1941) 2 Cal. 311.
6 All. 329 Dist. I.L.R. 1941 Bom. 350.
7 All. 362 Rel. I.L.R. 1941 Bom. 226.
———523 Dist. I.L.R. 1941 All 193.
———646 Ref. I.L.R. 1941 Kar. 257.
———661 (F. B.) Rel 22 Lah. 709.
———775 (F.B.) Ref. 43 Bom.L.R. 581 (F.B.).
8 All. 55 Ref. 43 Bom.L.R. 114.
———111 (F.B.) Ref. I.L.R. 1941 Nag. 543.
———149 Foll. I.L.R. 1941 All. 326 Ref. 1941 A.L.J. 118.
———319 Ref. (1941) 2 M.L.J. 134.
———384 Foll. I.L.R. 1941 Nag. 474.
9 All. 585 Ref. I.L.R. 1941 A.L.J. 427 (F.B.).
10 All. 97 Ref. 43 Bom.L.R. 719.
———467 Disc. 22 P.L.T. 760.
———570 Ref. (1941) 2 M.L.J. 1024.
———634 Ref. 16 Luck. 223.
11 All. 194 (F.B.) Appl. I.L.R. 1941 Mad. 13 (F.B.).
———372 Ref. (1941) 2 M.L.J. 121.
12 All. 313 Rel. I.L.R. 1941 Kar. 211.
13 All. 1 (F.B.) Not Foll. I.L.R. 1941 Nag. 199.
13 All. 28 Diss. 1941 Al.L.J. 518 (F.B.).
———189 Ref. 16 Luck. 1 (F.B.)
———282 (F.B.) Ref. I.L.R. 1941 Lah. 308 (F.B.).
———376 (F. B.) Foll. I.L.R. 1941 Nag. 276.
14 All. 273 (F.B.) Not Foll. I.L.R. 1941 Nag. 474.
15 All. 173 Rel. 16 Luck. 194.
———382 Ref. I.L.R. 1941 Nag. 437.
16 All. 124 Foll. 43 Bom.L.R. 858.
17 All. 29 Ref. I.L.R. (1941) 1 Cal. 490.
———87 Foll. I.L.R. 1941 Nag. 460.
———106 Disc. and Expl. I.L.R. 1941 All. 193.
———174 Diss. I.L.R. (1941) 2 Cal. 434.
———213 (F.B.) Ref. I.L.R. 1941 Lah. 191 (F.B.).
———526 Ref. I.L.R. 1941 Lah. 652.
18 All. 101 (F.B.) Ref. (1941) 2 M.L.J. 500.
———141 Ref. (1941) 2 M.L.J. 63.
———176 Rel. I.L.R. 1941 Lah. 39.
———206 Ref. I.L.R. 1941 Lah. 652.
———223 Foll. I.L.R. 1941 Nag. 276.
———395 Ref. I.L.R. 1941 Kar. 316.
———413 Foll. (1941) 2 M.L.J. 784.
———422 Ref. (1941) 2 M.L.J. 395.
19 All. 50 Ref. (1941) 2 M.L.J. 263.
———371 Ref. 45 C.W.N. 85.
20 All. 389 Diss. 1941 Rang.L.R. 395.
21 All. 348 Rel. I.L.R. 1941 Lah. 278.
———496 Rel. 22 P.L.T. 721.
22 All. 284 Ref. I.L.R. 1941 All. 220; 1941 A.L.J. 234.
———307 Dist. I.L.R. (1941) 1 Cal. 171.
———326 Rel. I.L.R. 1941 Nag. 513.
23 All. 106 Ref. I.L.R. 1941 All. 77 (F. B.); (1941) A.L J 137 F B
———502 Ref. I.L.R. 1941 Nag. 222; Rel. I.L.R. 1941 Nag. 144.
24 All. 160 Rel. I.L.R. 1941 Nag. 513.
25 All. 115 Rel. I.L.R. 1941 All. 17.
———133 Not Foll. I.L.R. (1941) 2 Cal. 394; Ref. 45 C. W. N. 912.
———165 Ref. 1941 Rang.L.R. 403.
———341 Ref. I.L.R. 1941 Lah. 512.
———355 Ref. 45 C.W.N. 757.

26 All. 28 Appr. I.L.R. 1941 All. 77 (F.B.); Foll. 43 Bom. L. R. 699; Ref. 1941 A.L. J. 137 (F. B.); I. L. R. 1941 Nag. 164.
———162 Ref. 43 Bom.L.R. 706.
———249 (F.B.) Foll. 1941 Rang. L.R. 90.
27 All. 88 Rel. I.L.R. 1941 Lah. 246.
———462 Dist. I.L.R. 1941 Bom. 71.
28 All. 51 Rel. I.L.R. 1941 Kar. 211.
———157 Diss. 45 C.W.N. 823.
———184 Ref. 1941 Rang.L.R. 249.
———340 Ref. 1941 Rang.L.R. 249.
———404 Rel. I.L.R. 1941 Mad. 592=(1941) 1 M.L.J. 236.
———458 Ref. (1941) 1 M.L.J. 724.
———545 Disc. 1941 Rang.L.R. 495 (F.B.).
———554 (F.B.) 1941 Rang.L.R. 90.
———655 Dist. I.L.R. 1941 Nag. 513 Doubt. 20 P. 86; Ref I.L.R. 1941 Bom. 136.
29 All. 267 Ref. I.L.R. 1941 All. 370=1941 A.L.J. 260.
———612 Ref. I.L.R. 1941 Nag. 381.
———615 Ref. 1941 Rang.L.R. 1 (S.B.).
30 All. 324 Ref. 1941 A.L.J. 284.
———375 Rel. 20 Pat. 780.
———508 Dist. I.L.R. 1941 Bom. 350.
———525 Ref. 22 P.L.T. 803.
31 All. 1 Rel. 22 Lah. 670.
———457 Ref. 16 Luck. 626.
———557 Ref. 16 Luck. 626.
———592 Ref. I.L.R. 1941 All. 280.
32 All. 136 Rel. 1941 A.L.J. 480.
———325 (F.B.) Ref. I.L.R. 1941 Nag. 255.
———363 Ref. 16 Luck. 626.
———363 *See* 37 I.A. 191.
———410 Ref. I.L.R. 1941 Nag. 677; Ref. 43 Bom.L.R. 35.
33 All. 51 Foll. 1941 A.L.J. 246.
———161 Ref. 1941 A.L.J. 374.
———233 Not Foll. 20 Pat. 280.
———237 Cons. I.L.R. (1941) 1 Cal. 428; Ref. 45 C.W.N. 426.
———257 Foll. I.L.R. 1941 Nag. 460.
———287 Ref. 16 Luck. 173.
———735 (F.B.) Ref. I.L.R. (1941) 2 Cal. 128; 45 C. W.N. 709.
———767 Disc. 1941 Rang.L.R. 495 (F.B.).
34 All. 25 (F.B.) Rel. I. L. R. 1941 Lah. 1 (F.B.).
34 All. 109 Dist. 43 Bom.L.R. 194 Ref. I.L.R. 1941 Bom. 260.
———184 Ref. 1941 Rang.L.R. 249.
———505 (F.B.) Ref. 43 Bom. L. R. 843.
———549 Ref. 43 Bom.L.R. 807.
35 All. 27 (F.B.) Ref. I.L.R. 1941 Nag. 54 (F.B.).
———51 Foll. I.L.R. 1941 All. 360.
———202 Ref. 16 Luck. 538.
———448 Ref. I.L.R. 1941 Mad. 49.
———470 Ref. I.L.R. (1941) 2 Cal. 311.
———543 Diss. I.L.R. 1941 Nag. 677.
———578 (F.B.) Ref. 45 C.W.N. 181.
36 All. 201 Rel. I.L.R. 1941 Nag. 356.
———406 Ref. I.L.R. 1941 All. 320=1941 A.L.J. 260.
37 All. 57 Ref. (1941) 1 M.L.J. Supp. 65.
———604 Ref. (1941) 1 M.L.J. 496.
———638 Foll. 20 Pat. 1.
38 All. 111 Foll. I.L.R. (1941) 1 Cal. 137.
———150 Ref. I.L.R. 1941 All. 573.
———452 Ref. I.L.R. (1941) 1 Cal. 477.
———469 Ref. 16 Luck. 252; 1941 A.L.J. 253.
41 All. 22 Appr. I.L.R. 1941 All. 320.
———111 Ref. (1941) 2 M.L.J. 913.
———243 Foll. 43 Bom.L.R. 805.
———278 Ref. 45 C.W.N. 122.
———399 Dist. 20 Pat. 751.
———435 Rel. I.L.R. 1941 Kar. 72.
———526 Ref. (1941) 2 M.L.J. 682.
42 All. 98 Disappr. I.L.R. 1941 All. 295; Ref. 1941 A.L.J. 46.
———174 Ref. I.L.R. 1941 All. 573.
———445 Foll. 20 Pat. 481 (S.B.)
———461 (F.B.) Foll. I.L.R. 1941 Nag. 652.
———568 Foll. 20 Pat. 346.
———596 Ref. I.L.R. 1941 Nag. 677.
43 All. 164 Ref. I.L.R. 1941 Lah. 428.
———170 Foll. 20 Pat. 223.
———228 Ref. (1941) 2 M.L.J. 12 (F.C.)
———314 Rel. I.L.R. 1941 Lah. 568.
———334 Not Foll. I.L.R. 1941 Nag. 543.
———520 (F.B.) Ref. I.L.R. 1941 Lah. 428.
44 All. 19 (F.B.) Foll. 20 Pat. 699 (S.B.).
———190 Foll. 20 Pat. 727.
———258 Diss. I.L.R. 1941 Lah. 383 (F.B.).
———278 Ref. I.L.R. 1941 Nag. 311.
———424 Rel. 22 P.L.T. 278.
———540 Foll. I.L.R. 1941 All. 36.
———555 Ref. I.L.R. 1941 Mad. 498.
45 All. 27 Ref. 16 Luck. 464 (F.B.).
———152 Ref. I.L.R. 1941 All. 443.
———159 Ref. 1941 Rang.L.R. 395.
———390 Ref. 1941 A.L.J. 501.
———396 Appr. 43 Bom.L.R. 681 (F.B.).
———425 (F.B.) Foll. 1941 A.L.J. 406.
———472 Rel. I.L.R. 1941 Nag. 464.
———501 Ref. I.L.R. 1941 Bom. 460=43 Bom.L.R. 581 (F. B.).
———506 (F.B.) Expl. I.L.R. 1941 All. 360.
———506 Dist. 1941 A.L.J. 246.
———557 Dist. (1941) 2 M.L.J. 661.
———592 Foll. 45 C.W.N. 174.
———669 Foll. I.L.R. 1941 All. 216.
———701 Dist. 16 Luck. 256.
46 All. 52 Ref. 16 Luck. 223.
———144 Ref. 16 Luck. 294.
———470 Ref. 16 Luck. 173.
———489 Ref. I.L.R. 1941 All. 77 (F.B.); 471 (F.B.).
———568 Ref. 20 Pat. 130.
———611 Rel. 16 Luck. 237.
———623 Diss. I.L.R. 1941 All. 168; Ref. 1941 A.L.J. 53.
———631 Ref. 16 Luck. 294.
———671 (F.B.) Ref. I.L.R. 1941 Mad. 332.
———831 Ref. 22 P.L.T. 485.
———884 Rel. 22 P.L.T. 392.
———917 Rel. I.L.R. 1941 Nag. 615.
———924 Ref. 16 Luck. 566.
47 All. 59 Ref. I.L.R. 1941 Mad. 592=(1941) 1 M.L.J. 236.
———73 Rel. I.L.R. 1941 Nag. 244.
———90 Diss. I.L.R. 1941 Nag. 513; Doubted 20 P. 86.
———98 Foll. I.L.R. 1941 Nag. 662.
———250 *See* 52 I.A. 145.
———291 Reviewed 20 Pat. 394.
———385 Ref. 16 Luck. 566.
———513 Rel. I.L.R. 1941 Lah. 278; Ref. 45 C.W.N. 181.
———853 Ref. (1941) 1 M.L.J. Supp. 65.
———872 Disc. 22 P.L.T. 760.

48 All. 44 Ref. I.L.R. (1941) 1 Cal. 477.
———168 Foll. I.L.R. 1941 Nag. 543; Ref. I.L.R. 1941 Nag. 96.
———175 Ref. I.L.R. 1941 All. 418.
———260 Rel. I.L.R. 1941 Kar. 199.
———302 Rel. I.L.R. 1941 Kar. 124.
———592 Ref. 1941 A.L.J. 501.
———821 Rel. 22 P.L.T. 465.
———834 Ref. 45 C.W.N. 122.
49 All. 57 Foll. 22 P.L.T. 98.
———137 Ref. 20 Pat. 130.
———147 Rel. (1941) 1 M.L.J. 388.
———536 Foll. 1941 Rang.L.R. 90.
———645 Ref. (1941) 2 M.L.J. 1024.
———779 Rel. I.L.R. 1941 Kar. 146.
———815 Ref. I.L.R. 1941 All. 598.
50 All. 193 Appr. I.L.R. 1941 All. 302 (F.B.).
———270 Rel. 20 Pat. 144.
———507 Rel. I.L.R. 1941 Kar. 401.
———532 Ref. 43 Bom.L.R. 843.
———645 Foll. I.L.R. 1941 Nag. 222.
———678 Ref. I.L.R. 1941 All. 598.
———965 (F.B.) Ref. I.L.R. 1941 All. 558; (1941) 1 M.L.J. Supp. 65; Rel. 16 Luck. 529.
———980 Rel. I.L.R. 1941 Nag. 467.
———986 (F.B.) Dist. I.L.R. 1941 Nag. 244; Rel. I.L.R. 1941 Nag. 615.
51 All. 164 (F.B.) Ref. 20 Pat. 130.
———506 Ref. I.L.R. 1941 Bom. 71.
———509 Foll. I.L.R. 1941 Mad. 255.
———850 Ref. 22 P.L.T. 553.
52 All. 134 Rel. I.L.R. 1941 Nag. 615.
———167 Rel. I.L.R. 1941 Nag. 613.
———203 Rel. 22 P.L.T. 80.
———232 Rel. I.L.R. 1941 Nag. 615.
———282 Ref. I.L.R. 1941 Lah. 100.
———419 Appr. & Diss. on another point I.L.R. 1941 Bom. 391.
———501 (F.B.) Foll. I. L. R. 1941 Nag. 96.
———748 Ref. I.L.R. 1941 All. 443.
———756 Ref. I.L.R. 1941 Lah. 234 (F.B.).
———793 Dist. I.L.R. 1941 Nag. 673.
52 All. 985 Rel. I.L.R. 1941 Nag. 356.
53 All. 75 (F.B.) Foll. I.L.R. 1941 Nag. 543.
———103 Rel. 22 P.L.T. 553.
———130 Diss. 1941 Rang.L.R. 316.
———313 Ref. I.L.R. 1941 Nag. 410.
———374 Rel. I.L.R. 1941 Lah. 441.
———461 Foll. 22 P.L.T. 779.
———466 Rel. 20 Pat. 417.
———747 Foll. 20 Pat. 144.
54 All. 282 Ref. I.L.R. 1941 Lah. 100.
———293 Dist. 1941 Rang.L.R. 376.
———399 Ref. (1941) 2 M.L.J. 671.
———428 Diss. (1941) 2 M.L.J. 690.
———448 Ref. (1941) 2 M.L.J. 1024.
———475 Not Foll. (1941) 2 M.L.J. 541; Rel. I.L.R. 1941 Nag. 613.
———496 Ref. I.L.R. 1941 All. 1; Rel. 1941 A.L.J. 12.
———499 Rel. I.L.R. 1941 Nag. 164.
———646 Rel. I.L.R. (1941) 1 Cal. 477.
———646 (F.B.) Ref. 345 C.W.N. 508.
———812 (F.B.) Rel. I.L.R. 1941 Lah. 451 (F.B.); 20 Pat. 780.
———1067 Ref. (1941) 2 M.L.J. 754; I.L.R. 1941 All. 153 (F.B.); Rel. I.L.R. 1941 Nag. 588.
———1085 Ref. I.L.R. 1941 Lah. 100.
55 All. 114 Rel. 1941 A.L.J. 374.
———283 Ref. (1941) 2 M.L.J. 311 (F.B.); 16 Luck. 464. (F.B.)
———490 Rel. I.L.R. 1941 Lah. 353.
———512 Dist. I.L.R. 1941 All. 74; Rel. I.L.R. 1941 Kar. 135.
———625 Ref. I.L.R. 1941 All. 160.
———666 Diss. I.L.R. (1941) 2 Cal. 155.
———711 Rel. I.L.R. 1941 Nag. 266.
———743 Expl. I.L.R. 1941 All. 326.
———745 Ref. 1941 A.L.J. 118.
———804 Appr. I.L.R. 1941 All. 1.
———825 Ref. (1941) 1 M.L.J. Supp. 65; 43 Bom.L.R. 646.
56 All. 158 Ref. 22 P.L.T. 273; Rel. 22 P.L.T. 510.
———277 Ref. I.L.R. 1941 All. 573.
———468 Ref. I.L.R. 1941 Nag. 632.
56 All. 496 Ref. 43 Bom.L.R. 553
———694 Foll. 43 Bom.L.R. 751 (F.B.),
———750 Ref. 1941 Rang.L.R. 258.
———766 (F.B.) Rel. I.L.R. 1941 Lah. 568.
———890 Foll. 45 C.W.N. 342.
———933 Appr. I.L.R. 1941 All. 1.
———954 (F.B.) Ref. 16 Luck. 464 (F.B.).
———1009 Disappr. I.L.R. 1941 All. 43.
———1032 Foll. 43 Bom.L.R. 280.
57 All. 108 Ref. 16 Luck. 464 (F.B.).
———605 Ref. I.L.R. 1941 All. 343; 1941 A.L.J. 217.
———727 Ref. 43 Bom.L.R. 854.
———740 Disapp. I.L.R. 1941 All. 54.
———754 Not Foll. I.L.R. 1941 Nag. 613.
———910 Ref. I.L.R. 1941 All. 364.
58 All. 132 (F.B.) Ref. (1941) 2 M.L.J. 834.
———261 Ref. I.L.R. 1941 All. 291.
———313 (F.B.) Diss. (1941) 1 M.L.J. 270.
———379 Ref. (1941) 2 M.L.J. 263.
———495 Diss. I.L.R. 1941 All. 311; Ref. (1941) 2 M.L.J. 268; 1941 A.L.J. 107.
———949 Foll. 22 P.L.T. 798.
———1083 Ref. I.L.R 1941 All. 471 (F.B.).
I.L.R. 1937 All. 113 Rel. I.L.R. 1941 Nag. 90.
———285 Reviewed 20 Pat. 798.
———317 Foll. 22 P.L.T. 223.
———344 Ref. I.L.R. 1941 All. 565.
———405 Rel. 22 P.L.T. 284.
———418 Not Foll. I.L.R. 1941 Nag. 356.
———434 Ref. I.L.R. 1941 Bom. 123.
———514 Ref. 16 Luck. 429.
———880 (F.B.) Foll. 43 Bom. L.R. 225; (1911) 1 M.L.J. 519; Appl. I.L.R. 1941 Mad. 924.
———913 Disc. 22 P.L.T. 760.
———921 (F.B.) Foll. I.L.R. 1941 Lah. 91.
I.L.R. 1938 All. 114=1937 A.L.J. 1396 Ref. (1941) 1 M.L.J. Supp. 65.
———230 Dist. I.L.R. 1941 All. 323.
———252 Ref. I.L.R. 1941 Bom. 123.
———350 Disc. 16 Luck 382.
———466 Foll. 20 Pat. 751.
———500 (F.B.) Rel. I.L.R. 1941 Lah. 353.
———535 Ref. (1941) 2 M.L.J 263.

I.L.R. 1938 All. 538 Rel. I.L.R. 1941 Kar. 381.
———548 Foll. I.L.R. 1941 Nag. 304.
———691 Ref. I.L.R.1941 A. 54.
———727 Ref. I.L.R. 1941 All. 471 (F.B.).
———750 Foll. 1941 Rang.L.R. 65.
———754 Overr. I.L.R. 1941 All. 250 (F.B.).
———861 Rel. I.L.R. 1941 Nag. 144.
———875 Rel. I.L.R. 1941 All. 280.
———922 (F.B.) Dist. 20 Pat 261.
———957 Disappr. I.L.R. 1941 All. 153 (F.B.).
I.L.R. 1939 All. 92 Ref. I.L.R. 1941 All. 136.
———443 Dist. and Disappr. I.L.R. 1941 All. 180 (F.B.)
———492 Diss. (1941) 2 M.L.J. 690.
———554 Ref. I.L.R. 1941 All. 589.
———647 (F.B.) Expl. 20 Pat. 1.
———885 Ref. 16 Luck. 607.
———892 Ref. 16 Luck. 72.
———912 Ref. (1941) 2 M.L.J. 12 (F.C.).
———934 Overr. I.L.R. 1941 All. 186 (F.B.).
I.L.R. 1940 All. 201 Ref. I.L.R. (1941) 1 Cal. 490.
———232 Ref. I.L.R. (1941) 1 Cal. 490.
———351 Appr. I.L.R. 1941 All. 250 (F.B.).
———396 (F. B.) Diss. I. L. R. 1941 Bom. 333; Dist. I. L.R. 1941 All. 280.
———504 Overr. A.I.R. 1941 All. 363 (F.B.).
———559 Ref. I.L.R. 1941 All. 576.
———568 Overr. A..I.R. 1941 All. 345 (F.B.).
I.L.R. 1941 All, 377 Ref. I.L.R. 1941 All. 443.

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3 A.L.J. 617 Appr. I.L.R. 1941 All. 302 (F.B.).
4 A.L.J. 249 Rel. 16 Luck. 203.
6 A.L.J. 760 Appr. I.L.R. 1941 All. 193.
8 A.L.J. 609 Rel. (1941) 1 M.L.J 759.
10 A.L.J. 421 Ref. 16 Luck. 1 (F.B.).
15 A.L.J. 313 Ref. 16 Luck. 464 (F.B.).
16 A.L.J. 871 Rel. 1941 A.L.J. 168.
17 A.L.J. 151 Rel. I.L.R. 1941 Nag. 598.
———647 Ref. 16 Luck, 464 (F.B.).
18 A.L.J. 476 Ref. 16 Luck. 464 (F.B.).
19 A.L.J. 907 Ref. I.L.R. 1941 All. 418.
20 A.L.J. 646 Rel. 1941 A.L.J. 43.
22 A.L.J. 241 Dist. I.L.R. 1941 All. 320.
22 A.L.J. 321 Ref. 1941 A.L.J. 427 (F.B.).
25 A.L.J. 636 Ref. 1941 A.L.J.
———895 Ref. (1941) A.L.J. 1 (F.B.)
———964 Ref. 1941 A.L.J. 376.
26 A.L.J. 449 Ref. 1941 A.L.J. 392.
———998 Ref. 1941 A.L.J. 376.
27 A.L.J. 367 Diss. 1941 A.L.J. 518 (F.B.).
———1257 Rel. 1941 A.L.J. 410.
1930 A.L.J. 756 Rel. 1941 A.L.J. 410.
———978 Ref. 1941 A.L.J. 269.
———1413 Appr. I.L.R. 1941 All. 302 (F.B.).
———1413 Rel. 1941 A.L.J. 1 (F.B.).
1931 A.L.J. 197 Not Appr. I.L.R. 1941 All. 326.
———727 Ref. I.L.R. 1941 All. 558.
———967 Ref. I.L.R. 1941 All. 216.
1932 A.L.J. 466 Ref. 1941 Rang. L.R. 385.
———576 Appr. I.L.R. 1941 All. 1.
1933 A.L.J. 123 Rel. 1941 A.L.J. 129.
———244 Ref. I.L.R. 1941 All. 573.
———510 Rel. 1941 A.L.J. 402.
———966 Ref. 1941 A.L.J. 29.
———1254 Ref. I.L.R. 1941 All. 576.
———1537 Ref. 1941 Rang.L.R. 387.
———1584 Ref. 1941 A.L.J. 501.
1934 A.L.J. 750 Overr. A.I.R. 1941 All. 314.
1935 A.L.J. 810 Ref. 1941 A.L.J. 265.
1936 A.L.J. 201 Dist. 1941 A.L.J. 557.
———605 Ref. 16 Luck. 566.
———671 (P.C.) Dist. I.L.R. 1941 All. 364.
———986 Dist. I.L.R. 1941 All. 264.
———1391 Appr. I.L.R. 1941 All. 264.
1937 A.L.J. 73 Ref. 1941 A.L.J. 501.
———94 Ref. 1941 A.L.J. 385.
———176 Ref. 16 Luck. 402.
———473 Appr I.L.R. 1941 M 1 P C
———689 Ref. 16 Luck. 500.
———726 Appr. I.L.R. 1941 All. 74.
———882 Rel. 16 Luck. 188.
———886 Rel. 1941 A.L.J. 549 (F.B.).
1937 A.L.J. 928 Ref. I.L.R. 1941 All. 1.
———970 Diss. 16 Luck. 500.
———1101 Ref. 1941 A.L.J. 85.
———1316 Dist. I.L.R. 1941 All. 69; Ref. 16 Luck. 566.
1938 A.L.J. 12 Rel. 1941 A.L.J. 129.
———56 Foll. 20 P. 755.
———288 Dist. I.L.R. 1941 All. 264.
———497 Foll. 1941 A.L.J. 229.
———541 Dist. 16 Luck. 287; Diss. 16 Luck. 533.
———708 Ref. 16 Luck. 398.
———943 Rel. 1941 A.L.J. 86.
———1078 Ref. I.L.R. 1941 All. 589.
———1153 Rel. 1941 A.L.J. 549 (F.B.).
1939 A.L.J. 233 Ref. 16 Luck. 500.
———293 Rel. 1941 A.L.J. 340.
———542 Foll. 20 P. 86.
———555 Foll. 16 Luck. 538.
———737 Overr. I.L.R. 1941 All. 180 (F.B.).
———959 Rel. 1941 A.L.J. 370.
———990 Dist. and Expl. I.L.R. 1941 All. 576.
1940 A.L.J. 176 Ref. 1941 A.L.J. 549 (F.B.).
———377 Foll. 1941 A.L.J. 258.
———456 Ref. 1941 A.L.J. 421.
———560 Ref. 16 Luck. 607.

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8 A.W.N. 210 Ref. (1941) 2 M.L.J 263.
1905 A.W.N. 162 Diss. 1941 Rang.L.R. 366.

I.L.R. BOMBAY SERIES.

1 Bom. 97 Ref. 43 Bom.L.R. 651.
———132 Rel. I.L.R. 1941 Nag. 266.
———267 Ref. I.L.R. 1941 Bom. 136.
———347 Ref. 43 Bom.L.R. 651.
2 Bom. 19 Ref. I.L.R. 1941 Bom. 226=43 Bom.L.R. 167.
———252 Ref. 43 Bom.L.R. 553; Dist. 43 Bom..L.R. 890.
———388 Ref. I.L.R. 1941 Bom. 438.
———457 Ref. (1941) 2 M.L.J. 105; 22 P.L.T. 46.
———494 Rel. I.L.R. 1941 Nag. 513.
———624 Rel. I.L.R. 1941 Nag. 437.
———643 Foll. I.L.R. 1941 Nag. 372.
3 Bom. 33 Ref. I.L.R. 1941 Bom. 160.
———214 Ref. 45 C.W.N. 603.
4 Bom. 25 Rel. I.L.R. 1941 Lah. 1 (F.B.).
———104 Ref. I.L.R. 1941 Bom. 438.
5 Bom. 296 Foll. 43 Bom.L.R. 681 (F.B.).

5 Bom. 685 Ref. I.L.R. 1941 Bom. 160.
6 Bom. 7 Foll. 20 Pat. 223.
———211 Foll. 43 Bom.L.R. 232.
———586 Ref. 45 C.W.N. 493.
———703 Ref. I.L.R. 1941 Bom. 160.
7 Bom. 109 Foll. 20 Pat. 96.
———341 Ref. I.L.R. 1941 Bom. 153.
———481 Disc. I.L.R. 1941 Kar. 79.
———530 Rel. 22 P.L.T. 109.
8 Bom. 31 Disc. 1941 Rang.L.R. 495 (F.B.).
———501 Rel. I.L.R. 1941 Kar. 89.
———616 Ref. I.L.R. 1941 All. 370.
9 Bom. 108 Ref. I.L.R. 1941 Nag. 437.
———115 Ref. I.L.R. 1941 Mad. 232.
———438 Ref. 16 Luck. 302.
10 Bom. 65 Disc. I.L.R. 1941 Kar. 79.
———58 Ref. I.L.R. 1941 Bom. 23.
———119 Appl.I.L.R. 1941 Bom. 341.
———119 Ref. 43 Bom.L.R. 126.
11 Bom. 153 Disc. I.L.R. 1941 Kar. 79.
———179 Ref. I.L.R. (1941) 2 Cal. 311.
———285 Ref. I.L.R. 1941 Bom. 250.
———313 Rel. I.L.R. 1941 Nag. 474.
———412 Ref. 43 Bom.L.R. 35.
———469 Ref. I.L.R. 1941 Bom. 59.
———488 Foll. 43 Bom.L.R. 480.
———708 Rel. I.L.R. 1941 Bom. 160.
12 Bom. 1 Ref. 22 P.L.T. 12.
13 Bom. 75 Rel. I.L.R. 1941 Lah. 39.
———294 Reviewed 20 Pat. 346.
———389 Ref. 22 P.L.T. 803.
———653 Comm. I.L.R. 1941 Bom. 177 (F.B.).
14 Bom. 222 Ref. I.L.R. 1941 Nag. 538.
15 Bom. 148 Foll. I.L.R. 1941 Nag. 543.
———344 Rel. 22 P.L.T. 694.
16 Bom. 338 (P.C.) Rel. I.L.R. 1941 Nag. 691.
———408 Ref. I.L.R. 1941 Mad. 935=(1941) 1 M.L.J. 721.
———525 Rel. I.L.R. (1941) 1 Cal. 182=45 C.W.N. 79.
———536 Diss. 20 Pat. 1.
17 Bom. 6 Dist. I.L.R. (1941) 1 Cal. 171.
———35 Ref. (1941) 2 M.L.J. 866.
———114 Ref. I.L.R. 1941 Bom. 250.
———711 Dist. 43 Bom.L.R. 553.
17 Bom. 735 Foll. 43 Bom.L.R. 733.
18 Bom. 92 Rel. (1941) 1 M.L.J. 759.
———342 Ref. I.L.R. 1941 Bom. 71.
———372 Foll. 43 Bom.L.R. 681 (F.B.).
———377 (F.B.) Disc. 43 Bom.L.R. 864.
———537 Foll. I.L.R. 1941 Bom. 361.
19 Bom. 123 Ref. 16 Luck. 454 (F.B.).
———232 Ref. I.L.R 1941 Mad. 61=(1941) 1 M.L.J. 703.
———245 Ref. 1941 Rang.L.R. 376.
———571 Ref. I.L.R. 1941 Bom. 160.
571 Rel. I.L.R. (1941) 1 Cal. 477.
———663 Dist. I.L.R. 1941 Bom. 71.
20 Bom. 50 Foll. I.L.R. 1941 Nag. 543.
———167 Appl. (1941) 2 M.L.J. 119.
———553 Rel. I.L.R. 1941 Lah. 601.
———767 Ref. I.L.R. 1941 Nag. 255.
21 Bom. 23 Ref. 43 Bom.L.R. 35.
———205 Ref. I.L.R. 1941 Bom. 160.
———250 Ref. I.L.R. 1941 Bom. 153.
———257 Ref. 43 Bom.L.R. 706.
———279 Dist. 20 Pat. 373 (F.B.)
———522 Rel. I.L.R. 1941 Bom. 71.
22 Bom. 101 Rel. I.L.R. 1941 Nag. 598.
———558 Ref. (1941) 2 M.L.J. 803 (F.B.).
———646 Dist. I.L.R. 1941 Nag. 266.
———718 Disc. 16 Luck. 382.
———996 Ref. I.L.R. 1941 Bom. 170.
23 Bom. 39 Ref. I.L.R. 1941 Bom. 226.
———39 Foll. 43 Bom.L.R. 167.
———122 Ref. 1941 Rang.L.R. 410.
———257 Ref. I.L.R. 1941 Bom. 250=43 Bom.L.R. 114.
———291 Ref. I.L.R. 1941 Mad. 13 (F.B.).
———372 Ref. 43 Bom.L.R. 807.
———494 Ref. I.L.R. 1941 Lah. 512.
———608 Ref. I.L.R. 1941 Mad. 13 (F.B.).
———666 Foll. I.L.R. 1941 Nag. 460.
———725 Ref. I.L.R. 1941 All. 377.
———789 Ref. 43 Bom.L.R. 483.
24 Bom. 77 Ref. I.L.R. (1941) 1 Cal. 171.
———305 Dist. I.L.R. (1941) 1 Cal. 83.
24 Bom. 386 Rel.I.L.R. 1941 Nag. 437; Ref. I.L.R. 1941 Bom. 483=43 Bom.L.R. 618.
———435 Ref. I.L.R. 1941 Bom. 226.
———547 Rel. I.L.R. (1941) 1 Cal. 477.
———563 Ref. 43 Bom.L.R. 114.
———622 Rel. I.L.R. 1941 Bom. 71.
25 Bom. 168 Foll. I.L.R. 1941 Bom. 23.
———189 Ref. 1941 Rang.L.R. 14.
———337 Ref. 22 P.L.T. 338.
———394 Ref. I.L.R. 1941 All. 77 (F.B.).
494 Ref. 43 Bom.L.R. 695; 699.
———551 Ref. I.L.R. 1941 Bom. 350.
———589 Diss. I.L.R. (1941) 2 Cal. 434.
26 Bom. 88 Ref. (1941) 2 M.L.J. 520.
———109 Ref. 43 Bom.L.R. 719.
———206 (F.B.) Ref. I.L.R. 1941 Nag. 255.
———396 Ref. 43 Bom.L.R. 896
———437 Not Foll. I.L.R. 1941 Nag. 474.
———497 Rel. 16 Luck. 93.
———526 Not Foll. I.L.R. 1941 Nag. 178.
———643 Dist. 45 C.W.N. 628.
———707 Ref. (1941) 2 M.L.J. 263.
———792 Ref. 1941 Rang.L.R. 376.
27 Bom. 189 Dist. 16 Luck. 421.
———515 Ref. 45 C.W.N. 240.
———610 Ref. 43 Bom.L.R. 114.
28 Bom. 82 Ref. 43 Bom.L.R. 114.
———248 Rel. I.L.R. 1941 Nag. 415.
———253 Dist. 43 Bom.L.R. 896.
———314 Dist. 16 Luck. 421.
———428 Ref. 45 C.W.N. 17.
———533 Ref. 22 P.L.T. 803.
29 Bom. 82 Ref. I.L.R. 1941 All. 471 (F.B.).
———300 Dist. I.L.R. 1941 Lah. 340.
30 Bom. 1 Ref. (1941) 2 M.L.J. 281.
———49 Ref. I.L.R. (1941) 2 Cal. 319.
319 Rel. I.L.R. 1941 Kar. 381.
———341 Ref. I.L.R. 1941 Lah. 100.
———603 Ref. 43 Bom.L.R. 706.
31 Bom. 293 Ref. I.L.R. 1941 Kar. 336.
———373 Ref. I.L.R. 1941 All. 43.
———405 Overr. 43 Bom.L.R. 681=A.I.R. 1941 Bom. 274 (F.B.).
———456 Foll. 43 Bom.L.R. 167 =I.L.R. (1941) Bom. 226.
———604 Ref. 45 C.W.N. 181.

32 Bom. 10 Ref. (1941) 2 M.L.J. 671.
———155 Ref. (1941) 1 M.L.J. Supp. 65.
———300 Ref. 43 Bom.L.R. 114 = I.L.R. 1941 Bom. 250.
———386 Rel. I.L.R. 1941 Nag. 356.
———394 Ref. (1941) 2 M.L.J. 558.
———479 Rel. 16 Luck. 302.
33 Bom. 107 Ref. I.L.R. 1941 Bom. 350.
———311 Ref. (1941) 2 M.L.J. 682.
———658 Ref. I.L.R. 1941 Lah. 308 (F.B.).
34 Bom. 72 Ref. I.L.R. 1941 Nag. 255.
———236 Disc. 1941 Rang.L.R. 495 (F.B.).
———571 Ref. 22 P.L.T. 46.
35 Bom. 79 Foll. I.L.R. 1941 Nag. 655.
———371 Rel. 45 C.W.N. 85.
———386 Not Appr. I.L.R. 1941 All. 326.
———403 Ref. I.L.R. 1941 Mad. 232.
———516 Foll. I.L.R. 1941 Nag. 214.
36 Bom. 168 Ref. 43 Bom.L.R. 706.
———373 (F.B.) Ref. I.L.R. 1941 Lah. 428.
———543 Ref. I.L.R. 1941 Bom. 59.
37 Bom. 107 Ref. 43 Bom.L.R. 483.
———320 Ref. I.L.R. 1941 Bom. 71.
———559 Ref. (1941) 2 M.L.J. 754.
———614 (F.B.) Dist. I.L.R. 1941 Bom. 415.
———621 Doubted 20 Pat. 86. Dist. I.L.R. 1941 Nag. 513.
38 Bom. 41 Not Foll. I.L.R. 1941 Nag. 467.
———47 Overr. 43 Bom.L.R. 880.
———183 Ref. I.L.R. 1941 Bom. 460.
39 Bom. 256 Ref. 20 Pat. 1.
———326 Ref. I.L.R. 1941 Kar. 305.
———339 Not Foll. I.L.R. 1941 Nag. 90.
———373 Ref. 43 Bom.L.R. 843.
———538 Dist. 43 Bom.L.R. 651.
———545 Ref. (1941) 2 M.L.J. 962.
40 Bom. 64 Ref. I.L.R. 194 1 Bom. 71.
———337 Foll. 43 Bom.L.R. 293.
———358 Ref. I.L.R. 1941 Bom. 460.
———401 Ref. 16 Luck. 173.
———600 Foll. I.L.R. 1941 Bom. 488=43 Bom.L.R. 615.
41 Bom. 181 Ref. I.L.R. 1941 All. 443.
———466 Reviewed 20 Pat. 346.
———560 Foll. 43 Bom.L.R. 737.
42 Bom. 420 Ref. I.L.R. 1941 Mad. 574 = (1941) 1 M.L.J. 242 (F.B.).
———499 Ref. 43 Bom.L.R. 35.
———504 Overr. I.L.R. 1941 Bom. 177 (F.B.).
43 Bom. 631 Ref. I.L.R. 1941 Bom. 1 6.
———Dist. I.L.R. 1941 Bom. 299=43 Bom.L.R.26(F.B.)
———707 Rel. I.L.R. (1941) 1 Cal. 536.
44 Bom. 104 Ref. 20 Pat. 481 (S.B.).
———283 Ref. I.L.R. 1941 Bom. 325.
———446 Ref. 43 Bom.L.R.35
———574 Rel. 22 P.L.T. 223.
———696 Ref. I.L.R. 1941 Bom. 460.
696 Com. 43 Bom.L.R. 581
———895 Diss. 22 P.L.T. 465.
45 Bom. 225 Ref. (1941) 2 M.L.J. 216.
———350 Ref. I.L.R. 1941 Bom. 107 (P.C.).
———604 Ref. I.L.R. 1941 Bom. 460=43 Bom.L.R. 581 (F.B.).
———627 Rel. I.L.R. 1941 Nag. 90.
———834 Doubted 43 Bom.L.R. 864.
46 Bom.229 Ref. I.L.R. 1941Nag. 96 ; I.L.R. 1941 Bom. 131.
———312 Ref. I.L.R. 1941 All. 343 ; I.L.R. 1941 Nag. 124.; Rel. I.L.R. 1941 Nag. 135.
———463 Dist. & Ref. I.L.R. 1941 Kar. 389.
———687 Ref. I.L.R. 1941 Bom. 107 (P.C.).
———710 Rel. I.L.R. 1941 Lah. 428.
———871 Not Foll. (1941) 1 M.L.J. 724.
———932 Ref. I.L.R. 1941 Lah. 428.
———964 Disc. I.L.R. 1941 Bom. 59.
47 Bom. 4 Disappr. I.L.R. 1941 Bom. 107 (P.C.); 43 Bom. L.R. 1.
———11 Ref. 1941 Rang.L.R. 254.
———104 Not Foll. (1941) 1 M.L.J. 305.
———128 Foll. I.L.R. 1941 Nag. 222.
———218 Ref. 45 C.W.N. 553.
———643 Overr. A.I.R. 1941 Bom. 302=43 Bom.L.R. 751 (F.B.).
———699 Ref. I.L.R. 1941 Lah. 100.
48 Bom. 43 Ref. 43 Bom.L.R. 816.
———673 Foll. I.L.R. 1941 Bom. 211.
49 Bom. 604 Ref. (1941) 2 M.L.J. 134.
———892 Foll. I.L.R. 1941 All. 36.
50 Bom. 42 Rel. I..L.R. 1941 Kar. 167.
———443 Ref. 16 Luck. 302.
———461 Foll. 45 C.W.N. 1075.
———616 Ref. I.L.R. 1941 Nag. 397.
51 Bom. 143 Foll. 43 Bom.L.R. 883.
———236 Dist. I.L.R. 1941 Nag. 96.
———430 Diss. I.L.R. (1941) 1 Cal. 299.
———454 (F.B.) Dist. I.L.R. 1941 Bom. 59.
———848 Rel. I.L.R. 1941 Nag 563.
52 Bom. 414 Ref. 43 Bom.L.R. 800.
———441 Rel. I.L.R. 1941 Kar. 72.
———521 Rel. I.L.R. 1941 Nag. 144.
———548 Dist. (1941) 1 M.L.J. 629.
53 Bom. 46 Rel. 22 Lah. 670.
———309 Ref. (1941) 2 M.L.J. 216.
———419 Ref. I.L.R. 1941 All. 343.
———453 Ref. 45 C.W.N. 603.
———525 Not Appr. 43 Bom.L. R. 581=I.L.R. 1941 Bom. 460 (F.B.).
———564 Foll. 43 Bom.L.R. 737.
———573 Disc. 45 C.W.N. 984.
———676 Dist. I.L.R. 1941 Nag. 244.
———844 Ref. I.L.R. 1941 Mad. 574=(1941) 1 M.L.J. 242 (F.B.).
54 Bom. 178 Foll. 45 C.W.N. 1075.
———216 Ref. I.L.R. 1941 Nag. 588.
———224 Ref. I.L.R. 1941 Bom. 427.
———417 Ref. 43 Bom.L.R. 843.
———696 Rel. I.L.R. 1941 Bom. 160.
———776 Diss. 20 Pat. 1.
55 Bom. 1 Not Foll. (1941) 1 M.L.J. 724.
———709 Ref. I.L.R. 1941 Bom. 177 (F.B.).
———741 (F.B.) Ref. 45 C.W.N. 906.
———839 Foll. I.L.R. 1941 Nag. 506 ; Appr. 43 Bom.L.R. 20 (P.C.).
56 Bom. 36 Disc. I.L.R. 1941 Bom. 59.
———135 Rel. I.L.R. 1941 Nag. 266.
———213 Dist. 45 C.W.N. 1124.
———369 Ref. I.L.R. 1941 Kar. 442.
57 Bom. 40 (F.B.) Ref. I.L.R. 1941 Nag. 255.
———253 Rel. 22 P.L.T. 260.
———292 Ref. 16 Luck. 357.
———364 Ref. I.L.R. 1941 Bom. 325.
———377 Ref. 43 Bom.L.R. 114.
———737 Rel. 16 Luck. 93.

58 Bom. 226 Ref. 43 Bom.L.R. 883.
———348 Ref. 43 Bom.L.R. 807.
———498 Appr. 43 Bom.L.R. 847.
———610 Rel. I.L.R. 1941 Kar. 389.
———660 Diss. 1941 A.L.J. 570. D. & Rel. 16 Luck. 42.
59 Bom. 1 Dist. (1941) 1 M.L.J. 267.
———57 Foll. 43 Bom.L.R. 250.
———161 Diss. (1941) 2 M.L.J. 362.
———278 Doubt. and Dist. 45 C.W.N. 1047.
———466 Dist. I.L.R. 1941 Bom. 131.
———618 Rel. 16 Luck. 159. Foll. I.L.R. 1941 All. 43.
60 Bom. 34 Diss. 1941 A.L.J. 570.
———141 Ref. (1941) 2 M.L.J. 834.
———448 Ref. I.L.R. (1941) 2 Cal. 319.
———718 Disc. I.L.R. 1941 Bom. 59.
———729 Rel. I.L.R. 1941 Lah. 383 (F.B.).
———800 Ref. I.L.R. 1941 Nag. 644.
———1027 Overr. Blackwell J's view approved (1941) 1 M.L.J. 88=I.L.R. 1941 Bom. 202 (P.C.).
I.L.R. 1937 Bom. 127 Dist. 1941 Rang.L.R. 148.
———211 Ref. I.L.R. 1941 Kar. 171.
———425 Ref. (1941) 1 M.L.J. Supp. 65.
———508 (F.B.) Ref. I.L.R. 1941 Nag. 178.
———591 Ref. 1941 Rang.L.R. 181.
———711 Rel. 22 P.L.T. 98.
———763 Rel. I.L.R. 1941 Lah. 441.
———795 Disappr. I.L.R. 1941 All. 77 (F.B.).
———827 Appr. I.L.R. 1941 All. 43.
———867 Ref. I.L.R. 1941 Bom. 123.
———895 Not Foll. I.L.R. 1941 Nag. 1 (F.B.).
I.L.R. 1938 Bom. 1 Dist. I.L.R. 1941 Nag. 437.
———119 (S.B.) Overr. I.L.R. 1941 Bom. 492 (F.B.).
———263 Rel. I.L.R. 1941 Kar. 129.
———374 Ref. 45 C.W.N. 681.
———421 (P.C.) Ref. (1941) 2 M.L.J. 595.
———487 Ref. I.L.R. 1941 All. 1.
———738 Overr. A.I.R. 1941 Bom. 1.
I.L.R. 1939 Bom. 284 Ref. (1941) 2 M.L.J. 972 (P.C.).
———340 Not Foll. I.L.R. (1941) 1 Cal. 477.
———340 (F.B.) Diss. 45 C.W.N. 508.
I.L.R. 1939 Bom. 529 Dist. I.L.R. 1941 Nag. 1 (F.B.).
———571 Cons. I.L.R. 1941 Bom. 427.
I.L.R. 1940 Bom. 29 Dist. I.L.R. 1941 Bom. 191.
———42 Ref. I.L.R. 1941 Bom. 306.
———257 Ref. I.L.R. 1941 All. 377.
———587 (S.B.) Foll. 20 Pat. 181 (F.B.).
———587 Rel. I.L.R. 1941 Kar. 431.
———715 Foll. I.L.R. (1941) 2 Cal. 289.
I.L.R. 1941 Bom. 136 Not Foll. I.L.R. 1941 Bom. 299(F.B.)

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3 Bom.L.R. 772 Dist. I.L.R. 1941 Bom. 34=43 Bom.L.R. 126.
4 Bom.L.R. 177 Ref. I.L.R. 1941 Kar. 308.
———948 Ref. I.L.R. 1941 Bom. 71.
5 Bom.L.R. 980 Ref. I.L.R. 1941 Bom. 492 (F.B.).
6 Bom.L.R. 536 Ref. 43 Bom.L.R. 823.
7 Bom. L.R. 57 & 611 Ref. I.L.R. 1941 Bom. 441.
———319 Dist. 43 Bom.L.R. 293.
8 Bom.L.R. 234 Ref. I.L.R. 1941 All. 471 (F.B.).
9 Bom.L.R. 1347 Ref. I.L.R. 1941 Bom. 427.
10 Bom.L.R. 175 Ref. 16 Luck. 302.
———1209 Ref. I.L.R. 1941 Mad. 232.
11 Bom.L.R. 356 Rel. I.L.R. 1941 Bom. 136.
———633 Ref. I.L.R. 1941 Kar. 257.
12 Bom.L.R. 870 Ref. I.L.R. 1941 Mad. 419=(1941) 1 M.L.J. 178.
———1075 Rel. I.L.R. 1941 Nag. 513.
14 Bom.L.R. 155 Foll. I.L.R. 1941 Nag. 474.
———547 Ref. (1941) 1 M.L.J. 724.
———987 Foll. 43 Bom.L.R. 622.
15 Bom.L.R. 568 Rel. 16 Luck. 194.
19 Bom.L.R. 56 Ref. 43 Bom.L.R. 651.
———370 Dist. I.L.R. (1941) 1 Cal. 171.
21 Bom.L.R. 724 Diss. I.L.R. 1941 All. 280.
22 Bom.L.R. 953 Overr. (Shah J's view accepted) I.L.R. 1941 Bom. 299=43 Bom.L.R. 26 (F.B.) Ref. I.L.R. 1941 Bom. 136.
———482 (F.B.) Ref.I.L.R. 1941 Bom. 350.
———533 Ref. I.L.R. 1941 Bom. 107 (P.C.).
23 Bom.L.R. 540 Foll. I.L.R. 1941 Nag. 222.
———1241 Ref. 43 Bom.L.R. 553 Dist. 43 Bom.L.R. 890.
24 Bom.L.R. 749 Ref. 43 Bom.L.R. 325.
———779 Ref. I.L.R. 1941 Bom. 455.
———1291 Disc. I.L.R. 1941 Bom. 59.
25 Bom.L.R. 689 Dist. 43 Bom. L.R. 562.
———1063 Rel. I.L.R. 1941 Kar. 89.
———1296 Rel. I.L.R. 1941 N. 563.
26 Bom.L.R. 237 Dist. I.L.R. 1941 Bom. 39.
———491 Overr. A.I.R. 1941 Bom. 302 (F.B.).
27 Bom.L.R. 42 Foll. I.L.R. 1941 Bom. 361=43 Bom.L.R. 293.
———434 Dist. I.L.R. 1941 Nag. 513.
———514 Ref. I.L.R. 1941 Mad. 419=(1941) 1 M.L.J. 178.
———581 Ref. 43 Bom.L.R. 896.
———1168 Foll. I.L.R. 1941 Bom. 71.
———1195 Foll. Dist. & Ref. 43 Bom.L.R. 655.
———1258 Ref. I.L.R. 1941 Bom. 107 (P.C.).
28 Bom.L.R. 384 Rel. I.L.R. 1941 Bom. 223. Foll. 43 Bom.L.R. 76.
———944 Expl. (1941) 1 M.L.J. 204, D. 45 C.W.N. 29.
———1213 Ref. I.L.R. 1941 Bom. 226.
———1225 Ref. I.L.R. 1941 Bom. 160.
———1488 Foll. 43 Bom.L.R. 269.
29 Bom.L.R. 249 Foll. 43 Bom. L.R. 341.
———274 Ref. I.L.R. 1941 Bom. 107 (P.C.).
———434 Rel. 16 Luck. 213.
———471 Ref. (1941) 2 M.L.J. 877.
———546 R. I.L.R. (1941) 1 C. 420.
———1391R. I.L.R. 1941 N. 543.
———1551 Ref. 43 Bom.L.R. 480.
———1563 Foll. I.L.R. 1941 Bom. 260=43 Bom.L.R. 194.
30 Bom.L.R. 415 Ref. (1941) 2 M.L.J. 281.
———546 R. I.L.R. (1941) 1 C. 490.
———1391 R. I.L.R. 1941 N. 543.
31 Bom.L.R. 565 Ref. I.L.R. 1941 Bom. 23.
———1287 Foll. I.L.R. 1941 Bom. 260=43 Bom.L.R. 194.
32 Bom.L.R. 178 Ref. 43 Bom.L.R. 333.
———188 Foll. 43 Bom.L.R. 603.
———416 Dist. 45 C.W.N. 408.

32 Bom.L.R. 907 Not Foll. 43 Bom.L.R. 167.
———995 Ref. I.L.R. 1941 Bom. 438.
33 Bom.L.R.31 Doubted 45 C.W. N. 401.
———55 Foll. 43 Bom.L.R. 341.
———278 Foll. 43 Bom.L.R. 646.
———463 Disc. I.L.R. 1941 Kar. 79.
———797 Expl. I.L.R. 1941 Bom. 431.
———1164 Ref. 43 Bom.L.R.702.
34 Bom.L.R. 267 Ref. & Foll. 43 Bom.L.R. 163.
———395 Ref. 45 C.W.N. 17.
———818 Ref. 43 Bom.L.R. 483.
———953 Ref. I.L.R. 1941 Bom. 260.
———953 Dist. 43 Bom.L.R. 194.
———1166 Ref. 1941 Rang.L.R. 268.
———1322 Rel. 43 Bom.L.R. 293.
35 Bom.L.R. 26 Diss. 45 C.W.N. 1075.
———93 Ref. 43 Bom.L.R. 655.
———163 Foll. 43 Bom.L.R. 800.
———276 Rel. I.L.R. 1941 Kar. 133.
———293 Appr. 43 Bom.L.R. 611.
———722 Diss. 43 Bom.L.R. 603.
36 Bom.L.R. 79 Dist. 43 Bom.L.R. 644.
———169 Foll. 43 Bom.L.R. 232.
———181 Foll. 43 Bom.L.R. 232.
———386 (P.C.) Ref. 43 Bom.L. R. 706.
———523 Dist. I.L.R. 1941 Bom. 299 (F.B.).
———804 Foll. I.L.R. 1941 Bom. 431.
———804 Ref. 43 Bom.L.R. 325.
37 Bom.L.R. 207 Not Foll. (1941) 2 M.L.J. 541.
———257 Ref. 43 Bom.L.R. 126.
———778 Ref. I.L.R. 1941 Bom. 415.
———946 Foll. 43 Bom.L.R. 622.
38 Bom.L.R. 681 (P.C.) Dist. I.L. R. 1941 Kar. 3 (F.B.).
———702 Ref. I.L.R. 1941 Bom. 119.
———776 (P.C.) Rel. I.L.R. 1941 Bom. 170.
———1023 Disc. I.L.R. 1941 Kar. 79.
39 Bom.L.R. 536 Dist. 43 Bom.L. R. 896.
———540 Ref. 43 Bom.L.R. 266.
———599 Not Foll. I.L.R. 1941 Nag. 178.
———815 Ref. 43 Bom.L.R. 695.
———1105 Ref. 43 Bom.L.R. 727.
———1124 Dist. 43 Bom.L.R. 800.
———1187 Overr. A.I.R. 1941 Bom. 259 (F.B.).
40 Bom.L.R. 125 Ref. I.L.R. 1941 Bom. 153.
———152 Foll. 43 Bom.L.R. 480.
40 Bom.L.R. 297 (F.B.) Rel. I.L. R. 1941 Kar. 422.
———387 Cons. I.L.R. 1941 Bom. 427.
———483 (F.B.) Ref. 43 Bom. L.R. 702.
———929 Ref. I.L.R. 1941 Bom. 34.
———1010 Rel. I.L.R. 1941 Nag. 144.
———1185 Ref. I.L.R. 1941 Bom. 306.
———1236 (P.C.) Dist. I.L.R. 1941 Bom. 42.
41 Bom.L.R. 19 Rel. I.L.R. 1941 Kar. 50.
———195 Ref. 43 Bom.L.R. 807.
———208 Disappr. 43 Bom.L.R. 592.
———232 Rel. I.L.R. 1941 Kar. 135.
———308 Ref. I.L.R. 1941 Bom. 441.
———760 Ref. 43 Bom.L.R. 114.
———937 Cons. 43Bom.L.R. 333.
———943 Ref. I.L.R. 1941 Bom. 290.
———1150 Dist. 43 Bom.L.R. 742.
———1300 Foll. 43 Bom.L.R. 214.
42 Bom.L.R. 592 Dist. I.L.R. 1941 Bom. 299 (F.B.); Ref. I.L.R. 1941 Bom. 136.
———1086 Ref. 43 Bom.L.R. 483.
———1113 Comm. 43 Bom.L.R. 26 (F.B.).
43 Bom.L.R. 519 Expl. 43 Bom. L.R. 877.
———553 Dist. 43 Bom.L.R. 890.

I.L.R. CALCUTTA SERIES.

2 Cal. 208 Foll. 20 Pat. 75=22 P. L.T. 649.
———233 Ref. I.L.R. 1941 All. 418.
———445 Foll. I.L.R. (1941) 2 Cal. 160.
3 Cal. 192 (P.C.) Ref. 20 Pat. 202 (F.B.).
———324 Rel. 22 P.L.T. 699.
———353 Dist. I.L.R. (1941) 1 Cal. 171 Ref. 45 C.W.N. 113.
———551 Ref. 22 P.L.T. 553.
———758 Ref. I.L.R. (1941) 1 Cal. 345=45 C.W.N. 347.
4 Cal. 124 Ref. I.L.R. 1941 Kar. 336.
———172 Rel. 1941 A.L.J. 352.
———566 Ref. (1941) 2 M.L.J. 866.
5 Cal. 21 Ref. 16 Luck. 464 (F.B.).
———425 Ref. (1941) 2 M.L.J. 550.
———584 (F.B.) Rel. I.L.R. 1941 Lah. 428.
6 Cal. 311 Foll. I.L.R. 1941 Nag. 655.
———319 (F.B.) Dist. 45 C.W.N. 220.
———340 Dist. I.L.R. 1941 Bom. 260=43 Bom.L.R. 194.
6 Cal. 394 Ref. 22 P.L.T. 46; Rel. 22 P.L.T. 699.
———460 Foll. 20 Pat. 75; Ref. 22 P.L.T. 649.
———709 Dist. 20 Pat. 735.
———764 Ref. I.L.R. 1941 All. 598.
7 Cal. 132 Ref. 45 C.W.N. 486.
———616 Rel. 22 P.L.T. 666.
———711 (F.B.) Rel. I.L.R. 1941 Kar. 211.
———816 Appr. 45 C.W.N. 29 (P.C.).
8 Cal. 211 Diss. 1941 Rang.L.R. 258.
———593 (F.B.) Ref. 45 C.W.N. 996.
———645 Disappr. I.L.R. 1941 All. 264.
———757 Ref. I.L.R. 1941 Lah. 234 (F.B.); 1941 Rang. L.R. 249.
9 Cal. 68 Rel. (1941) 1 M.L. J. 759.
———75 Ref. I.L.R. 1941 All. 401 (P.C.).
———255 *See* 9 I.A. 82.
———520 (F.B.) Rel. I.L.R. 1941 Lah. 601.
———656 *See* 10 I.A. 25.
———698 Rel. I.L.R. 1941 Nag. 655.
———744 Ref. 45 C.W.N. 797.
10 Cal. 19 Disc. 22 P.L.T. 649.
———380 Dist. 1941 Rang.L.R. 387.
———626 *See* 11 I.A. 26.
———860 Ref. (1941) 2 M.L.J. 222.
———1035 Ref. I.L.R. 1941 All. 220.
———1102 Dist. I.L.R. (1941) 1 Cal. 234=45 C.W.N. 141.
11 Cal. 121 Rel. I.L.R. 1941 Nag. 669.
———275 Dist. I.L.R. 1941 Nag. 397.
———338 Ref. I.L.R. (1941) 2 Cal. 128.
———582 Ref. 1941 Rang.L.R. 258.
———591 Ref. 1941 Rang.L.R. 410.
———718 Ref. I.L.R. 1941 All. 77 (F.B.).
12 Cal. 52 Rel. I.L.R. 1941 Nag. 135.
———69 Dist. I.L.R. (1941) 1 Cal. 477.
———279 Foll. I.L.R. 1941 Nag. 538.
———580 Diss. I.L.R. (1941) 2 Cal. 434.
13 Cal. 21 Ref. (1941) 2 M.L.J. 12 (F.B.).
———232 Disc. 1941 Rang.L.R. 495 (F.B.).
———267 Ref. I.L.R. 1941 Mad. 144.
14 Cal. 256 Dist. I.L.R. (1941) 2 Cal. 160.
———262 (F.N.) Ref. I.L.R. (1941) 2 Cal. 160.

4 Cal. 533 Ref. I.L.R. 1941 All. 418.
———583 Rel. I.L.R. 1941 Nag. 90.
———809 (F.B.) Not Foll. I.L.R. 1941 Nag. 474.
15 Cal. 94 Rel. I.L.R. 1941 Nag. 236.
———179 Foll. I.L.R. (1941) 2 Cal. 366.
———319 Ref. I.L.R. (1941) 2 Cal. 237.
———460 Ref. 22 P.L.T. 46.
———684 Rel. I.L.R. 1941 Nag. 669.
16 Cal. 206. Rel. I.L.R. 1941 Lah. 267.
———223 Rel. 22 P.L.T. 721.
———267 (F.B.) Ref. I.L.R. (1941) 1 Cal. 409.
———310 Rel. 16 Luck. 194.
———523 Appr. I.L.R. 1941 All. 220.
———640 Ref. I.L.R. 1941 Lah. 413.
———788 Rel. (1941) 2 M.L.J. 644.
———795 Ref. 45 C.W.N. 987.
17 Cal. 268 Ref. (1941) 2 M.L.J. 754.
———290 Ref. I.L.R. 1941 Kar. 238.
———373 Ref. I.L.R. 1941 Mad. 13 (F.B.).
———574 (F.B.) Diss. 43 Bom.L.R. 858.
———631 Cons. & Dist. I.L.R. (1941) 2 Cal. 251.
18 Cal. 264 Dist. 45 C.W.N. 1047.
———378 Disc. 1941 Rang.L.R. 495 (F.B.).
———385 Ref. I.L.R. 1941 All. 43.
19 Cal. 275 Rel. 22 P.L.T. 699.
———504 Ref. 45 C.W.N. 137.
———615 Ref. 45 C.W.N. 996.
20 Cal. 269 Rel. I.L.R. 1941 Kar. 124.
———481 Ref. 22 P.L.T. 46.
———708 (F.B.) Expl. 20 Pat. 346.
———762 Rel. I.L.R. 1941 Kar. 102 ; Ref. 1941 Rang.L.R. 249.
21 Cal. 142 Ref. 22 P.L.T. 12.
———169 Ref. (1941) 2 M.L.J. 947.
———866 Rel. 16 Luck. 256.
22 Cal. 8 Foll. I.L.R. (1941) 1 Cal. 477.
———185 (F.B.) Dist. (1941) 1 M.L.J. 815.
———276 Rel. I.L.R. 1941 Mad. 592=(1941) 1 M.L.J. 236.
———558 Rel. 22 P.L.T. 439.
———752 Dist. I.L.R. 1941 Bom. 71.
———898 Ref. I.L.R. (1941) 1 Cal. 67.
23 Cal. 636 Foll. I.L.R. (1941) 1 Cal. 137=45 C.W.N. 105.
23 Cal. 723 (F.B.)Ref. I.L.R. 1941 Mad. 935 ; (1941) 1 M.L.J. 721.
———884 (F.B.) Ref. 45 C.W.N. 519.
24 Cal. 62 (F.B.) Foll. 20 Pat. 86.
———95 Ref. 1941 Rang.L.R. 376.
———473 (F.B.) Foll. 20 Pat. 223.
———524 Ref. 22 P.L.T. 46.
———546 Ref. I.L.R. 1941 Bom. 160.
———584 Ref. 20 Pat. 417.
———677 Ref. 22 P.L.T. 529.
———900 Foll. I.L.R. (1941) 2 Cal. 434.
25 Cal. 112 Ref. 1941 Rang.L.R. 410.
———594 (F.B.) Foll. I.L.R. 1941 Nag. 199.
———703 Ref. I.L.R. (1941) 1 Cal. 147.
———844 (P.C.) *See* 25 I.A. 95.
26 Cal. 428 (F.B.) Ref. 45 C.W.N. 420.
———434 Ref. I.L.R. 1941 Nag. 677.
———449 Ref. I.L.R. (1941) 1 Cal. 147.
———650 Foll. I.L.R. (1941) 2 Cal. 155.
———891 Ref. I.L.R. 1941 Bom. 160.
27 Cal. 144 Rel. 22 P.L.T. 443.
———174 Ref. I.L.R. 1941 Lah. 512.
———194 Rel. I.L.R. 1941 Nag. 513.
Dist. I.L.R. 1941 Nag. 513 Doubted 20 Pat. 86.
———295 Dist. I.L.R. 1941 Nag. 110.
———308 Ref. I.L.R. (1941) 1 Cal. 90.
———366 Rel. 22 P.L.T. 80.
———488 Expl. 22 P.L.T. 439.
———555 Ref. I.L.R. 1941 Mad. 13 (F.B.).
———565 Ref. I.L.R. (1941) 1 Cal. 345.
———979 Rel. I.L.R. (1941) 1 Cal. 67.
28 Cal. 209 Doubted I.L.R. 1941 Bom. 273=43 Bom.L.R. 53.
———278 Ref. I.L.R. 1941 Mad. 13 (F.B.).
———441 Doubted 20 Pat. 75.
———485 Ref. I.L.R. 1941 All. 250 (F.B.).
———540 Dist. (1941) 2 M.L.J. 510.
———689 Ref. I.L.R. 1941 Nag. 169 ; Expl. I.L.R. 1941 Kar. 308.
———709 Ref. I.L.R. (1941) 1 Cal. 67.
———738 Ref. I.L.R. 1941 All. 27 ; Rel. 1941 A.L.J. 7.
29 Cal. 1 (F.B.) Rel. I.L.R. 1941 Nag. 615.
———68 Diss. 1941 Rang.L.R. 376.
———518 Rel. 22 P.L.T. 35.
———664 Rel. 22 P.L.T. 514.
———707 Ref. I.L.R. 1941 All. 418.
———871 Ref. I.L.R. 1941 All. 370.
30 Cal. 288 Ref. I.L.R. 1941 Nag. 139.
———433 Rel. 20 Pat. 780.
———449 Rel. I.L.R. (1941) 1 Cal. 67 ; Ref. I.L.R. 1941 Rang.L.R. 82.
———463 Dist. I.L.R. (1941) 1 Cal. 514=45 C.W.N. 530.
———788 Ref. 1941 Rang.L.R. 387.
———937 Ref. I.L.R. 1941 Mad. 675=(1941) 1 M.L.J. 586.
31 Cal. 214 Ref. (1941) 1 M.L.J. 697.
———433 Rel. I.L.R. 1941 Nag. 135.
———448 Ref. 45 C.W.N. 177.
———667 Ref. I.L.R. 1941 Mad. 144.
———687 Ref. 45 C.W.N. 50.
———849 Disc. 1941 Rang.L.R. 495 (F.B.).
———1065 Ref. 43 Bom.L.R. 843.
32 Cal. 62 Rel. I.L.R. (1941) 1 Cal. 234=45 C.W.N. 141.
———146 Foll. I.L.R. 1941 Nag. 543.
———552 Foll. I.L.R. 1941 All. 14.
———669 (P.C.) *See* 32 I.A. 80.
———783 Rel. I.L.R. (1941) 1 Cal. 67.
———837 Rel. I.L.R. 1941 Lah. 246.
33 Cal. 30 Foll. 45 C.W.N. 195.
———560 Dist. 20 Pat. 223.
———812 Rel. 22 P.L.T. 666.
———905 Ref. 22 P.L.T. 46.
———927 Ref. I.L.R. (1941) 1 Cal. 490.
———1175 Ref. I.L.R. (1941) 1 Cal. 155.
———1278 Ref. (1941) 2 M.L.J. 913.
———1290 Ref. (1941) 2 M.L.J. 1 (P.C.).
34 Cal. 101 Foll. I.L.R. (1941) 1 Cal. 373.
Rel. I.L.R. (1941) 1 Cal. 490.
———257 Foll. 20 Pat. 13 (F.B.) ; Reviewed 20 Pat. 394.
———352 Disc. 1941 Rang.L.R. 495 (F.B.).
———427 Ref. I.L.R. (1941) 1 Cal. 155.
———451 Ref. & Foll. I.L.R. 1941 Mad. 753 ; Rel. I.L.R. (1941) 2 Cal. 394.
———642 Foll. I.L.R. (1941) 1 Cal. 137=45 C.W.N. 105.
———902 Ref. I.L.R. 1941 All. 27.

35 Cal. 61 (F.B.) Ref. 43 Bom. L.R. 758.
———209 Rel. I.L.R. 1941 Bom. 435 ; 209 Foll. 43 Bom.L. R. 329.
———243 Ref. I.L.R. (1941) 1 Cal. 67.
———320 Disc. I.L.R. 1941 Nag. 255.
———837 Ref. I.L.R. 1941 B. 136 ; I.L.R.1941 Nag. 356 Dist. I.L.R. 1941 Nag 513.
———859 Rel. I.L.R. 1941 Lah. 71 ; I.L.R. 1941 Nag. 279.
———1051 Dist. I.L.R. (1941) 1 Cal. 536.
———1100 Dist. 20 Pat. 223.
36 Cal. 21 Ref. 43 Bom.L.R. 854.
———287 Ref. 45 C.W.N. 896.
———659 Diss. 1941 Rang.L.R. 258.
———713 Ref. 1941 Rang.L.R. 300.
———936 (F.B.) Ref. 45 C.W.N. 519.
Rel. I.L.R. 1941 Kar. 401.
37 Cal. 179 Ref. 43 Bom.L.R. 854.
———412 Ref. I.L.R. (1941) 1 Cal. 67.
———618 (S.B.) Foll. 43 Bom. L.R. 864.
———671 Ref. I.L.R. (1941) 1 Cal. 345.
———754 Ref. I.L.R. (1941) 2 Cal. 221.
———860 Disc. 1941 Rang.L.R. 495 (F.B.).
38 Cal. 13 Ref. I.L.R. 1941 Mad. 567=(1941) 1 M.L.J. 123.
———127 Dist. I.L.R. 1941 Kar. 89.
———169 Appr. 45 C.W.N. 269 (P.C.) ; 43 Bom.L.R. 20 (P.C.).
———559 (S.B.) Ref. I.L.R. 1941 Nag. 169.
———880 Ref. I.L.R. 1941 Mad. 332.
———1051 Dist. 45 C.W.N. 498.
39 Cal. 220 Foll. 43 Bom.L.R. 719.
———704 Rel. I.L.R. (1941) 1 Cal. 451=45 C.W.N. 795.
———953 Rel. 22 P.L.T. 510.
40 Cal. 21 Appl. I.L.R. 1941 Mad. 261=(1941) 1 M.L.J. 164 (F.B.).
Rel. I.L.R. 1941 Nag. 588.
Foll. 22 P.L.T. 341.
———192 Ref. 1941 Rang.L.R. 410.
———215 Cons. 45 C.W.N. 1047.
———308 Dist. I.L.R. (1941) 2 Cal. 160.
———452 (2) Rel. 16 Luck. 421.
———477 Foll. 1941 Rang.L.R. 90.
———503 Reviewed 20 Pat. 394.
———548 Rel. I.L.R. 1941 Kar. 316.
———721 Dist. I.L.R. (1941) 1 Cal. 234.
Ref. 45 C.W.N. 141.
40 Cal. 836 Ref. I.L.R. (1941) 1 Cal. 16 ; Cons. 45 C.W. N. 408.
———955 Foll. 45 C.W.N. 1023.
41 Cal. 1 Ref. 16 Luck. 294.
———17 Rel. 22 P.L.T. 80.
———173 (S.B.) Rel. I.L.R. 1941 Nag. 397 ; Dist. 20 Pat. 306.
———323 Ref. I.L.R. 1941 Nag. 543.
———347 Reviewed 20 Pat. 346.
———466 Ref. 22 P.L.T. 803.
———1125 Foll. 43 Bom.L.R.194 =I.L.R. 1941 Bom. 260.
42 Cal. 1 Ref. I.L.R. 1941 All. 77 Foll. 43 Bom.L.R. 699 (F.B.).
———46 Rel. I.L.R. 1941 Nag. 266.
———72 Foll. 22 P.L.T. 520.
———172 Ref. I.L.R. (1941) 2 Cal. 209.
———455 Appl. I.L.R. (1941) 2 Cal. 258.
———546 Ref. 16 Luck. 538.
———574 Rel. I.L.R. 1941 Nag. 135.
———612 Foll. 22 P.L.T. 803 ; 43 Bom.L.R. 737.
———625 Foll. 16 Luck 607.
———660 Rel. I.L.R. 1941 Bom. 435 (S.B.) Dist. 1941 Ran. L.R. 1 (S.B.).
———1001 Rel. I.L.R. 1941 Kar. 146.
———1085 Ref. I.L.R. 1941 All. 443 ; 43 Bom.L.R. 706.
———1128 Rel. I.L.R. 1941 Kar. 308.
———1152 Foll. 45 C.W.N. 195.
44 Cal. 119 Ref. 20 Pat. 481 (S.B.)
———627 Disc. I.L.R. 1941 Kar. 79.
———698 Foll. (1941) 2 M.L.J. 784.
———816 Ref. I.L.R. 1941 Nag. 203.
———858 Rel. 22 P.L.T. 35.
———890 Ref. (1941) 2 M.L.J. 962.
———1016 Ref. I.L.R. 1941 Mad. 398.
45 Cal. 169 (S.B.) Ref. I.L.R. 1941 Kar. 3 (F.B.).
———492 Foll. I.L.R. (1941) 2 Cal. 155.
45 Cal. 530 Dist. 20 Pat. 751.
———634 Ref. (1941) 2 M.L.J. 962.
———697 Foll. I.L.R. (1941) 2 Cal. 155.
———720 Ref. 1941 A.L.J. 374.
46 Cal. 22 Diss. 43 Bom.L.R. 880.
———390 Foll. 43 Bom.L.R. 167.
———485 Dist. 1941 Rang.L.R. 410.
———566 Ref. I.L.R. 1941 All. 136.
———663 Ref. (1941) 2 M.L.J. 816.
———700 Foll. I.L.R. 1941 Nag. 506.
46 Cal. 771 Dist. 43 Bom.L.R.293.
———975 Rel. I.L.R. 1941 Nag. 381.
47 Cal. 115 Ref. 1941 Rang.L.R. 376.
———838 Ref. 16 Luck. 454 (F.B.).
———1079 Rel. (1941) 2 M.L.J. 347.
48 Cal. 45 Ref. 45 C.W.N. 215.
———69 Ref. I.L.R. (1941) 1 Cal. 147.
———138 Rel. I.L.R. 1941 Nag. 266.
———509 Dist. I.L.R. 1941 All. 320.
———766 (S.B.) Not Foll. 20 Pat. 699 (S.B.) ; Ref. 22 P.L.T. 670.
———817 Rel. I.L.R. 1941 All. 415.
———1105 Foll. I.L.R. 1941 Kar. 32.
49 Cal. 167 Not Foll. I.L.R. 1941 Nag. 372.
———355 Ref. (1941) 2 M.L.J. 500 (F.B.).
———626 Dist. I.L.R. (1941) 1 Cal. 514=45 C.W.N. 530.
———1026 Expl. 22 P.L.T. 771.
———1048 Ref. 45 C.W.N. 705.
50 Cal. 49 Foll. I.L.R. 1941 Nag. 655.
———159 Ref. 43 Bom.L.R. 737.
———419 Ref. I.L.R. (1941) 1 Cal. 382.
———423 Ref. 22 P.L.T. 273 ; 510.
———743 Cons. & Dist. I.L.R. (1941) 2 Cal. 251.
———853 Ref. I.L.R. 1941 All. 418.
———939 Rel. I.L.R. 1941 Kar. 167.
———992 Rel. 22 P.L.T. 392.
51 Cal. 101 Ref. 45 C.W.N. 141.
———225 Ref. I.L.R. 1941 Bom. 415.
———265 Ref. I.L.R. 1941 Mad. 592=(1941) 1 M.L.J. 236.
———331 Ref. 43 Bom.L.R. 854.
———337 Rel. I.L.R. 1941 Nag. 500.
———504 Foll. 20 Pat. 573 (S.B.)
———745 Ref. 16 Luck. 454 (F. (B.).
———778 Ref. 43 Bom.L.R. 758.
———874 Cons. 45 C.W.N. 408.
———969 Rel. I.L.R. 1941 All. 180 (F.B.) ; 22 P.L.T. 736.
52 Cal. 275 (F.B.) Ref. I.L.R. 1941 Nag. 356.
———417 Ref. 22 P.L.T. 310.
———670 Rel. 22 P.L.T. 510.
———695 Reviewed 20 Pat. 346 ; Foll. 43 Bom.L.R. 603.
———1015 Rel. 22 P.L.T. 694.
53 Cal. 34 Ref. 22 P.L.T. 670.
———101 Ref. I.L.R. 1941 All. 471 (F.B.).
———166 (F.B.) Disc. I.L.R. 1941 Kar. 79.

53 Cal. 679 Disappr. I.L.R. 1941 All. 193.
———827 Foll. 1941 Rang.L.R. 90.
———901 Foll. I.L.R. 1941 Nag. 199.
54 Cal. 52 Ref. 1941 A.L.J. 374.
———126 Ref. I.L.R. 1941 Mad. 49.
———189 Ref. (1941) 2 M.L.J. 216.
———251 Ref. 1941 Rang.L.R. 268.
———266 (S.B.) Ref. 43 Bom. L.R. 864.
———405 Disappr. I.L.R. 1941 All. 193; Ref. 1941 Rang. L.R. 246.
———595 *See* 54 I.A. 190.
———650 Ref. 45 C.W.N. 1124.
———727 Ref. I.L.R. 1941 Nag. 397.
———863 (F.B.) Foll. 20 Pat. 573 (S.B.).
———969 Rel. 16 Luck. 421.
———1052 Foll. 22 P.L.T. 26.
55 Cal. 274 Rel. I.L.R. (1941) 1 Cal. 67.
———371 Rel. 22 P.L.T. 327.
———396 Foll. 20 Pat. 162.
———464 Ref. 22 P.L.T. 310.
———488 Rel. 16 Luck. 252.
———777 Disappr. I.L.R. 1941 All. 295.
56 Cal. 101 Ref. I.L.R. (1941) 1 Cal. 234.
———188 Ref. I.L.R. 1941 Lah. 234 (F.B.).
———427 Ref. 45 C.W.N. 129.
———462 Rel. 22 P.L.T. 457.
———477 Ref. I.L.R. (1941) 1 Cal. 147.
———738 Ref. 22 P.L.T. 721.
———1023 Ref. I.L.R. 1941 Kar. 32.
57 Cal. 25 Ref. (1941) 1 M.L.J. 200.
———274 Disc. Expl. I.L.R. 1941 Bom. 290.
———463 Foll. I.L.R. 1941 Nag. 344; I.L.R. 1941 Bom. 477.
———488 Reviewed 20 Pat. 547.
———526 Foll. 22 P.L.T. 46.
———649 Ref. 22 P.L.T. 297.
———980 Ref. 45 C.W.N. 551.
———1007 Dist. I.L.R. 1941 Lah. 145.
———1042 Ref. I.L.R. (1941) 2 Cal. 373.
———1127 Rel. 22 P.L.T. 465.
———1162 Rel. 22 P.L.T. 327.
———1228 Rel. 22 P.L.T. 327.
———1280 Ref. I.L.R. (1941) 1 Cal. 373; Rel. I.L.R. (1941) 1 Cal. 490.
———1336 Ref. 43 Bom.L.R. 258.
58 Cal. 136 Ref. I.L.R. 1941 Bom. 136.
———170 Ref. 45 C.W.N. 78.
———301 Ref. 22 P.L.T. 457.
58 Cal. 358 Ref. 22 P.L.T. 388.
———430 Ref. 22 P.L.T. 670.
———539 Foll. I.L.R. (1941) 2 Cal. 160.
———628 Rel. I.L.R. (1940) 2 Cal. 366.
———649 Foll. I.L.R. 1941 Nag. 222.
———788 Ref. I.L.R. 1941 Nag. 485.
———801 Ref. (1941) 1 M.L.J. Supp. 65.
———822 Ref. I.L.R. 1941 Lah. 423.
———829 Rel. I.L.R. 1941 Nag. 194.
———850 Reviewed 20 Pat. 394.
———884 Dist. 20 Pat. 306.
———999 Foll. (1941) 1 M.L.J. 476 (S.B.).
———1018 Disc. I.L.R. 1941 Kar. 79.
———1167 (F.B.) Foll. I.L.R. 1941 Nag. 434.
———1235 Rel. 22 P.L.T. 721.
———1404 Rel. 22 P.L.T. 98.
———68 Foll. 1941 Rang.L.R. 90.
———76 Appr. I.L.R. 1941 All. 220.
———205 Ref. I.L.R. 1941 Lah. 590.
———276 Ref. I.L.R. 1941 Kar. 32.
———388 Rel. I.L.R. 1941 Nag. 467; Ref. (1941) 2 M.L.J. 500 (F.B.).
———739 Ref. I.L.R. (1941) 1 Cal. 382.
———760 (F.B.) Foll. 43 Bom.L. R. 880.
———1073 Dist. 1941 Rang.L. R. 1 (S.B.).
———1192 Ref. I.L.R. 1941 Lah. 423.
———1266 Rel. I.L.R. (1941) 2 Cal. 251.
———1314 Foll. 20 Pat. 13 (F.B.)
———1343 Rel. I.L.R. 1941 All. 54; 22 P.L.T. 485.
60 Cal. 87 Rel. I.L.R. 1941 Nag. 615.
———191 Disc. I.L.R. 1941 Kar. 79.
———233 Ref. I.L.R. 1941 Kar. 32.
———259 Dist. I.L.R. 1941 Nag. 410.
———394 Rel. 16 Luck. 213.
———452 (F.B.) Ref. 45 C.W.N. 709.
———571 Rel. I.L.R. 1941 All. 356; I.L.R. (1941) Lah. 191 (F.B.).
———630 Not Appr. I.L.R. 1941 All. 313; Dist. 20 Pat. 765; Rel. I.L.R. 1941 Lah. 709.
———777 Rel. I.L.R. 1941 Nag. 615.
———948 Rel. I.L.R. (1941) 2 Cal. 209.
———996 Ref. I.L.R. 1941 All. 160.
60 Cal. 1003 Ref. (1941) 2 M.L.J. 105; 22 P.L.T. 46.
———1042 Ref. 43 Bom.L.R. 576.
———1339 Rel. 22 P.L.T. 98.
61 Cal. 80 Ref. (1941) 2 M.L.J. 35 (F.B.).
———262 Foll. I.L.R. 1941 Nag. 691.
———399 Ref. I.L.R. 1941 Bom. 23.
———508 Ref. (1941) 2 M.L.J. 665.
———663 Rel. I.L.R. 1941 Nag. 467.
———670 Rel. I.L.R. (1941) 1 Cal. 490.
———841 Ref. I.L.R. 1941 Nag. 677.
———975 Ref. 20 Pat. 755.
62 Cal. 75 Rel. I.L.R. (1941) 1 Cal. 514.
———257 Diss. 20 Pat. 459 (S.B.)
———312 Diss. I.L.R. 1941 Nag. 169; Reviewed 20 Pat. 547.
———492 Ref. 45 C.W.N. 240.
———572 Ref. I.L.R. 1941 All. 280.
———612 Dist. I.L.R. (1941) 1 Cal. 171.
———682 Ref. 20 Pat. 144.
———692 Ref. 22 P.L.T. 46.
———701 Ref. (1941) 1 M.L.J. Supp. 65.
———808 Ref. I.L.R. (1941) 2 Cal. 319.
———833 (F.B.) Reviewed 20 Pat. 547.
———867 Ref. I.L.R. 1941 Kar. 442.
———900 Appr. 45 C.W.N. 269 (P.C.).
———1115 Ref. 16 Luck. 184.
63 Cal. 15 Ref. (1941) 2 M.L.J 12 (F.C.).
———92 Ref. I.L.R. 1941 Kar. 72.
———194 Ref. I.L.R. (1941) 2 Cal. 237.
———217 (F.B.) Rel. I.L.R. 1941 Kar. 3 (F.B.).
———833 Rel. 22 P.L.T. 297.
———923 Diss. 1941 A.L.J. 137 (F.B.)=I.L.R. 1941 All. 77; 43 Bom.L.R. 699.
———1033 Ref. I.L.R. (1941) 1 Cal. 171.
———1172 Ref. I.L.R. 1941 Nag. 677.
I.L.R. (1937) 1 Cal. 637 Foll. I. L.R. 1941 Nag. 662.
———653 Ref. I.L.R. 1941 All. 43.
I.L.R. (1937) 2 Cal. 36 Diss. 1941 Rang.L.R. 181.
———79 (S.B.) Ref. 43 Bom.L.R. 854.
———187 Diss. 43 Bom.L.R. 847.
———265 Ref. I.L.R. (1941) 1 Cal. 457.

I.L.R. (1937) 2 Cal. 273 Ref. 20 Pat. 1.
———540 Rel. I.L.R. 1941 Kar. 191.
———606 Ref. I.L.R. (1941) 1 Cal. 147.
———689 Rel. I.L.R. (1941) 1 Cal. 382.
I.L.R. (1938) 1 Cal. 164. Ref. I.L.R. (1941) 1 Cal. 278.
———433 Appl. I.L.R. 1941 Bom. 415.
———433 Ref. 43 Bom.L.R. 758.
———455 Rel. 22 P.L.T. 260.
———476 Dist. I.L.R. 1941 Nag. 397.
———607 Foll. 45 C.W.N. 240.
I.L.R.(1938) 2 Cal. 295 *See* 65 I.A. 158.
I.L.R. (1939) 1 Cal. 345 Dist. I.L.R. 1941 Nag. 262.
———349 Ref. I.L.R. 1941 Mad. 785.
———437 Ref. I.L.R. (1941) 1 Cal. 132.
———437 Foll. I.L.R. (1941) 2 Cal. 68.
———437 Ref. I.L.R. 1941 Lah. 524 (F.B.).
———574 Ref. I.L.R. 1941 Mad. 332.
I.L.R. (1939) 2 Cal. 1 Ref. 1941 Rang.L.R. 376.
———93 Rel. 45 C.W.N. 617.
———210 Foll. I.L.R. (1941) 1 Cal. 101.
———358 Ref. 45 C.W.N. 460.
———411 Foll. I.L.R. 1941 Bom. 402.
I.L.R. (1940) 1 Cal. 133 Ref. I.L.R. 1941 Lah. 524.
———138 Ref. I.L.R. (1940) 2 Cal. 353.
I.L.R. (1941) 1 Cal. 79 Ref. I.L.R. (1941) 2 Cal. 373.
———322 Foll. I.L.R. (1941) 2 Cal. 385.
———373 Ref. I.L.R. (1941) 1 Cal. 490.
———499 Dist. I.L.R. (1941) 2 Cal. 342.
I.L.R. (1941) 2 Cal. 34 (f.n.) Ref. I.L.R. (1941) 2 Cal. 30.
———107 Dist. I.L.R. (1941) 2 Cal. 342.
———184 Ref. I.L.R. (1941) 2 Cal. 232.

CALCUTTA WEEKLY NOTES

1 C.W.N. 96 Ref. 22 P.L.T. 46.
———248 Reviewed 20 Pat. 346.
———626 Ref. I.L.R. 1941 Nag. 543.
2 C.W.N. 702 Foll. I.L.R. 1941 Nag. 372.
3 C.W.N. 250 Cons. 45 C.W.N. 1047.
4 C.W.N. 369 Dist. I.L.R. 1941 Mad. 538=(1941) 1 M.L.J. 369.
———488 Dist. 22 P.L.T. 278.
5 C.W.N. 20 Ref. (1941) 2 M.L.J. 134.
———285 Ref. 22 P.L.T. 46.
6 C.W.N. 96 Reviewed 20 Pat. 346.
———190 Ref. 45 C.W.N. 493.
———321 Ref. 1941 Rang.L.R. 410.
———513 Rel. 22 P.L.T. 98.
7 C.W.N. 619 Not Foll. I.L.R. (1941) 1 Cal. 457.
8 C.W.N. 454 Rel. 45 C.W.N. 805.
9 C.W.N. 584 Ref.(1941) 1 M.L.J. Supp. 65.
10 C.W.N. 28 Foll. 22 P.L.T. 792.
———1044 Ref. 45 C.W.N. 637 (P.C.) ; 43 Bom.L.R. 777 (P.C.).
11 C.W.N. 135 Ref. 20 Pat. 130.
———135 Ref. 45 C.W.N. 906.
———314 Rel. I.L.R. (1941) 2 Cal. 209.
———314 Ref. 45 C.W.N. 883.
———403 Not Appr.I.L.R.(1941) 1 Cal. 514=45 C.W.N. 530 ; Rel. I.L.R. (1941) 2 Cal. 209=45 C.W.N. 705 Ref. 45 C.W.N. 883.
———703 Dist. I.L.R. (1941) 2 Cal. 44.
———708 Dist. 45 C.W.N. 590.
12 C.W.N. 98 Rel. I.L.R.(1941) 2 Cal. 394.
Ref. (1941) 1 M.L.J. 527, 753.
———107 Rel. I.L.R. (1941) 2 Cal. 209.
———138 Foll. I.L.R. 1941 Nag. 496.
———241 Foll. 45 C.W.N. 792 ; Ref. I.L.R. (1941) Lah. 100.
———840 Dist. 20 Pat. 735.
———987 Foll. I.L.R. (1941) 2 Cal. 394=45 C.W.N. 912.
13 C.W.N. 160 Reviewed 20 Pat. 798.
———690 Ref. 45 C.W.N. 1023.
———815 Ref. 1941 A.L.J. 381 ; (1941) 2 M.L.J. 774.
———861 Ref. I.L.R. 1941 Bom. 23.
14 C.W.N. 141 Reviewed 20 Pat. 346.
———352 Ref. I.L.R. (1941) 1 Cal. 1 (P.C.).
———812 Ref. 45 C.W.N. 797.
15 C.W.N. 78 Foll. I.L.R. (1941) 2 Cal. 366.
———239 Ref. 45 C.W.N. 906.
———974 Ref. 45 C.W.N. 797.
16 C.W.N. 46 Ref. 22 P.L.T. 327.
———327 Ref. I.L.R. 1941 Lah. 100.
———558 Rel. 45 C.W.N. 930.
———831 Ref. I.L.R. (1941) 1 Cal. 409.
17 C.W.N. 73 Ref. 22 P.L.T. 46.
———621 Foll. I.L.R. 1941 Nag. 203.
17 C.W.N. 667 Foll. I.L.R. 1941 Nag. 144.
———750 Ref. 45 C.W.N. 797.
———833 Ref. 45 C.W.N. 460.
———948 Rel. I.L.R. 1941 Kar. 352.
———1088 Appr. I.L.R. (1941) 2 Cal. 44.
———1132 Dist. I.L.R. 1941 Lah. 267.
18 C.W.N. 705 Expl. 22 P.L.T. 297.
———778 Ref. 45 C.W.N. 998.
———1023 Dist. 20 Pat. 181 (F. B.).
———1121 Ref. 1941 Rang.L.R. 224.
19 C.W.N. 136 Ref. I.L.R. (1941) 2 Cal. 44.
———287 Not Foll. I.L.R. 1941 Nag. 199.
———419 Rel. I.L.R. (1941) 1 Cal. 405 ; Ref. 45 C.W.N. 392.
———747 Rel. I.L.R. (1941) 2 Cal. 1.
———764 Foll. 45 C.W.N. 890= I.L.R. (1941) 2 Cal. 353.
———787 (P.C.) Ref. 45 C.W.N. 906.
———914 Ref. 45 C.W.N. 805.
———1110 Rel. I.L.R. (1941) 1 Cal. 382.
20 C.W.N. 58 Dist. 20 Pat. 223.
———550 Rel. I.L.R. (1941) 1 Cal. 278=45 C.W.N. 119.
———957 (P.C.) Rel. I.L.R. 1941 Nag. 538.
21 C.W.N. 88 Foll. 20 Pat. 346.
———93 Foll. 20 Pat. 346.
———158 Ref. I.L.R. 1941 Bom. 290.
———375 Ref. 1941 Rang.L.R. 387.
———401 Dist. I.L.R. (1941) 1 Cal. 536.
———872 Not Foll. I.L.R. 1941 Nag. 262.
22 C.W.N. 289 Dist. I.L.R. (1941) 1 Cal. 171.
———297 Ref. I.L.R. 1941 Mad. 419=(1941) 1 M.L.J. 178.
———330 (P.C.) Rel. I.L.R. 1941 Lah. 428.
———515 Ref. 45 C.W.N. 603.
———540 Rel. I.L.R. (1941) 2 Cal. 251 ; Ref. 45 C.W.N. 903.
———662 Ref. I.L.R. (1941) 2 Cal. 209=45 C.W.N. 883.
24 C.W.N. 73 Expl. (1941) 1 M.L.J. 193.
———478 Ref. I.L.R. (1941) 2 Cal. 128.
———536 Ref. I.L.R. (1941) 1 Cal. 147 ; 45 C.W.N. 873.
———1032 Ref. 45 C.W.N. 873.
25 C.W.N. 127 Dist. 45 C.W.N. 381.
———544 Ref. 45 C.W.N. 177.
———1002 Ref. 45 C.W.N. 553.

26 C.W.N. 138 Ref. 45 C.W.N. 460.
———177 Dist. 20 Pat. 780.
———486 Foll. 22 P.L.T. 416.
———499 Dist. (1941) 2 M.L.J. 455.
———713 Ref. I.L.R. 1941 Kar. 133.
27 C.W.N. 972 Ref. 1941 Rang. L.R. 387.
28 C.W.N. 131 Ref. 45 C.W.N. 177.
———500 Ref. 45 C.W.N. 478.
29 C.W.N. 131 Rel. I.L.R. 1941 Lah. 601.
———161 (P.C.) Ref. 45 C.W.N. 1065.
———270 Foll. 20 Pat. 162.
———575 Rel. (1941) 2 M.L.J. 918.
———1037 (P.C.) Foll. I.L.R. 1941 Nag. 124.
30 C.W.N. 63 Ref. 45 C.W.N. 930.
———173 Rel. I.L.R. (1941) 1 Cal. 318.
———266 (P.C.) Ref. 1941 Rang. L.R. 376.
———384 Rel. 22 P.L.T. 255.
———494 Ref. 45 C.W.N. 1068.
31 C.W.N. 32 Dist. 45 C.W.N. 590.
———384 Ref. 45 C.W.N. 912.
———572 Diss. 20 Pat. 459 (S.B.)
32 C.W.N. 387 Foll. (1941) 2 M.L.J. 66.
———874 (P.C.) Ref. 45 C.W.N. 906.
33 C.W.N. 100 Rel. I.L.R. (1941) 2 Cal. 209.
———623 Ref. 45 C.W.N. 797.
34 C.W.N. 47 Ref.45 C.W.N. 797.
———177 Ref. I.L.R. (1941) 2 Cal. 128.
———321 Ref. I.L.R. 1941 Lah. 451 (F.B.).
———631 Ref. 45 C.W.N. 1023.
———813 Diss. I.L.R. (1941) 2 Cal. 366.
———1002 Ref. I.L.R. (1941) 2 Cal. 402.
35 C.W.N. 251 Ref. I.L.R. (1941) 2 Cal. 402.
———381 Ref. 45 C.W.N. 873.
———478 Dist. I.L.R. (1941) 2 Cal. 128 ; 45 C.W.N. 709.
———688 Ref. 45 C.W.N. 735.
———721 Ref. 45 C.W.N. 654.
———768 Expl. & Dist. Suhurwardi's objections held to be *obiter* I.L.R. (1941) 1 Cal. 309 ; Dist. 45 C.W.N. 699.
———925 (P.C.) Rel. I.L.R. 1941 Kar. 146.
36 C.W.N. 238 Ref. I.L.R. (1941) 1 Cal. 90.
———263 Ref. 45 C.W.N. 50.
37 C.W.N. 146 Ref. 45 C.W.N. 987.
———166 Foll. 1941 Rang.L.R. 101.
———703 Ref. 45 C.W.N. 34.
37 C.W.N. 897 Ref. 45 C.W.N. 705.
———897 Ref. 45 C.W.N. 883.
———981 Ref. 45 C.W.N. 304.
38 C.W.N. 238 Ref. 45 C.W.N. 90.
———384 Ref. (1941) 2 M.L.J. 866.
———586 Ref. 22 P.L.T. 297.
———634 Ref. 45 C.W.N. 735.
———648 Dist. 45 C.W.N. 381.
———654 Dist. I.L.R. (1941) 1 Cal. 303.
———707 Ref. 45 C.W.N. 727.
———795 Ref. 45 C.W.N. 1023.
———1002 Ref. 45 C.W.N. 735.
———1081 Expl. (1941) 1 M.L.J. 354.
———1178 Appr. 45 C.W.N. 530.
39 C.W.N. 211 Dist. 45 C.W.N. 590
———311 Dist. I.L.R. (1941) 2 Cal. 44.
———428 Ref. I.L.R. (1941) 2 Cal. 209.
———451 Ref. 45 C.W.N. 240.
———651 Foll. I.L.R. (1941) 1 Cal. 299.
———652 Ref. I.L.R. (1941) 1 Cal. 409.
———725 Ref. I.L.R. 1941 Nag. 513 ; Doubted 20 Pat. 86.
———986 Reviewed 20 Pat. 547.
———1003 Ref. 45 C.W.N. 137.
40 C.W.N. 86 Ref. 45 C.W.N. 805.
———149 Ref. 45 C.W.N. 930.
———591 Ref. 45 C.W.N. 113.
———816 Ref. 45 C.W.N. 603.
———1022 Ref. I.L.R. (1941) 2 Cal. 24.
———1176 Ref. 45 C.W.N. 489.
———1205 Diss. I.L.R. (1941) 2 Cal. 434.
41 C.W.N. 85 Ref. I.L.R. (1941) 1 Cal. 278.
———115 Ref. 45 C.W.N. 906.
———534 Ref. (1941) 2 M.L.J. 968.
———563 Rel. 45 C.W.N. 984.
———928 Ref. I.L.R. 1941 Lah. 524 (F.B.).
———998 Ref. 45 C.W.N. 873.
———1001 Ref. 45 C.W.N. 805.
———1015 Ref. I.L.R. 1941 Mad. 212 (F.B.).
———1103 Reversed (1941) 1 M.L.J. 746 (P.C.).
———1173 Ref. 45 C.W.N. 460.
———1301 Ref. 45 C.W.N. 792.
———1349 Ref. I.L.R. (1941) 1 Cal. 309. ; Expl. 45 C.W.N. 932.
———1363 Ref. I.L.R. 1941 Lah. 524 (F.B.).
42 C.W.N. 173 Ref. I.L.R. 1941 Lah. 524 (F.B.).
———212 Ref. 45 C.W.N. 792.
———288 Dist. I.L.R. (1941) 1 Cal. 303.
———411 Ref. I.L.R. 1941 Lah. 524 (F.B.).
———481 Ref. I.L.R. 1941 Lah. 524 (F.B.).
———529 Ref. I.L.R. 1941 Lah. 524 (F.B.).
42 C.W.N. 721 Ref. I.L.R. (1941) 1 Cal. 514.
———755 Ref. I.L.R.(1941) 1 Cal. 278.
———864 Rel. I.L.R. (1941) 2 Cal. 199.
———1023 Cons. 45 C.W.N. 628.
———1065 Ref. I.L.R. (1941) 1 Cal. 514.
43 C.W.N. 1 (P.C.) Ref. I.L.R. 1941 Nag. 677.
———205 Ref. 45 C.W.N. 1075.
———322 Ref. 45 C.W.N. 578.
———337 (P.C.) Rel. I.L.R. (1941) 1 Cal. 234.
———497 Dist. & Diss. 45 C.W.N. 519.
———858 Ref. I.L.R. 1941 Bom. 136.
———886 Appl. 45 C.W.N. 922.
———969 Rel. I.L.R. (1941) 1 Cal. 405.
———1221 Ref. 45 C.W.N. 908.
44 C.W.N. 122 Foll. 45 C.W.N. 890.
———364 Foll. 45 C.W.N. 922 ; Doubted 45 C.W.N. 82 ; Rel. 45 C.W.N. 379.
———443 Ref. (1941) 2 M.L.J. 134.
———465 Expl. 45 C.W.N. 823.
———587 Rel. I.L.R. 1941 Lah. 670.
———688 Ref. I.L.R. (1941) 2 Cal. 128.
———706 Affirmed 45 C.W.N. 663.
———729 Ref. 45 C.W.N. 493.
———733 Dist. 45 C.W.N. 908.
———892 Dist. 16 Luck. 302.
———984 Foll. 45 C.W.N. 82.
———1099 Ref. 45 C.W.N. 420.
———1133 Dist. 45 C.W.N. 908.
———F.R. 12 Dist. I.L.R. (1941) 1 Cal. 514=45 C.W.N. 530.
45 C.W.N. 11 Affirmed 45C.W.N. 548 ; Foll. 45 C.W.N. 877.
———13 Appr. I.L.R. (1941) 1 Cal. 499 ; 45 C.W.N. 877; Dist. I.L.R. (1941) 1 Cal. 514=45 C.W.N. 530.
———22 Dist. 45 C.W.N. 780 ; Doubt. 45 C.W.N. 991.
———57 Ref. I.L.R. (1941) 2 Cal. 44.
———119 Ref. 45 C.W.N. 460.
———401 Appr. 45 C.W.N. 408.
———408 Foll. I.L.R. (1941) 1 Cal. 435.
———526 Dist. 45 C.W.N. 772.
———603 (dictum of Biswas, J.) Foll. I.L.R. (1941) 2 Cal. 273 ; Affirmed 45 C.W.N. 967.
———609 Dist. 45 C.W.N. 772 ; Foll. 45 C.W.N. 973.
———734 Ref. 45 C.W.N. 1122.
———739 Ref. 45 C.W.N. 757.
———859 Ref. 45 C.W.N. 863. Diss. 45 C.W.N. 976.
———863 Diss. 45 C.W.N. 976. Overr. 45 C.W.N. 1091.
———975 Ref. 45 C.W.N. 976.

BENGAL LAW REPORTER.

2 B.L.R.A.J. 15 Ref. I.L.R. 1941 Mad. 13 (F.B.).

4 B..L.R. 134 (F.B.) Rel. 45 C.W. N. 1047.

11 B.L..R. 405 Ref. 45 C.W.N. 129

WEEKLY REPORTER.

1 W.R. 98 Dist. I.L.R. (1941) 1 Cal. 234.

7 W.R. 151 Dist. 20 Pat. 735.

9 W.R. 152 Rel. I.L.R. 1941 Nag. 437.

———402 Not Foll. I.L.R. 1941 Nag. 588.

———(Cr.) 463 Dist. I.L.R. (1941) 1 Cal. 234.

———598 Ref. I.L.R. 1941 Nag. 96.

11 W.R. (Suth.) 308 Dist. I.L.R. 1941 Nag. 598.

13 W.R. (C.R.) 161 Ref. I.L.R. (1941) 1 Cal. 90.

14 W.R. 372 Foll. I.L.R. 1941 Nag. 90.

18 W.R. 76 Dist. I.L.R. 1941 Mad. 347=(1941) 1 M.L.J.257 (F.B.).

———(C.R.) 230 Ref. I.L.R. (1941) 2 Cal. 155.

19 W.R. 222 Rel. I.L.R. 1941 Lah. 601.

21 W.R. 94 Ref. 22 P.L.T. 457.

———97 (P.C.) Ref. I.L.R. 1941 Mad. 347=(1941) 1 M.L. J. 257 (F.B.).

22 W.R. (Cr.) 10 Ref. I.L.R. 1941 Lah. 145.

23 W.R. 390 (P.C.) Rel. 20 Pat. 273.

24 W.R. 183 Ref. (1941) 2 M.L.J. 134.

———425 Reviewed 20 Pat. 346.

———476 Rel. I.L.R. (1941) 2 Cal. 199.

25 W.R. 43 Appr. I.L.R. 1941 Bom. 460.

(1864) W.R. Gap. No. 42 Ref. 22 P.L.T. 789.

CALCUTTA LAW REPORTS.

1 C.L.R. 236 Ref. I.L.R. (1941) 1 Cal. 90.

———531 Rel. 22 P.L.T. 514.

5 C.L.R. 18 Rel. I.L.R. 1941 Nag. 437.

9 C.L.R. 479 Foll. I.L.R. 1941 Nag. 392.

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1 C.L.J. 526 Dist. 20 Pat. 96.

2 C.L.J. 431 Ref. I.L.R. 1941 Lah. 395 (F.B.).

———537 Foll. 20 Pat. 346.

4 C.L.J. 343 Ref. I.L.R. 1941 All. 401 (P.C.).

5 C.L.J. 527 Ref. I.L.R. (1941) 2 Cal. 128.

6 C.L.J. 141 Dist. 45 C.W.N. 1 (P.C.).

———143 Dist. 22 P.L.T. 529.

———158 Foll. I.L.R. 1941 Nag. 222.

———609 Rel. I.L.R. (1941) 2 Cal. 209=45 C.W.N. 883.

———612 Ref. 45 C.W.N. 705; 883.

———651 Ref. I.L.R. 1941 Lah. 308 (F.B.).

7 C.L.J. 249 Rel. I.L.R. (1941) 1 Cal. 67.

10 C.L.J. 618 Ref. 45 C.W.N. 1068.

11 C.L.J. 19 Rel. I.L.R. 1941 Kar. 362.

———420 Rel. I.L.R. (1941) 2 Cal. 394.

———461 Appl. I.L.R. (1941) 2 Cal. 434.

———632 Diss. I.L.R. (1941) 1 Cal. 419; Dist. 45 C.W.N. 515.

12 C.L.J. 146 Ref. I.L.R. 1941 Mad. 567=(1941) 1 M.L. J. 123.

———443 Ref. I.L.R. 1941 Lah. 413.

———545 Rel. I.L.R. (1941) 2 Cal. 394=45 C.W.N. 912.

14 C.L.J. 648 Ref. (1941) 1 M.L. J. 492.

15 C.L.J. 505 Foll. I.L.R. 1941 Nag. 392.

———621 Dist. 20 Pat. 273.

———672 Ref. 45 C.W.N. 805.

16 C.L.J. 383 Dist. 22 P.L.T. 453.

17 C.L.J. 426 Dist. 22 P.L.T. 453.

19 C.L.J. 321 Ref. I.L.R. 1941 Lah. 413.

22 C.L.J. 566 Ref. 16 Luck. 357.

24 C.L.J. 335 Ref. I.L.R. 1941 Mad. 419=(1941) 1 M.L. J. 178.

26 C.L.J. 590 (P.C.) Rel. 20 Pat. 573 (S.B.).

27 C.L.J. 100 Appr. I.L.R. 1941 All. 77 (F.B.).

———605 Ref. I.L.R. (1941) 2 Cal. 128; Rel. 45 C.W.N. 665.

28 C.L.J. 100 Ref. 1941 A.L.J. 137 (F.B.).

33 C.L.J. 338 Foll. I.L.R. 1941 All. 14.

———411 Ref. 45 C.W.N. 1065.

34 C.L.J. 333 Ref. I.L.R. 1941 Nag. 418.

———465 Foll. 20 Pat. 497.

———485 Rel. I.L.R. (1941) 2 Cal. 199.

———563 Foll. I.L.R. 1941 Nag. 418.

35 C.L.J. 1 Ref. I.L.R. (1941) 2 Cal. 209.

———58 Foll. I.L.R. 1941 Mad. 739.

36 C.L.J. 202 Ref. 45 C.W.N. 174.

———382 Ref. 45 C.W.N. 896.

———491 Foll. 43 Bom.L.R. 681 (F.B.).

39 C.L.J. 40 Ref. 45 C.W.N. 470.

———526 Rel. I.L.R. (1941) 2 Cal. 44.

40 C.L.J. 307 Ref. 45 C.W.N. 805.

———311 Ref. 45 C.W.N. 987.

———331 Not Foll. 20 Pat. 280.

41 C.L.J. 176 Reviewed 20 Pat. 394.

———396 Diss. I.L.R. (1941) 2 Cal. 434.

43 C.L.J. 574 Dist. I.L.R. (1941) 2 Cal. 160.

45 C.L.J. 41 Foll. 45 C.W.N. 85.

51 C.L.J. 70 Rel. I.L.R. (1941) 1 Cal. 514.

54 C.L.J. 353 Dist. I.L.R. (1941) 2 Cal. 44.

56 C.L.J. 249 Rel. 22 P.L.T. 312.

———285 Ref. I.L.R. (1941) 1 Cal. 514.

60 C.L.J. 123 Cons. & Dist. I.L.R. (1941) 2 Cal. 251.

———225 Reviewed 20 Pat. 346.

61 C.L.J. 310 Ref. 45 C.W.N. 658.

———548 Ref. I.L.R. (1941) 1 Cal. 278.

62 C.L.J. 10 Not Foll. 22 P.L.T. 239.

63 C.L.J. 105 Foll. 45 C.W.N. 922.

64 C.L.J. 3. Diss. I.L.R. (1941) 2 Cal. 434.

———212 Foll. I.L.R. (1941) 1 Cal. 499.

66 C.L.J. 10 Rel. (1941) 1 M.L.J. 225.

———57 Cons. & Dist. I.L.R. (1941) 2 Cal. 251.

70 C.L.J. 289 Ref. 45 C.W.N. 122.

I.L.R. LAHORE SERIES.

1 Lah. 27 Not Foll. I.L.R. (1941) 1 Cal. 477.

———151 Rel. I.L.R. (1941) Lah. 709.

———234 Rel. I.L.R. 1941 Nag. 467.

2 Lah. 27 Ref. 1941 Rang.L.R. 224.

———66 Ref. 16 Luck. 27.

———127 Overr. I.L.R. 1941 Lah. 191 (F.B.).

———204 Ref. I.L.R. 1941 Lah. 512.

———376 Rel. (1941) 2 M.L.J. 244.

4 Lah. 249 Dist. I.L.R. 1941 Nag. 244.

———376 Ref. I.L.R. 1941 Lah. 66.

5 Lah. 92 Rel. 22 P.L.T. 12.

———147 Cons. 45 C.W.N. 1047.

———364 Ref. I.L.R. 1941 Lah. 641.

5 Lah. 375 Appr. I.L.R. 1941 Mad. 13 (F.B.).
———450 Rel. I.L.R. 1941 Lah. 546.
6 Lah. 124 Ref. I.L.R. 1941 Lah. 620.
———226 Rel. 22 P.L.T. 98.
———548 Ref. I.L.R. 1941 Bom. 136.
7 Lah. 17 Rel. I.L.R. 1941 Lah. 323.
———543 Rel. I.L.R. 1941 Lah. 546.
8 Lah. 54 Not Foll. 20 Pat. 144.
———193 (P.C.) Ref. I.L.R. 1941 Lah. 66.
———356 Foll. 20 Pat. 346.
———531 Rel. I.L.R. 1941 Lah. 451 (F.B.).
———584 Appr. I.L.R. 1941 Lah. 154 (P.C.).
9 Lah. 38 (F.B.) Ref. I.L.R. 1941 Lah. 499 (F.B.).
———284 Ref. I.L.R. 1941 Lah. 558.
———470 Ref. 16 Luck. 302.
———496 Ref. I.L.R. 1941 Lah. 692.
———504 (F.B.) Foll. I.L.R. 1941 Nag. 279.
———510 *See* 55 I.A. 154.
———608 Foll. I.L.R. 1941 Nag. 372.
10 Lah. 7 (F.B.) Dist. 16 Luck. 515 (F.B.).
———208 Rel. 43 Bom.L.R. 644.
———253 Rel. 16 Luck. 194.
———570 Ref. 1941 Rang.L.R. 254.
———596 Appr. I.L.R. 1941 All 1.
———657 Foll. (1941) 1 M.L.J. 99 (S.B.).
11 Lah. 375 Rel. 1941 A.L.J. 570.
———449 (F.B.) Dist. I.L.R. 1941 Lah. 524.
12 Lah. 262 Ref. I.L.R. 1941 Mad. 175 (P.C.)=(1941) 1 M.L.J. 393.
———275 Diss. I.L.R. (1941) 1 Cal. 137.
———725 (F.B.) Dist. I.L.R. 1941 Kar. 135.
13 Lah. 240 Rel. I.L.R. 1941 Nag. 415.
———259 Rel. I.L.R. 1941 Lah. 601.
———276 Appr. I.L.R. 1941 Lah. 154 (P.C.).
———342 (F.B.) Diss. 1941 Rang. L.R. 90.
———391 Rel. I.L.R. 1941 Kar. 101 ; I.L.R. 1941 Lah. 451 (F.B.).
———399 Ref. I.L.R. 1941 Nag. 255.
———713 (F.B.) Foll. 43 Bom. L.R. 681 (F.B.).
14 Lah. 58 Appl. 20 Pat. 144.
———255 Ref. (1941) 2 M.L.J. 972 (P.C.).
14 Lah. 380 Ref. I.L.R. 1941 Lah. 353.
———473 Reviewed 20 Pat. 798.
———507 Foll. & Dist. I.L.R. 1941 Nag. 372.
———543 Rel. I.L.R. 1941 Lah. 39.
———749 Ref. I.L.R. 1941 Nag. 677.
———770 Ref. 43 Bom.L.R. 823.
15 Lah. 320 Rel. I.L.R. 1941 Nag. 266.
———331 Ref. I.L.R. 1941 Kar. 270 ; 308.
———531 (F.B.) Ref. I.L.R. 1941 Lah. 234 (F.B.); 308 (F.B.)
———652 Foll. I.L.R. 1941 Nag. 222.
———667 Disc. 16 Luck. 382.
———698 Ref. I.L.R. 1941 Nag. 410.
———786 Ref. I.L.R. 1941 Lah. 512.
———893 Ref. I.L.R. 1941 Mad. 935.
16 Lah. 12 Dist. I.L.R. 1941 Nag. 244.
———328 Dist. I.L.R. 1941 Bom. 290.
———392 Ref. (1941) 2 M.L.J. 834.
———448 (F.B.) Overr. I.L.R. 1941 Lah. 191 (F.B.).
———517 Ref. (1941) 2 M.L.J. 105.
———546 (F.B.) Ref. 20 Pat. 130.
———594 Ref. I.L.R. 1941 Nag. 372.
———680 Rel. I.L.R. (1941) 1 Cal. 536.
———714 Dist. 16 Luck. 302.
———757 Ref. I.L.R. 1941 Lah. 323.
———768 Ref. 20 Pat. 144.
———998 Ref. I.L.R. 1941 Lah. 641.
———1086 Overr. .I.L.R. 1941 Lah. 499 (F.B.).
17 Lah. 176 (F.B.) Ref. I.L.R. 1941 Kar. 308.
———275 Ref. (1941) 2 M.L.J. 968.
———419 Foll. I.L.R. 1941 Nag. 110.
———515 Appr. I.L.R. 1941 All. 186 (F.B.).
———531 Rel. I.L.R. 1941 Lah. 441.
———629 Dist. I.L.R. 1941 Nag. 104 ; Ref. I.L.R. 1941 Nag 372.
———843 Ref. I.L.R. (1941) 1 Cal. 345.
18 Lah. 637 Foll. 43 Bom.L. R. 699.
19 Lah. 193 (F.B.) Foll. I.L.R. 1941 Nag. 144.
———352 Appr. I.L.R. 1941 Bom. 483.
———655 Ref. I.L.R. 1941 All. 343.
21 Lah. 242 (F.B.) Diss. I.L.R. 1941 Bom. 333.
———470 *See* 67 I.A. 160.
I.L.R. 1937 Lah. 48 Disappr. I.L.R. 1941 Lah. 1 (F.B.).
———196 Rel. I.L.R. 1941 Nag. 344.
———486 Ref. I.L.R. 1941 Lah. 590.
———594 (F.B.) Disappr. I.L.R. 1941 Lah. 154 (P.C.).
———594 Overr. A.I.R. 1941 P.C. 21.
I.L.R. 1938 Lah. 403 Overr. A.I.R. 1941 Lah. 386 (F.B.).
———509 Overr. A.I.R. 1941 Lah. 189 (F.B.).
———720 Overr. I.L.R. 1941 Lah. 524 (F.B.)=A.I.R. 1941 Lah. 234 (F.B.).
I.L.R. 1939 Lah. 295 Ref. I.L.R. 1941 Lah. 91.
———513 Appr. I.L.R. 1941 Lah. 512.
———520 Reversed (1941) 2 M.L.J. 972 (P.C.).
I.L.R. 1940 Lah. 242 (F.B.) Diss. 43 Bom.L.R. 157.
———707 (F.B.) Rel I.L.R. 1941 Lah. 71.
I.L.R. 1941 Lah. 71 (F.B.) Rel. I.L.R. 1941 Lah. 524 (F. B.).
———133 Foll. I.L.R. 1941 Lah. 121.
———395 (F.B.) Foll. (1941) 2 M.L.J. 541.

PUNJAB RECORDS.

81 P.R. 1874 (F.B.) Ref. I.L.R. 1941 Lah. 620.
71 P.R. 1882 Ref. I.L.R. 1941 Lah. 620.
99 P.R. 1882 Appr. I.L.R. 1941 Lah. 697.
39 P.R. 1884 Ref. I.L.R. 1941 Lah. 620.
44 P.R. 1884 Ref. I.L.R. 1941 Lah. 620.
44 P.R. 1886 Foll. I.L.R. 1941 Nag. 222.
178 P.R. 1888 Rel. I.L.R. 1941 Lah. 546.
37 P.R. (Cr.) 1888 Dist. I.L.R. 1941 Lah. 718.
60 P.R. 1889 Ref. I.L.R. 1941 Lah. 641,
148 P.R. 1890 Ref. I.L.R. 1941 Lah. 620.
150 P.R. 1890 Rel. I.L.R. 1941 Lah. 524.
50 P.R. 1893 Rel. I.L.R. 1941 Lah. 546.
3 P.R. 1895 Ref. I.L.R. 1941 Lah. 499 (F.B.).

39 P.R. 1898 Appr. I.L.R. 1941 Lah. 212 (F.B.).
90 P.R. 1898 Rel. I.L.R. 1941 Lah. 278.
63 P.R. 1908 Rel. I.L.R. 1941 Lah. 546.
140 P.R. 1908 Ref. I.L.R. 1941 Lah. 620.
5 P.R. 1908 (Cr.) Dist. 1941 Rang. L.R. 90.
91 P.R. 1909 Overr. A.I.R. 1941 Lah. 433 (F.B.).
87 P.R. 1912 Disappr. I.L.R. 1941 Lah. 697.
18 P.R. 1913 Overr. A.I.R. 1941 Lah. 97 (F.B.).
111 P.R. 1913 (F.B.) Dist. I.L.R. 1941 Lah. 451 (F.B.).
26 P.R. 1914 Overr. A.I.R. 1941 Lah. 433 (F.B.).
45 P.R. 1914 Ref. I.L.R. 1941 Lah. 428.
65 P.R. 1915 Ref. I.L.R. 1941 Lah. 100.
61 P.R. 1916 Ref. I.L.R. 1941 Lah. 620.
67 P.R. 1916 Ref. I.L.R. 1941 Lah. 100.
278 P.R. 1916 Appr. I.L.R. 1941 All. 175.
20 P.R. 1917 Ref. I.L.R. 1941 Lah. 428.
28 P.R. 1917 Rel. .I.L.R. 1941 Lah. 546.
44 P.R. 1917 Overr. I.L.R. 1941 Lah. 212 (F.B.).
62 P.R. 1918 Diss. I.L.R. 1941 All. 175.
64 P.R. 1918 (P.C.) Rel. I.L.R. 1941 Lah. 340.
34 P.R. (Cr.) 1918 Ref. I.L.R. 1941 Lah .718.
90 P.R. 1919 Overr. A.I.R. 1941 Lah. 433 (F.B.).
16 P.R. (Cr.) 1919 Ref. I.L.R. 1941 Lah. 512.

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151 P.L.R. 1912 Rel. I.L.R. 1941 Lah. 22 (F.B.).
31 P.L.R. 383 Overr. A.I.R. 1941 Lah. 97 (F.B.).
———1014 Ref. 43 Bom.L.R. 440 (P.C.).
32 P.L.R. 365 Overr. A.I.R. 1941 Lah. 149 (F.B.).
37 P.L.R. 160 Rel. I.L.R. 1941 Lah. 22 (F.B.).
38 P.L.R. 79 Ref. I.L.R. 1941 Lah. 652.
———429 Ref. I.L.R. 1941 L. 652.
39 P.L.R. 566 Reversed A.I.R. 1941 P.C. 21.
41 P.L.R. 888 Overr. A.I.R. 1941 Lah. 337.
42 P.L.R. 69 Reversed A.I.R. 1941 Lah. 189 (F.B.).
———208 Overr. A.I.R. 1941 Lah. 337.

I.L.R. MADRAS SERIES.

1 Mad. 45 Ref. (1941) 1 M..L.J. 550.
———174 Ref. (1941) 2 M.L.J. 671.
———235 *See* 4 I.A. 76.
3 Mad. 95 Dist. 43 Bom.L.R. 126.
———124 Foll. I.L.R. 1941 All. 276.
4 Mad. 172 Ref. 45 C.W.N. 493.
———179 (F.B.) Ref. (1941) 1 M.L.J. 754.
5 Mad. 169 (F.B.) Disc. (1941) 2 M.L.J. 883 (F.B.).
———189 (F.B.) Rel. I.L.R. 1941 Nag. 563.
———239 Rel. I.L.R. 1941 Kar. 99.
———304 Ref. (1941) 2 M.L.J. 105.
6 Mad. 303 Ref. (1941) 2 M.L.J 1002.
7 Mad. 255Overr. (1941) 2 M.L.J. 622 (F.B.).
———392 Dist. (1941) 2 M.L.J. 939.
———405 Ref. (1941) 2 M.L.J. 1002.
———434 Ref. (1941) 2 M.L.J. 993.
8 Mad. 87 Ref. I.L.R. 1941 All. 471 (F.B.) .
———94 Rel. I.L.R. 1941 Nag. 437.
———464 Rel. I.L.R. (1941) 2 Cal. 258.
9 Mad. 134 Foll. I.L.R. 1941 Nag. 398.
———203 Diss. I.L.R. 1941 Kar. 50 ; Rel. I.L.R. 1941 Kar. 401.
———463 Ref. 22 P.L.T. 46.
10 Mad. 66 Foll. 20 Pat. 513.
———73 Rel. 20 Pat. 298 (F.C.)
———158 Ref. I.L.R. 1941 All. 479 (F.B.).
———179 (F.B.) Appl. I.L.R. 1941 Mad. 36.
11 Mad. 26 Rel. I.L.R. 1941 Nag. 588.
———106 Ref. I.L.R. 1941 All. 370.
———148 Ref. 43 Bom.L.R. 706.
———309 (F.B.) Ref. (1941) 2 M.L.J. 529.
———452 Foll. I.L.R. 1941 Nag. 474.
12 Mad. 19 *See* 15 I.A. 171.
———105 Ref. I.L.R. 1941 Mad. 850 (F.B.).
———183 Rel. I.L.R. 1941 Nag. 437.
———239 Dist. 45 C.W.N. 29 (P.C.).
13 Mad. 42 Ref. (1941) 1 M.L.J. 550.
———269 Ref. (1941) 2 M.L.J 873.
———467 Rel. 22 P.L.T. 514.
14 Mad. 177 Ref. (1941) 2 M.L.J. 105.
14 Mad. 269 Reviewed 20 Pat. 346
———408 (F.B.)=1 M.L.J. 603 Ref. (1941) 1 M.L.J. 15.
———439 (P.C.) Ref. (1941) 1 M.L.J. Supp. 45.
———840 Ref. I.L.R. 1941 Bom. 226.
15 Mad. 150 Ref. I.L.R. 1941 All. 471 (F.B.).
———183 Rel. (1941) 1 M.L.J. 510.
———253 Rel. I.L.R. 1941 Lah. 601.
———424 Ref. 1941 Rang.L.R. 410.
16 Mad. 238 Ref. I.L.R. 1941 Bom. 273.
———285 Ref. (1941) 2 M.L.J. 500 (F.B.).
———476 Ref. (1941) 2 M.L.J. 63.
17 Mad. 21 Ref. (1941) 2 M.L.J. 834.
———199 Foll. (1941) 2 M.L.J. 636.
———373 Foll. 20 Pat. 75 ; Disc. 22 P.L.T. 649.
———392 Ref. I.L.R. 1941 Nag. 437.
———479 Ref. 43 Bom.L.R. 651.
18 Mad. 161 Ref. 1941 Rang.L.R. 376.
———327 Ref. 20 Pat. 144.
19 Mad. 154 Rel. I.L.R. 1941 Lah. 22 (F.B.) Ref. 20 P. L.T. 46.
———485 Foll. I.L.R. 1941 Nag. 124.
20 Mad. 3 Foll. 1941 Rang.L.R. 65.
———389 Foll. I.L.R. 1941 Nag. 460.
21 Mad. 18 Ref. 16 Luck. 184.
———83 Ref. I.L.R. 1941 Lah. 370.
———152 Ref. (1941) 2 M.L.J. 500 (F.B.).
———179 Ref. (1941) 2 M.L.J. 34 (F.B.).
———241 Not Foll. I.L.R. 1941 Nag. 576.
———373 Ref. (1941) 2 M.L.J. 222.
———403 Foll. (1941) 1 M.L.J. 305.
———406 Ref. (1941) 2 M.L.J. 636.
22 Mad. 49 (F.B.) Disc. (1941) 2 M.L.J. 883 (F.B.).
———119 Ref. (1941) 2 M.L.J. 1002.
———155 Ref. (1941) 2 M.L.J. 500 (F.B.).
———175 Rel. I.L.R. 1941 Nag. 437.
———289 Ref. I.L.R. 1941 Mad. 775.
———289=9 M.L.J. 64 Foll. (1941) 1 M.L.J. 800 (F.B.)
———337 Ref. (1941) 2 M.L.J. 301.

23 Mad. 184 Ref. (1941) 2 M.L.J. 99.
———306 Ref. I.L.R. 1941 Mad. 498.
———367 Rel. I.L.R. 1941 Nag. 1 (F.B.); Disc. I.L.R. 1941 Kar. 79.
———371 Appr. I.L.R. 1941 All. 326.
24 Mad. 47=10 M.L.J. 321 (F.B.) Ref. (1941) 1 M.L.J. 161.
———121 Ref. I.L.R. 1941 Nag. 397.
———279 Rel. 16 Luck. 421.
———375 Ref. (1941) 2 M.L.J. 636.
———609 Foll. (1941) 1 M.L.J. 270.
———672 Dist. (1941) 1 M.L.J. 267.
———675 Rel. (1941) 2 M.L.J. 420.
25 Mad. 118 obiter Not Foll. (1941) 1 M.L.J. 768.
———149 Rel. 16 Luck. 302.
———383 Overr. I.L.R. 1941 Mad. 438=(1941) 1 M.L.J. 45 (F.B.).
———406 Foll. I.L.R. 1941 Nag. 559.
———690 (F.B.) Ref. (1941) 1 M.L.J. 15.
26 Mad. 49 Ref. I.L.R. 1941 Lah. 512.
———91 Ref. (1941) 1 M.L.J. Supp. 49.
———143 Ref. (1941) 2 M.L.J. 134.
———179 =12 M.L.J. 276 Ref. I.L.R. 1941 All. 77 (F.B.) Diss. 43 Bom.L.R. 695. Not Foll. (1941) 2 M.L.J. 918.
———230=12 M.L.J. 368 Ref. (1941) 2 M.L.J. 993.
———243 Ref. (1941) 2 M.L.J. 35 (F.B.).
———268 Ref. (1941) 2 M.L.J. 564.
———376 Ref. (1941) 2 M.LJ 105.
———656 (F.B.) Ref. (1941) 2 M.L.J. 852.
———673 (F.B.) Foll. I.L.R. 1941 Mad. 398.
———681 Not Appr. (1941) 2 M.L.J. 798 (F.B.).
———686 (F.B.) Foll. I.L.R. 1941 Nag. 474.
———792=13 M.L.J. 258 Ref. (1941) 2 M.L.J. 1024.
27 Mad. 71 Dist. I.L.R. 1941 Mad 27.
———243 (F.B.) Disc. (1941) 2 M.L.J. 883 (F.B.).
———386=14 M.L.J. 37 (F.B.) Ref. (1941) 2 M.L.J. 993.
———435 Dist. I.L.R. (1941) 2 Cal. 128; Ref. (1941) 2 M.L.J. 35 (F.B.).
———483 (F.B.) Foll. I.L.R. (1941) Mad. 356=(1941) 1 M.L.J. 1 (F.B.).
28 Mad. 161 Appl. (1941) 2 M.L.J. 650.
———393 Ref. (1941) 1 M.L.J. 550.
———420 Ref. (1941) 2 M.L.J. 993.
———473=15 M.L.J. 126 (F.B.) Expl. (1941) 1 M.L.J. 116.
———526 Foll. I.L.R. 1941 Nag. 90.
29 Mad. 333 =16 M.L.J. 63 (F.B.) Rel. (1941) 1 M.L.J. 354 Foll. (1941) 2 M.L.J. 932.
———473 Foll. I.L.R. 1941 Nag. 90.
———508 Dist. I.L.R. 1941 Bom. 1.
———534 Ref. (1941) 2 M.L.J. 35 (F.B.).
———553 Ref. I.L.R. 1941 Mad. 708; Rel. (1941) 1 M.L.J. 414.
30 Mad. 6 Ref. (1941) 2 M.L.J. 99; Rel. I.L.R. (1941) 1 Cal. 536.
———18 Rel. I.L.R. 1941 Lah. 451 (F.B.); 20 Pat. 780.
———75 Dist. I.L.R. 1941 Mad. 378.
———88 Foll. I.L.R. 1941 Mad. 248.
———96 (F.B.) Ref. (1941) 2 M.L.J. 774.
———145 Ref. (1941) 2 M.L.J. 834.
———284 Rel. I.L.R. 1941 Lah. 601.
———298 Ref. (1941) 2 M.L.J., 222.
———340 Ref. I.L.R. 1941 All. 443.
———367 Overr. (1941) 2 M.L.J. 904 (F.B.).
———459 Ref. (1941) 2 M.L.J. 222.
———533 Dist. 45 C.W.N. 1 (P.C.).
31 Mad. 66 Ref. I.L.R. 1941 Mad. 538=(1941) 1 M.L.J. 369.
———100 Ref. I.L.R. 1941 Bom. 438.
———223 Disc. (1941) 1 M.L.J. 784.
———310=18 M.L.J. 420 Ref. (1941) 1 M.L.J. 724.
———461 Cons. (1941) 1 M.L.J. 554.
32 Mad. 68 Ref. (1941) 2 M.L.J. 910.
———242 (F.B.) Ref. (1941) 2 M.L.J. 943.
———258 (F.B.) Dist. (1941) 1 M.L.J. 200.
———284 Rel. I.L.R. 1941 Lah. 601.
———377 Foll. I.L.R. 1941 Nag. 598.
———429 Foll. (1941) 2 M.L.J. 622 (F.B.).
33 Mad. 62 Ref. (1941) 2 M.L.J. 219.
———75 Rel. 22 P.L.T. 338.
33 Mad. 323=20 M.L.J. 718 (F.B.) Expl. (1941) 1 M.L.J. 635.
———373 Ref. 1941 Rang.L.R, 376.
———452 Appr. (1941) 2 M.L.J. 463 (F.B.).
———465 Disappr. I.L.R. 1941 All. 77 (F.B.).
34 Mad. 7 =20 M.L.J. 785 Ref. I.L.R. 1941 Mad. 567=(1941) 1 M.L.J. 123.
———173=20 M.L.J. 803 Disappr. I.L.R. 1941 Mad. 367=(1941) 1 M.L.J. 145 (F.B.).
———375 Ref. (1941) 2 M.L.J. 35 (F.B.).
———493=20 M.L.J. 794 Ref. (1941) 2 M.L.J. 993; (1941) 2 M.L.J. 1002.
———585 Ref. I.L.R. 1941 Kar. 171.
35 Mad. 47=21 M.L.J. 246 (F.B.) Foll. (1941) 1 M.L.J. 15.
———120 Dist. I.L.R. 1941 Nag. 669.
———648 Ref. (1941) 2 M.L.J. 287.
36 Mad. 29 Diss. I.L.R. (1941) 1 Cal. 536; Ref. (1941) 2 M.L.J. 98.
———72 Dist. I.L.R. 1941 Nag. 397; Ref. 20 Pat. 373 (F.B.).
———113 Ref. 43 Bom.L.R. 800.
———120 Ref. 45 C.W.N. 181.
———348=21 M.L.J. 983 Ref. (1941) 1 M.L.J. 547.
———439 (F.B.) Reviewed (1941) 1 M.L.J. Supp. 49.
———493 Foll. I.L.R. 1941 Nag. 474.
———557 Foll. 20 Pat. 115.
———575 Rel. 16 Luck. 213.
37 Mad. 107 Ref. 45 C.W.N. 1124.
———181=25 M.L.J. 1 Rel. (1941) 1 M.L.J. 200.
———186 Foll. 20 Pat. 1.
———227 (P.C.) Ref. (1941) 2 M.L.J. 99.
———281 Foll. (1941) 1 M.L.J. 384.
———483 (F.B.) Ref. (1941) M.L.J. 740.
———530 Ref. I.L.R. 1941 Kar. 238.
38 Mad. 36 Ref. I.L.R. 1941 Mad. 498.
———86=23 M.L.J. 695 Foll. (1941) 1 M.L.J. 220.
———158 Rel. I.L.R. (1941) 2 Cal. 434.
———203 Ref. (1941) 2 M.L.J. 640.
———280 Appr. I.L.R. 1941 Mad. 367=(1941) 1 M.L.J. 145 (F.B.).
———295 (F.B.) Rel. I.L.R. 1941 Nag. 563.
———297 Dist. I.L.R. 1941 Mad. 378.

38 Mad. 482=25 M.L.J. 425 Diss. I.L.R. 1941 Mad. 513=(1941) 1 M.L.J. 441 (F.B.).
———535 Ref. (1941) 2 M.L.J. 754.
———594 Rel. 20 Pat. 373 (F.B.)
———655 Ref. (1941) 2 M.L.J. 529.
———674 Dist. (1941) 2 M.L.J. 507.
———698 Ref. I.L.R. 1941 Bom. 361.
———705=27 M.L.J. 740 (F.B.) Rel. (1941) 1 M.L.J. 106.
———867 Reviewed 20 Pat. 346.
———922 (F.B.) Ref. (1941) Rang.L.R. 387; I.L.R. 1941 Mad. 708; Rel. I.L.R. 1941 Lah. 451 (F.B.); 20 Pat. 780.
———1144 Ref. (1941) 2 M.L.J. 442.
———1176 Ref. (1941) 2 M.L.J. 35 (F.B.).

39 Mad. 159=29 M.L.J. 793 and 816 (F.B.) Ref. (1941) 2 M.L.J. 951.
———195 (F.B.) Foll, I.L.R. 1761 Nag. 543.
———317 (F.B.) Ref. (1941) 2 M.L.J. 287.
———382 Foll. I.L.R. (1941) 1 Cal. 137.
———414 Ref. I.L.R. 1941 Nag. 397.
———608 Diss. 43 Bom.L.R. 615.
———700 Ref. (1941) 2 M.L.J. 35 (F.B.).
———725 (F.B.) Foll. I.L.R. 1941 Nag. 344; 1941 A.L.J. 381.
———853 Rel. 22 P.L.T. 223.
———915 Rer. (1941) 2 M.L.J. 568.
———997 (F.B.) Rel. I.L.R. 1941 Lah. 568.
———1035 Ref. (1941) 2 M.L.J. 134.
———1196 Foll. 20 Pat. 513.

40 Mad. 31=32 M.L.J. 422 (F.B.) Ref. (1941) 1 M.L.J. 36.
———93=30 M.L.J. 387 Ref. (1941) 2 M.L.J. 1002.
———125 Ref. I.L.R. 1941 Nag. 397.
———355 Ref. (1941) 2 M.L.J. 571.
———581 Disc. (1941) 2 M.L.J. 883 (F.B.).
———698 Ref.(1941)2M.L.J.848
———709 *See* 44 I.A. 147.
———910 Rel. 16 Luck. 203.
———1028 Dist. 1941 Rang.L.R. 148.
———1069=33 M.L.J. 130(F.B). Overr. I.L.R. 1941 Mad. 574=(1941) 1 M.L.J. 242 (F.B.).

41 Mad. 75 (F.B.) Ref. (1941) 2 M.L.J. 134.
———124 Ref. I.L.R. 1941 Mad. 708; Foll. (1941) 1 M.L.J. 414.
41 Mad. 136 Ref. (1941) 2 M.L.J. 311 (F.B.).
———169 (FB.) Ref. I.L.R. 1941 Mad. 136.
———442=34 M.L.J. 213 Ref. (1941) 2 M.L.J. 951.
———691=34 M.L.J. 446 Ref. (1941) 2 M.L.J. 993; Foll. 43 Bom.L.R. 600.
———701 Dist. I.L.R. 1941 Nag. 96.
———792 Rel. 22 P.L.T. 392.
———840 (F.B.) Ref. I.L.R. 1941 Bom. 97.
———855 *See* 45 I.A. 156.
———985=35 M.L.J. 335 (F.B.) Rel. (1941) 2 M.L.J. 956
———1033 Dist. I.L.R. 1941 Bom. 341; Foll. 43 Bom. L.R. 126.

42 Mad. 25 Expl. & Dist. I.L.R. (1941) 1 Cal. 234.
———52=35 M.L.J. 552 Rel. (1941) 1 M.L.J. 388; (1941) 2 M.L.J. 125.
———61=35 M.L.J. 579 Dist. (1941) 1 M.L.J. 388.
———185 (F.B.) Ref. I.L.R. 1941 Mad. 675=(1941) 1 M.L. J. 586; Disc. I.L.R. 1941 Nag. 255.
———219 Rel. 20 Pat. 417.
———231 Ref. I.L.R. 1941 Lah. 100.
———319 Ref. I.L.R. 1941 Mad. 136.
———455 Rel. I.L.R. 1941 Mad. 109.
———540=36 M.I..J. 448 (F.B.) Dist. (1941) 1 M.L.J. 363.
———629 Rel. I.L.R. 1941 Lah. 632.
———647 (F.B.) Diss. 43 Bom.L. R. 615.
———684 Overr. (1941) 2 M.L.J. 684.
———854 Dist. .I.L.R. (1941) 1 Cal. 234.
———869 Ref. (1941) 2 M.L.J. 287.

43 Mad. 107 (F.B.) Expl. I.L.R. 1941 Mad. 438=(1941) 1 M.L.J. 45 (F.B.) Dist. I.L.R. 1941 Lah. 91.
———185 (F.B.) Rel. (1941) 2 M.L.J. 904 (F.B.).
———214 Rel. I.L.R. 1941 Nag. 164.
———244 Rel. 22 P.L.T. 514.
———372 (F.B.) Ref. (1941) 2 M.L.J. 520.
———675 (F.B.) Disc. I.L.R. 1941 Kar. 79.

44 Mad. 253 Dist. I.L.R. 1941 Nag. 244.
———417 Ref. 1941 Rang.L.R. 224.
———499 (F.B.) Ref. I.L.R. 1941 Nag. 598.
———534=40 M.L.J. 213 Expl. I.L.R. 1941 Mad. 356 =(1941) 1 M.L.J. 1 (F.B.); (1941) 2 M.L.J. 79 (F.B.).
44 Mad. 605=41 M.L.J. 129 (F. B.)Ref. (1941) 1 M.L.J. 15.
———778=41 M.L.J. 223 (F.B.) Dist. (1941) 1 M.L.J. 754.
———919 (F.B.) Appl. (1941) 2 M.L.J. 631; Foll. 43 Bom.L.R. 719.
———984=41 M.L.J. 279 Ref. (1941) 1 M.L.J. 697.

45 Mad. 14 Ref. I.L.R. 1941 Nag. 397.
———180 Ref. I.L.R. (1941) 2 Cal. 237.
———246 Ref. 1941 Rang.L.R. 54.
———425 Rel. I.L.R. (1941) 1 Cal. 477,
———518 (F.B.) Not Foll. 20 Pat. 699 (S.B.).
———703 Ref. (1941) 2 M.L.J. 568.
———710 Not Foll. 20 Pat. 699 (S.B.).
———827 Ref. (1941) 2 M.L. 834; Dist. (1941) 2 M.L. J. 956 (F.B.).
———890 (F.B.) Foll. I.L.R. 1941 Mad. 785.
———900 (F.B.) Rel. I.L.R. 1941 Nag. 629.
———928 (F.B.) Rel. (1941) 1 M.L.J. 611.
———1014=43 M.L.J. 700 Ref. I.L.R. 1941 Mad. 574=(1941) 1 M.L.J. 242 (F.B.).

46 Mad. 88 Diss. 1941 Rang.L.R. 224.
———257 Rel. I.L.R. 1941 Kar. 352.
———360 Foll. (1941) 1 M.L.J. 99 (S.B.).
———525 Ref. I.L.R. 1941 Lah. 428.
———583 Ref. (1941) 1 M.L.J. 193.
———592 Ref. I.L.R. 1941 Mad. 49.
———659=45 M.L.J. 533 (F.B.) Ref. I.L.R. 1941 Mad. 567 =(1941) 1 M.L.J. 123.
———938 Rel. I.L.R. 1941 Nag. 563; Not Foll. 43 Bom. L.R. 480.
———955 Rel. (1941) 2 M.L.J. 390.

47 Mad. 288 (F.B.) Ref. (1941) 1 M.L.J. 569.
———308 Dist. I.L.R. 1941 Nag. 437.
———325=46 M.L.J. 60 Foll. I.L.R. 1941 Mad. 481=(1941) 1 M.L.J. 310.
———357 (F.B.) Ref. I.L.R. 1941 Lah. 100.
———585 Foll. I.L.R. 1941 Mad. 481=(1941) 1 M.L.J. 310.
———621 Ref. (1941) 2 M.L. J. 311 (F.B.).
———837 (S.B.) Ref. (1941) 2 M.L.J. 700 (F.B.).
———920 Dist. I.L.R. 1941 Kar. 72.

48 Mad. 465 Ref. (1941) 2 M.L. J. 951.
———482 Foll. 20 Pat. 223.
49 Mad. 98 Rel. (1941) 1 M.L.J. 557.
———315 Ref. I.L.R. 1941 Mad. 332; Rel (1941) 1 M.L.J. 200.
———461 (F.B.) Foll. 43 Bom. LL.R. 805; Ref. (1941) 2 M.L.J. 698.
———468=50 M.L.J. 520 (F.B.) Dist. I.L.R. 1941 Mad. 414 =(1941) 1 M.L.J. 27.
———691 Rel. (1941) 1 M.L.J. 116.
———728 (F.B.) Foll. (1941) 2 M.L.J. 618.
———762 Rel. I.L.R. 1941 Nag. 696.
———960 Doubted 20 Pat. 75.
———978 Ref. I.L.R. 1941 Kar. 345.
50 Mad. 34 Ref. (1941) 1 M.L.J. Supp. 65.
———63 Appr. I.L.R. 1941 All. 313; I.L.R. 1941 Lah. 709.
———228 Ref. 43 Bom.L.R. 114.
———261 (F.B.) Rel. 20 Pat. 144.
———274 Ref. 43 Bom.L.R. 144.
———541 Ref. 45 C.W.N. 441.
———639 Dist. 20 Pat. 261.
———646 Ref. (1941) 2 M.L.J. 962; Rel. (1941) 2 M.L.J. 567.
———663 Ref. (1941) 2 M.L.J. 263.
———706 Ref. I.L.R. 1941 Mad. 753.
———866 Rel. I.L.R. 1941 Lah. 246; Ref. (1941) 2 M.L.J. 951.
———1023=67 M.L.J. 306(S.B.) Ref. (1941) 2 M.L.J. 972 (P.C.).
51 Mad. 76 Rel. (1941) 2 M.L.J. 717.
———185 Ref. I.L.R. 1941 Kar. 345.
———339 Diss. 1941 Rang.L.R. 224.
———361 Ref. (1941) 2 M.L.J. 311 (F.B.).
———417 (F.B.) Ref. (1941) 2 M.L.J. 311 (F.B.); (1941) 2 M.L.J. 951; 45 C.W.N. 329.
———574 Ref. (1941) 2 M.L.J. 287.
———594 Rel. (1941) 2 M.L.J. 778.
———770 Foll. (1941) 1 M..L.J. 831.
———833 Ref. (1941) 2 M.L.J. 968.
———876 Foll. I.L.R. 1941 Nag. 279.
———994 Rel. 1941 A.L.J. 361.
52 Mad. 160=55 M.L.J. 478 Overr. (1941) 1 M.L.J. 724.
52 Mad. 207 Rel. I.L.R. 1941 Mad. 109.
———263 Rel. (1941) 2 M.L.J. 110; Ref. (1941) 1 M.L.J. 531.
———388 Ref. I.L.R. 1941 Mad. 935; (1941) 1 M.L.J. 721.
———465 Ref. (1941) 2 M.L.J. 754.
———717 Ref. 1941 Rang.L.R. 268.
———809 (F.B.) Dist. 43 Bom.L. R. 293.
———845 Foll. I.L.R. 1941 Nag. 652; Ref. 43 Bom.L.R. 807.
———856 Ref. (1941) 2 M.L.J. 951.
———885 (F.B.) Dist. I.L.R. 1941 Kar. 69.
———899 Ref. 16 Luck. 294.
———987 Ref. I.L.R. 1941 Kar. 345.
53 Mad. 84 =57 M.L.J. 826 (F. B.) Ref. I.L.R. 1941 Mad. 567=(1941) 1 M.L.J. 123.
———223 Ref. 43 Bom.L.R. 756; Rel. I.L.R. 1941 Kar. 204.
———585 Expl. I.L.R. 1941 M 340.
———716 Rel. (1941) 1 M.L.J. 765.
———796 at 799 Ref. 45 C.W.N. 1 (P.C.).
———937 Ref. (1941) 2 M.L.J. 534.
54 Mad. 21 (S.B.) Foll. 20 Pat. 699 (S.B.).
———27 Ref. (1941) 2 M.L.J. 707.
———68 Foll. 22 P.L.T. 98.
———132 Foll. I.L.R. 1941 Bom. 1; Doubted 20 Pat. 86.
———163 Disc. I.L.R. 1941 Nag. 255.
———184 Foll. (1941) 2 M.L.J. 344.
———416 Ref. 22 P.L.T. 779.
———678 Diss. 1941 Rang.L.R. 258.
———768 Ref. 1941 Rang.L.R. 224.
———900 Foll. 20 Pat. 699 (S.B.)
———928 Ref. I.L.R. 1941 Mad. 850 (F.B.).
55 Mad. 26 Ref. (1941) 2 M.L.J. 962.
———385 Ref. 1941 Rang.L.R. 268.
———577 Rel. I.L.R. 1941 Nag. 598.
———581 Ref. I.L.R. 1941 Nag. 178.
———711 Rel. I.L.R. 1941 All. 280.
———720 (F.B.) Foll. 43 Bom.L. R. 751 (F.B.).
———795 Expl. I.L.R. 1941 Kar. 167.
———830 Foll. (1941) 1 M.L.J 633.
55 Mad. 960 Ref. (1941) 2 M.L. J. 537.
———1041 Ref. I.L.R. 1941 Kar. 58.
56 Mad. 1 (S.B.) Foll. I.L.R. 1941 Mad. 104 (S.B.); I.L.R. 1941 All. 43; Rel. 16 Luck 159.
———159 (F.B.) Rel. I.L.R. 1941 Lah. 66.
———198 Rel. I.L.R. 194 1 Lah. 383 (F.B.).
———231 Diss. 43 Bom.L.R. 144 =I.L.R. 1941 Bom. 315.
———534 Disappr. (1941) 1 M.L. J. 15.
———646 Diss. 43 Bom.L.R. 681 (F.B.).
———705 Not Foll. I.L.R. 1941 Nag. 344; Ref. 16 Luck. 398.
———713 Dist. I.L.R. 1941 Kar. 417.
———808 Overr. I.L.R. 1941 Mad. 438=(1941) 1 M.L. J. 45 (F.B.); Foll. (1941) 1 M.L.J. 193.
———833 Appr. (1941) 2 M.L.J. 311 (F.B.).
———886 Foll. 20 Pat. 481 (S.B.).
———909 Appl. (1941) 1 M.L.J. 407.
———915 Ref. 22 P.L.T. 798.
57 Mad. 95 (F.B.) Ref. (1941) 2 M.L.J. 951.
———177 Ref. (1941) 2 M.L.J. 390.
———218 Ref. I.L.R. 1941 Lah. 353.
———271 =66 M.L.J. 43 (F.B.) Foll. I.L.R. 1941 Mad. 559=(1941) 1 M.L.J. 250; (1941) 2 M.L.J. 529.
———411 Overr. (1941) 2 M.L.J. 803 (F.B.).
———457=67 M.L.J. 207 Overr. I.L.R. 1941 Mad. 438= (1941) 1 M.L.J. 45 (F.B.).
———670=66 M.L.J. 532 Foll. (1941) 1 M.L.J. 531.
———760 Reviewed 20 Pat. 346.
———767 Rel. I.L.R. 1941 Mad. 136.
———824 Ref. 20 Pat. 144.
———892 Ref. 43 Bom.L.R. 646.
———1019 Foll. I.L.R. 1941 Nag. 496.
58 Mad. 65 Ref. (1941) 2 M.L.J. 216.
———233 Ref. I.L.R. (1941) 1 Cal. 363.
———418 Ref. (1941) 2 M.L.J. 883 (F.B.).
———469 Dist. I.L.R. 1941 Mad. 393.
———488 Ref. (1941) 2 M.L.J. 770.
———735=68 M.L.J. 540 (F.B.) Diss. I.L.R. 1941 Mad.513 =(1941) 1 M.L.J. 441; Disc. I.L.R. 1941 Nag. 255; Ref. (1941) 2 M.L.J. 568.

58 Mad. 735 Overr. A.I.R. 1941 Mad. 417 (F.B.).
———743 Foll. I.L.R. 1941 Lah. 659.
———781 Disappr. I.L.R. 1941 Bom. 34.
———908 (F.B.) Dist. I.L.R. 1941 Nag. 410.
———936 Dist. (1941) 2 M.L.J. 956.
———972 (F.B.) Dist. (1941) 1 M.L.J. 793.
———994 (F.B.) Foll. (1941) 2 M.L.J. 344.
59 Mad. 1 Appr. I.L.R. 1941 Bom. 290.
———75 Dist. I.L.R. 1941 Mad. 275 (F.B.); 544.
———93 Appr. I.L.R. 1941 All. 77 (F.B.); 43 Bom.L.R. 699.
———171 Rel. (1941) 2 M.L.J. 172.
———202 (F.B.) Ref. (1941) 2 M.L.J. 121.
———359 (F.B.) Foll. 43 Bom.L.R. 225.
———377 Dist. I.L.R. 1941 Mad. 220 = (1941) 1 M.L.J. 120. (S.B.).
———433 Ref. I.L.R. 1941 All. 54.
———616 Ref. 22 P.L.T. 202.
———667 Not Foll. 20 Pat. 727.
———779 Appr. & Foll. I.L.R. 1941 Mad. 785 = (1941) 2 M.L.J. 79 (F.B.).
———805 Not Foll. I.L.R. 1941 Mad. 389.
———876 Ref. (1941) 2 M.L.J. 403.
———1036 Ref. 43 Bom.L.R. 888.
———1064 Ref. (1941) 2 M.L.J. 134.
I.L.R. 1937 Mad. 28 Ref. 20 Mad. 755.
———121 Diss. 20 Pat. 459 (S.B.)
———471 Ref. (1941) 2 M.L.J. 827.
———498 Foll. I.L.R. 1941 All. 276; Ref. (1941) 1 M.L.J. 779.
———616 (F.B.) Dist. 20 Pat. 735; Appl. (1941) 1 M.L.J. 540; Cons. (1941) 1 M.L.J. 365.
———797 (F.B.) Ref. (1941) 2 M.L.J. 972 (P.C.).
———841 Ref. (1941) 2 M.L.J. 968.
———880 (F.B.) Ref. (1941) 2 M.L.J. 816; Rel. (1941) 2 M.L..J. 1050.
———906 Ref. I.L.R. 1941 All. 343.
———980 Ref. (1941) 2 M.L.J. 774.
I.L.R. 1938 Mad. 1 Ref. I.L.R. 1941 All. 54.
72 Ref. 1941 Rang.L.R. 268.
———162 Dist I.L.R. 1941 Nag. 397.
I.L.R. 1938 Mad. 326 Foll. (1941) 1 M.L.J. 837; (1941) 2 M.L.J. 493.
———360 Ref. 1941 Rang.L.R. 153.
———431 Foll. (1941) 2 M.L.J. 75.
———451 Dist. (1941) 2 M.L.J. 344.
———568 Rel. (1941) 2 M.L.J. 816.
———578 (F.B.) Ref. I.L.R. 1941 Mad. 824.
———598 = A.I.R. 1938 Mad. 435 Foll. I.L.R. 1941 Nag. 344; I.L.R. 1941 Bom. 477.
———744 (F.B.) Foll. I.L.R. 1941 Mad. 398.
———968 Foll. (1941) 2 M.L.J. 883 (F.B.).
———988 Diss. I.L.R. 1941 Lah. 133.
I.L.R. 1939 Mad. 73 Ref. (1941) 2 M.L.J. 1024.
———135 Ref. 45 C.W.N. 1023.
———140 Disc. (1941) 2 M.L.J. 883 (F.B.).
———151 = (1939) 1 M.L.J. 272 (F.B.) Appr. (1941) 1 M.L.J. supp. 1.
———218 Appl. I.L.R. 1941 Mad 53; Ref. I.L.R. 1941 Mad. 486; 930.
———252 Dist. I.L.R. 1941 Mad. 703 = (1941) 1 M.L.J.614.
———269 Foll. I.L.R. 1941 Mad. 220 (S.B.) = (1941) 1 M.L.J. 120.
———443 Ref. I.L.R. 941 Nag. 632.
———466 (F.B.) Expl. 20 Pat. 306; Ref. I.L.R. (1941) Kar. 3 (F.B.).
———520 Foll. I.L.R. 1941 Mad. 53.
———530 Dist. (1941) 1 M.L.J. 218.
———566 (F.B.) Rel. (1941) 1 M.L.J. 824.
———853 Appr. I.L.R. 1941 Bom. 290.
———870 Ref. (1941) 2 M.L.J. 105.
———886 Expl. (1941) 1 M.L.J. 296.
———891 Ref. I.L.R. 1941 Mad. 675 = (1941) 1 M.L.J. 586.
———947 Appr. I.L.R. 1941 Bom. 333 Foll. 43 Bom.L.R. 157; Ref. I.L.R. 1941 Kar. 257.
———1040 Foll. I.L.R. 1941 Nag. 279.
I.L.R. 1940 Mad. 60 Ref. (1941) 2 M.L.J. 1018.
———123 Foll. (1941) 2 M.L.J. 622.
———149 Ref. (1941) 2 M.L.J. 216.
———172 (P.C.) *See* 67 I.A. 25.
———188 Foll. I.L.R. 1941 Mad. 78
I.L.R. 1940 Mad. 259 (F.B.) Ref. I.L.R. 1941 Mad. 708 = (1941) 1 M.L.J. 414; I.L.R. 1941 Mad. 157; Ref. I.L.R. 1941 Lah. 308 (F.B.).
———349 (F.B.) Ref. (1941) 1 M.L.J. 365.
———599 (P.C.) *See* 67 I.A. 222.
———649 Ref. I.L.R. 1941 Mad. 935.
———762 (F.B.) Ref. (1941) 2 M.L.J. 390; Rel. (1941) 1 M.L.J. 611.
———791 = (1940) 1 M.L.J. 732 (F.B.) Does not affect 57 Mad. 271 (F.B.) Ref. I.L.R. 1941 Mad. 559 = (1941) 1 M.L.J. 250.
———815 Ref. (1941) 2 M.L.J. 816.
———830 Ref. I.L.R. 1941 Mad. 567 = (1941) 1 M.L.J. 123.
———872 (F.B.) Expl. (1941) 2 M.L.J. 913.
———901 Dist. I.L.R. 1941 Mad. 36.
———947 Expl. I.L.R. 1941 Mad 486.
———969 (F.B.) Expl. I.L.R. 1941 Mad. 761.
———1023 Foll. I.L.R. 1941 Mad. 248.
I.L.R. 1941 Mad. 43 Ref. (1941) 2 M.L.J. 514.
———53 Ref. I.L.R. 1941 Mad. 336.
———220 Ref. I.L.R. 1941 Mad. 868.
———248 Ref. (1941) 2 M.L.J. 703.
———275 = (1940) 2 M.L.J. 990 (F.B.) Foll. I.L.R. 1941 Mad. 544 = (1941) 1 M.L.J. 322.
———356 (F.B.) Expl. & Foll. I.L.R. 1941 Mad. 785; Ref. (1941) 2 M.L.J. 947.

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1 M.L.J. 321 *See* 14 Mad. 177.
8 M.L.J. 182 Rel. (1941) 2 M.L.J. 301.
10 M.L.J. 398 Ref. (1941) 2 M.L.J. 529.
11 M.L.J. 353 Ref. (1941) 2 M.L.J. 304.
13 M.L.J. 292 (F.B.) Ref. (1941) 1 M.L.J. 31.
14 M.L.J. 84 *See* 27 Mad. 243 (F.B.) Ref. (1941) 2 M.L.J. 311 (F.B.).
———339 Foll. I.L.R. 1941 Nag 437.
16 M.L.J. 272 Ref. (1941) 1 M.L.J. 174.
———545 *See* 30 Mad. 26 Foll. (1941) 2 M.L.J. 622 (F.B.)
19 M.L.J. 270 Foll. I.L.R. 1941 Nag. 90.
20 M.L.J. 407 *See* 34 Mad. 47 Ref. (1941) 2 M.L.J. 386.

21 M.L.J. 21 (F.B.) Ref. I.L.R. 1941 Lah. 308 (F.B.).
———254 Ref. (1941) 1 M.L.J. 724.
———481 Ref. I.L.R. 1941 Mad. 49; I.L.R. 1941 Mad. 935 =(1941) 1 M.L.J. 721.
22 M.L.J. 186 Ref. I.L.R. 1941 Mad. 592=(1941) 1 M. L.J. 236.
———379 Ref. I.L.R. 1941 Mad. 753.
23 M.L.J. 223 Appl. I.L.R. 1941 Mad. 13 (F.B.).
———352 Dist. (1941) 1 M.L.J. 573.
———417 Sundara Iyer J's view approved I.L.R. 1941 Mad 513=(1941) 1 M.L.J. 441 (F.B.).
24 M.L.J. 49 Expl. & Dist. (1941) 1 M.L.J. 492.
———223 Ref. (1941) 2 M.L.J. 442.
———266 Ref. (1941) 2 M.L.J. 99.
———659 Ref. (1941) 2 M.L.J. 159.
26 M.L.J. 260 Rel. 45 C.W.N. 1047.
———509 Foll. I.L.R. 1941 Mad. 191=(1941) 1 M.L.J. 77 (F.B.).
27 M.L.J. 231 Ref. I.L.R. 1941 Mad. 322.
———295 Ref. (1941) 2 M.L.J. 993.
———677 Rel. I.L.R. 1941 Nag. 467.
29 M.L.J. 125 Ref. I.L.R. (1941) 2 Cal. 237.
———551 Rel. (1941) 1 M.L.J. 354.
30 M.L.J. 607 Ref. I.L.R. 1941 Mad. 767.
———607 Ref. (1941) 1 M.L.J. 788 (F.B.).
31 M.L.J. 207 Ref. 43 Bom.L.R. 719.
32 M.L.J. 259 Foll. (1941) 2 M.L.J. 568.
33 M.L.J. 84 Foll. (1941) 1 M.L.J. 759.
———601 Rel. I.L.R. 1941 Nag. 513.
34 M.L.J. 439 Ref. I.L.R. 1941 Mad. 767; (1941) 2 M.L. J. 788 (F.B.).
36 M.L.J. 188 Rel. (1941) 2 M.L. J. 301.
———618 Dist. I.L.R. 1941 Nag 513.
37 M.L.J. 188 Ref. (1941) 2 M.L. J. 972 (P.C.).
———234 Dist. (1941) 1 M.L.J. 200.
39 M.L.J. 233 Rel. 1941 A.L.J. 361.
———492 Treated as overruled by 66 M.L.J. 614 (P.C.) (1941) 1 M.L.J. 374= I.L.R. 1941 Mad. 587.
———565 Diss. I.L.R. 1941 Mad. 720.
———565 Ref. (1941) 1 M.L.J. 336 (F.B.).
41 M.L.J. 198 Dist. (1941) 2 M.L. J. 956.
42 M.L.J. 51 Rel. (1941) 2 M.L.J. 125.
———426 Foll. I.L.R. 1941 Nag. 559.
———551 Ref. I.L.R. 1941 Mad. 486.
43 M.L.J. 264 Appl. (1941) 2 M. L.J. 79 (F.B.).
———827 Ref. (1941) 2 M.L.J. 834.
44 M.L.J. 171 Ref. (1941) 2 M.L. J. 1024.
———431 Ref. (1941) 2 M.L.J. 558.
———486 Appr. I.L.R. 1941 Mad. 212 (F.B.).
46 M.L.J. 125 Ref. (1941) 2 M.L.J. 99.
———371 Foll. (1941) 2 M.L.J. 481.
47 M.L.J. 671 Overr. A.I.R. 1941 Mad. 822 (F.B.).
———671 Overr. (1941) 2 M.L. J. 463 (F.B.).
48 M.L.J. 616 Overr. (1941) 2 M.L.J. 956 (F.B.).
49 M.L.J. 55 Rel. I.L.R. 1941 Lah. 39.
———266 *See* 48 Mad. 933 Ref. (1941) 2 M.L.J. 134.
———554 Ref. (1941) 2 M.L.J. 770.
———717 Ref. (1941) 2 M.L.J. 568.
50 M.L.J. 559 Doubted I.L.R. 1941 Mad. 592=(1941)1 M.L.J. 236.
51 M.L.J. 500 (F.B.) Ref. (1941) 2 M.L.J. 962.
52 M.L.J. 121 Ref. I.L.R. 1941 Mad. 157.
———330 Ref. (1941) 1 M.L.J. 31.
53 M.L.J. 176 Rel. I.L.R. 1941 Nag. 513.
———255 Dist. 20 Pat. 261.
———494 Rel. (1941) 1 M.L. J. 638.
———763 Rel. (1941) 1 M.L.J. 807.
54 M.L.J. 462 (P.C.) Dist. (1941) 2 M.L.J. 717.
55 M.L.J. 132 Ref. (1941) 2 M.L. J. 304; 877.
———330 Ref. (1941) 2 M.L.J. 500 (F.B.).
56 M.L.J. 269 Ref. 16 Luck. 191.
———299 Foll. I.L.R. 1941 Mad. 109.
———394 Rel. (1941) 2 M.L.J. 567.
———489 Appr. (1941) 2 M.L.J. 684.
———760 *See* 52 Mad. 620 (F.B.) observations not approved (1941) 2 M.L.J. 803 (F. B.).
57 M.L.J. 581 (P.C.) Foll. I.L.R. 1941 Mad. 232.
———800 Dist. (1941) 1 M.L.J. 484.
58 M.L.J. 170 Dist. I.L.R. 1941 Mad. 136.
———349 Ref. 43 Bom.L.R. 440 (P.C.).
59 M.L.J. 82 *See* 57 I.A. 117 Ref. (1941) 2 M.L.J. 827 (P.C.).
———928 Disappr. (1941) 2 M.L.J. 986.
60 M.L.J. 90 Ref. (1941) 2 M.L.J 568.
———97 Foll. (1941) 1 M.L.J. 580.
61 M.L.J. 39 Ref. I.L.R. 1941 Mad. 708=(1941) 1 M.L. J. 417.
———805 Appr. (1941) 2 M.L.J. 450.
63 M.L.J. 414 Ref. I.L..R 1941 Mad. 500.
———450 (F.B.) Ref. (1941) 2 M.L.J. 529.
64 M.L.J. 715 (P.C.) Expl. (1941) 1 M.L.J. 378.
65 M.L.J. 29 Ref. I.L.R. 1941 Mad. 486.
———302 Ref. I.L.R. 1941 Mad. 486.
———678 Ref. (1941) 2 M.L.J. 544.
66 M.L.J. 65=61 I.A. 90 Ref. (1941) 2 M.L.J. 816.
67 M.L.J. 364 Ref. (1941) 2 M.L. J. 932.
68 M.L.J. 67 Appr. I.L.R. 1941 Bom. 290.
———283 Ref. I.L.R. 1941 Mad. 486.
69 M.L.J. 388 Ref. (1941) 2 M.L.J. 803 (F.B.).
———443 Foll. (1941) 2 M.L.J. 537.
———479 Foll. (1941) 1 M.L.J. 796.
———487 Rel. (1941) 1 M.L.J. 765.
———695 Ref. I.L.R. 1941 Mad. 850=(1941) 2 M.L.J. 47 (F.B.).
———791 Ref. (1941) 2 M.L.J. 450; 968.
———799 Dist. (1941) 1 M.L.J. 565.
———842 Exql. (1941) 1 M.L.J. 476 (S·B.)
70 M.L.J. 619 Ref. (1941) 2 M.L. J. 803 (F.B.).

71 M.L.J. 1 Ref. I.L.R. 1941 Nag. 632.
———663 Ref. (1941) 2 M.L.J. 968.
(1937) 1 M.L.J. 28 Ref. (1941) 2 M.L.J. 442.
———89 Foll. (1941) 1 M.L.J. 796.
———496 Dist. (1941) 1 M.L.J. 411.
(1937) 2 M.L.J. 17 Ref. I.L.R. 1941 Mad. 486.
———170 Diss. I.L.R. 1941 Mad. 739.
Disappr. (1941) 1 M.L.J. 388.
Overr. A.I.R. 1941 Mad. 475.
———273 Overr. (1941) 2 M.L.J. 968.
———386 Affirmed (1941) 2 M.L.J. 58 (P.C.).
———559 Reversed A.I.R. 1941 P.C. 43.
———666 Appr. (1941) 2 M.L.J. 986.
———717 Ref. (1941) 2 M.L.J. 968.
———830 Dist. I.L.R. 1941 Mad. 559=(1941) 1 M.L.J. 250.
(1938) 1 M.L.J. 574 Ref. (1941) 2 M.L.J. 490.
———824 Ref. (1941) 1 M.L.J. 537.
———856 Ref. (1941) 2 M.L.J. 487.
(1938) 2 M.L.J. 44 Ref. (1941) 2 M.L.J. 968.
———428 Ref. I.L.R. 1941 Mad. 775.
Foll. (1941) 1 M.L.J. 800 (F.B.).
———434 Dist. I.L.R. 1941 Mad. 275 (F.B.).
———647 Foll. (1941) 1 M.L.J. 796.
———745 Affirmed (1941) 1 M.L.J. 310.
(1939) 1 M.L.J. 120 Ref. (1941) 2 M.L.J. 390.
———209 Ref. (1941) 2 M.L.J. 910.
———324 Ref. I.L.R. 1941 Mad. (1941) 1 M.L.J. 788 (F. B.).
———412 Overr. (1941) 2 M.L. J. 618.
———476 Reversed A.I.R. 1941 Mad. 428.
———780 Affirmed (1941) 1 M.L.J. 479.
———Supp. 1=1939 F.C.R. 18 Ref. I.L.R. 1941 Mad. 874; (1941) 1 M.L.J. Supp. 65; (1941) 2 M.L.J. 607.
(1939) 2 M.L.J. 225 Overr. I.L.R. 1941 Mad. 53 Dis. 45 C.W.N. 530.
———226; Rel. (1941) 2 M.L.J. 567; Ref. (1941) 2 M.L.J. 962.
(1939) 2 M.L.J. 325 Ref. (1941) 1 M.L.J. 818.
———362 Ref. (1941) 2 M.L.J. 99.
———469 Ref. (1941) 2 M.L.J. 1018.
———495 Ref. (1941) 1 M.L.J. 605=I.L.R 1941 Mad. 383.
———593 Foll. (1941) 1 M.L.J. 759.
———604 Ref. (1941) 2 M.L.J. 47 (F.B.).
———609 Ref. I.L.R. 1941 Mad. 128; 261 (1941) 1M.L.J. 164 (F.B.).
———619 Reversed A.I.R. 1941 Mad. 678.
———658 Diss. I.L.R. 1941 Mad. 248.
———686 Affirmed (1941) 1 M.L.J. 153.
———727 Ref. (1941) 2 M..L.J. 123.
———745 Foll. I.L.R. 1941 Mad. 496=(1941) 1 M.L.J. 467.
———822 Rel. (1941) 2 M.L.J. 722.
———853 Disappr. I.L.R. 1941 Mad. 261=(1941) 1 M.L. J. 164 (F.B.).
———864 Ref. (1941) 2 M.L.J. 1018.
———Supp. 45=1939 F.C.R. 193 Ref. (1941) 1 M.L.J. Supp. 49 Reviewed 20 Pat. 429 (F.C.).
(1940) 1 M.L.J. 134 Reversed A.I.R. 1941 Mad. 475.
———134 Reversed (1941) 1 M.L.J. 388.
———254 Ref. (1941) 2 M.L.J. 910.
———268 Ref. (1941) 1 M.L.J. 721.
———363 Dist. (1941) 1 M.L.J. 270.
———369 Ref. (1941) 2 M.L.J. 159.
———422 Appr. I.L.R. 1941 Mad. 261=(1941) 1 M.L. J. 164 (F.B.)
———647 Reversed (1941) 2 M.L.J. 932.
———693 Reversed A.I.R. 1941 Mad. 549=(1941) 1 M.L. J. 484.
———860 Reversed (1941) 1 M.L.J. 833.
(1940) 2 M.L.J. 5 Affirmed (1941) 2 M.L.J. 35 (F.B.).
———174 Ref. (1941) 2 M.L.J. 257; 261.
———185 Appr. (1941) 1 M.L.J. 25.
———202 Ref. (1941) 2 M.L.J. 295; Foll. (1941) 2 M.L. J. 359.
———283 Dist. (1941) 2 M.L.J. 123.
———291 Appr. (1941) 1 M.L.J. 304.
Foll. I.L.R. 1941 Mad. 496=(1941) 1 M.L.J. 467.
(1940) 2 M.L.J. 371 Affirmed (1941) 1 M.L.J. 614.
———402 Overr. (1941) 2 M.L.J. 956 (F.B.).
———463 Expl. (1941) 1 M.L.J. 185.
———476 Foll. (1941) 2 M.L.J. 658.
———516 Foll. I.L.R. 1941 Mad. 53.
———547 Foll. (1941) 1 M.L.J. 296.
———556 Rel. (1941) 1 M.L.J. 200.
———651 Foll. (1941) 1 M.L.J. 39, (1941) 2 M.L.J. 257.
———664 Foll. (1941) 1 M.L.J. 302.
———685 Foll. (1941) 2 M.L.J. 658.
———700 Ref. (1941) 2 M.L.J. 537.
———707 Ref. (1941) 1 M.L.J. 156.
———726=51 L.W. 453 Appr. I.L.R. 1941 Mad. 191=(1941) 1 M.L.J. 77 (F.B.).
———760 Foll. (1941) 2 M.L.J. 351.
———786 Foll. (1941) 2 M.L.J. 255.
———825 Foll. (1941) 1 M.L.J. 633.
Ref. (1941) 2 M.L.J. 655.
———841 Ref. (1941) 1 M.L.J. 605.
———872 Dist. (1941) 1 M.L.J. 223; (1941) 1 M.L.J. 547.
———887 Dist. (1941) 1 M.L.J. 223; Appl. (1941) 2 M.L. J. 257.
———934 Foll. (1941) 2 M.L.J. 584.
———935 Disappr. I.L.R. 1941 Mad. 433 (F.B.)=(1941) 1 M.L.J. 333; Foll. (1941) 1 M.L.J. 177.
(1941) 1 M.L.J. 1 Expl. (1941) 2 M.L.J. 79 (F.B.).
———39 Foll. (1941) 1 M.L.J. 718; Ref. (1941) 2 M.L.J. 703.
———116 Reversed (1941) 2 M.L.J. 248.
———120 *See* I.L.R. 1941 Mad. 220 (S.B.) Ref. (1941) 2 M.L.J. 152 (S.B.).
———164 Ref. (1941) 2 M.L.J. 295.
———773 Ref. (1941) 2 M.L.J. 703.
———837 Ref. (1941) 2 M.L.J. 1018.
———Supp. 1 Ref. (1941) 2 M. L.J. 514.
———49 Supp. Ref. (1941) 2 M.L.J. 514.
(1941) 2 M.L.J. 47 Rel. (1941) 2 M.L.J. 577.
———79 Ref. (1941) 2 M.L.J. 947.

(1941) 2 M.L.J. 257 Ref. (1941) 2 M.L.J. 261.
———456 (f.n.) Disappr. (1941) 2 M.L.J. 455.
———458 (f.n.) Appr. (1941) 2 M.L.J. 455.
———587 Dis. (1941) 2 M.L.J. 568.

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1 L.W. 511 Appr. (1941) 2 M.LJ. 798 (F.B.).
3 L.W. 405 Overr. I.L.R. 1941 Mad. 212 (F.B.).
4 L.W. 440 Ref. (1941) 2 M.L.J. 1047.
5 L.W. 158 Foll. (1941) 2 M.L.J. 622 (F.B.).
———672 Ref. (1941) 2 M.L.J. 35 (F.B.).
———721 Ref. (1941) 2 M.L.J. 816.
13 L.W. 153 Ref. (1941) 2 L.W. 35 (F.B.).
———212 Ref. (1941) 2 M.L.J. 35 (F.B.).
16 L.W. 678 Ref. (1941) 2 M.L.J. 1024.
17 L.W. 107 Ref. I.L.R. 1941 Nag. 632.
18 L.W. 453 Dist. (1941) 2 M.L.J. 167.
20 L.W. 503 Not Appr. (1941) 2 M.L.J. 798 (F.B.).
———916 Ref. (1941) 2 M.L.J. 401.
———919 Ref. (1941) 2 M.L.J. 420.
21 L.W. 606 Foll. I.L.R. 1941 Mad. 27.
24 L.W. 22 Rel. (1941) 1 M.L.J 200.
———659 Ref. (1941) 2 M.L.J. 537.
25 L.W. 86 Ref. (1941) 2 M.L.J. 420.
27 L.W. 483 Foll. I.L.R. 1941 Mad. 850 (F.B.).
28 L.W. 869 Ramesam, J's observations explained and Distinguished (1941) 1 M.L.J. 286.
30 L.W. 778 Foll. (1941) 1 M. L.J. 580.
34 L.W. 399 Appl. (1941) 1 M.L.J 793.
———949 Ref. (1941) 2 M.L.J. 99.
35 L.W. 98 Ref. (1941) 2 M.L.J. 534.
37 L.W. 729 Overr. (1941) 2M.L. J. 803 (F.B.).
38 L.W. 877 Rel. (1941) 1 M.L.J. 267.
40 L.W. 595 Dist. (1941) 1 M.L.J. 388.
45 L.W. 380 Ref. I.L.R. 1941 Mad. 708.
———767 Ref. (1941) 2 M.L.J. 883 (F.B.).
47 L.W. 51 Ref. (1941) 2 M.L.J. 121.
———668 Ref. (1941) 2 M.L.J. 216.
50 L.W. 95 Disc. I.L.R. 1941 Bom. 191.
———364 Ref. I.L.R. 1941 Mad. 850 (F.B.)
———571 Ref. (1941) 2 M.L.J. 406.
51 L.W. 237 Not Appr. I.L.R. 1941 Mad. 57.
———606 Not Appr. (1941) 2 M.L.J. 855.
52 L.W. 377 Reversed A.I.R. 1941 Mad. 580.

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1914 M.W.N. 502 Not Appr. (1941) 2 M.L.J. 798 (F.B.).
1918 M.W.N. 244 Ref. 43 Bo m. L.R. 440 (P.C.).
———262 Ref. 16 Luck. 538.
———680 Ref. (1941) 2 M.L.J. 877.
1919 M.W.N. 805 Dist. (1941) 2 M.L.J. 956 (F.B.).
1920 M.W.N. 412 Rel. (1941) 1 M.L.J. 140.
1928 M.W.N. 415 Ref. 43 Bom. L.R. 440 (P.C.).
1930 M.W.N. 1145 Ref. (1941) 2 M.L.J. 99.
1931 M.W.N. Cr. 1194 Ref. (1941) 2 M.L.J. 852.
1932 M.W.N. 655 Ref. (1941) 2 M.L.J. 500 (F.B.).
1933 M.W.N. 791 Foll. (1941) 1 M.L.J. 800 (F.B.); Rel. I.L.R. 1941 Mad. 775.
———1263 Foll. (1941) 2 M.L.J. 618.
1935 M.W.N. 179 Expl. (1941) 2 M.L.J. 401.
———820 Ref. (1941) 2 M.L.J. 534.
1936 M.W.N. 367 Reversed A. I.R. 1941 P.C. 90.
———839 Ref. (1941) 2 M.L.J. 534.
———1088 Overr. I.L.R. 1941 Mad. 322.
———1095 Ref. (1941) 2 M.L.J. 534.
1937 M.W.N. 279 Reversed A.I. R. 1941 Mad. 620.
———398 Expl. (1941) 1 M.L.J. 354.
———415 Dist. (1941) 1 M.L.J. 31.
———465 Overr. I.L.R. 1941 Mad. 347=(1941) 1 M.L. J. 257 (F.B.).
———672 Ref. (1941) 2 M.L.J. 774.
1939 M.W.N.Cr. 133 Ref. I.L. R. 1941 Mad. 503=(1941) 1 M.L.J. 227.
———Cr. 174 Ref. I.L.R. 1941 Mad. 503=(1941) 1 M.L. J. 227.
———739 Dist. (1941) 1 M.L.J. 421.
1940 M.W.N. 547 Dist. (1941) 1 M.L.J. 267.
———895 Ref. 16 Luck. 538.

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1 M.H.C.R. 448 Ref. I.L.R. 1941 Mad. 486.
2 M.H.C.R. 196 Ref. I.L.R. 1941 Bom. 350.
5 M.H.C.R. 90 Reviewed (1941) 2 M.L.J. 848.
7 M.H.C.R. 260 Ref. I.L.R. 1941 All. 370.
———290 Ref. I.L.R. 1941 All. 370.

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1 N.L.R. 66 Ref. I.L.R. 1941 Nag. 255.
2 N.L.R. 4 . Ref.I.L.R. 1941 Nag. 337 Foll. I.L.R. 1941 Nag. 655.
———25 Ref. I.L.R. 1941 Nag. 255.
———34 Ref. I.L.R. 1941 Nag. 337.
———170 Foll. I.L.R. 1941 Nag. 203.
4 N.L.R. 120 Ref. I.L.R. 1941 Nag. 348 Dist. I.L.R. 1941 Nag. 571.
6 N.L.R. 12 Ref. I.L.R. 1941 Nag. 348.
———53 Ref. I.L.R. 1941 Nag. 266.
8 N.L.R. 22 Foll. I.L.R. 1941 Nag. 203.
———107 Foll. I.L.R. 1941 Nag. 279.
10 N.L.R. 93 Ref. I.L.R. 1941 Nag. 54 (F.B.) ; Foll. I L.R. 1941 Nag. 372.
11 N.L.R. 59 Foll. I.L.R. 1941 Nag. 372.
———126 Ref. I.L.R. 1941 Nag. 337.
———132 Rel. I.L.R. 1941 Nag. 266.
———164 Ref. I.L.R. 1941 Nag. 54 (F.B.).
12 N.L.R. 19 Not Foll. I.L.R. 1941 Nag. 607.
———24 Ref. I.L.R. 1941 Nag. 54 (F.B.).
13 N.L.R. 25 Rel. I.L.R. 1941 Nag. 691.
———81 Dist. I.L.R. 1941 Nag. 311.
———96 Ref. I.L.R. 1941 Nag. 54 (F.B.).

13 N.L.R. 109 Ref. I.L.R. 1941 Nag. 255.
———130 Foll. I.L.R. 1941 Nag. 214.
14 N.L.R. 1 Ref. I.L.R. 1941 Nag. 356.
———101 Ref. I.L.R. 1941 Nag. 54 (F.B.).
———181 Foll. I.L.R. 1941 Nag. 214.
17 N.L.R. 66 Rel. I.L.R. 1941 Nag. 90.
18 N.L.R. 15 Overr. I.L.R. 1941 Nag. 662=A.I.R. 1941 Nag. 313.
———82 Dist. I.L.R. 1941 Nag. 203.
———119 Ref. I.L.R. 1941 Nag. 255.
———121 Foll. I.L.R. 1941 Nag. 279.
19 N.L.R. 59 Ref. I.L.R. 1941 Nag. 54 (F.B.).
20 N.L.R. 140 Rel. I.L.R. 1941 Nag. 415.
———145 Ref. I.L.R. 1941 Nag. 96.
21 N.L.R. 23 Not Foll. I.L.R. 1941 Nag. 381.
22 N.L.R. 86 Rel. I.L.R. 1941 Nag. 348.
Appr. I.L.R. 1941 Nag. 454.
23 N.L.R. 148 Overr. I.L.R. 1941 Nag. 386.
———160 Appr. I.L.R. 1941 Nag 54 (F.B.).
24 N.L.R. 54 Ref. I.L.R. 1941 Nag. 255.
———83 Overr. I.L.R. 1941 Nag. 144.
25 N.L.R. 144 Not Foll. I.L.R. 1941 Nag. 178.
———187 (F.B.) Not Foll. I.L.R. 1941 Nag. 607.
26 N.L.R. 183 Rel. I.L.R. 1941 Nag. 467.
———217 Foll. I.L.R. 1941 Nag. 279.
27 N.L.R. 183 Foll. I.L.R. 1941 Nag. 337.
———226 Rel. I.L.R. 1941 Nag. 629.
28 N.L.R. 93 Foll. I.L.R. 1941 Nag. 203.
———214 Foll. I.L.R. 1941 Nag. 474.
29 N.L.R. 20 Foll. I.L.R. 1941 Nag. 222.
———31 Rel. I.L.R. 1941 Nag. 345.
———41 Ref. & Rel. I.L.R. 1941 Nag. 135.
———52 Foll. I.L.R. 1941 Nag. 485.
———130 Ref. I.L.R. 1941 Nag. 276.
———342 Ref. I.L.R. 1941 Nag. 1 (F.B.).
———367 Dist. I.L.R. 1941 Nag. 96.
30 N.L.R. 121 Foll. I.L.R. 1941 Nag. 279.
———135 Rel. I.L.R. 1941 Nag. 381.
———240 Ref. I.L.R. 1941 Nag. 474.
31 N.L.R. 117 Foll. I.L.R. 1941 Nag. 496.
———223 Foll. I.L.R. 1941 Nag. 203.
———260 Appr. I.L.R. 1941 Nag 392.
———347 Dist. I.L.R. 1941 Nag. 471.
———Supp. 43 (F.B.) Overr. I.L.R. 1941 Nag. 1 (F B.).
———Supp. 132 Ref. I.L.R. 1941 Nag. 54 (F.B.).
———Supp. 180 (F.B.) Rel. I.L.R. 1941 Nag. 178.
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———92 Expl. & Dist. I.L.R. 1941 Nag. 496.
———104 (P.C.) Ref. I.L.R. 1941 Nag. 203.
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———71 Ref. I.L.R. 1941 Nag. 299.
———97 Appr. I.L.R. 1941 Nag. 543.
———268 Dist I.L.R. 1941 Nag. 506; Ref. I.L.R. 1941 Nag. 104.
———350 Dist. I.L.R. 1941 Nag. 571.
———461 Dist. I.L.R. 1941 Nag. 500.
I.L.R. 1938 Nag. 54 A.I.R. 1937 Nag. 354; Ref. 45 C.W.N. 197.
———91 Ref. I.L.R. 1941 Nag. 607.
———370 Rel. I.L.R. 1941 Nag. 615.
———431 Dist. I.L.R. 1941 Nag. 513.
———489 Foll. I.L.R. 1941 Nag. 428.
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———559 Foll. 20 Pat. 1.
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———512 Foll. (1941) 2 M.L.J. 690.
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17 N.L.J. 57 Not Foll. I.L.R. 1941. Nag. 178.
18 N.L.J. 134 Foll. I.L.R. 1941 Nag. 214.
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19 N.L.J. 18 Dist. I.L.R. 1941 Nag. 139.
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20 N.L.J. 29 Rel.I.L.R. 1941 Nag. 428.
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7 C.P.L.R. 42 Not Foll. I.L.R. 1941 Nag. 474.
———111 Appr.I.L.R. 1941 Nag. 392.
11 C.P.L.R. 1 Ref. I.L.R. 1941 Nag. 54 (F.B.).
———111 Not Foll. I.L.R. 1941 Nag. 474.
13 C.P.L.R. 113 Ref. I.L.R. 1941 Nag. 54 (F.B.).
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14 C.P.L.R. 129 Foll. I.L.R. 1941 Nag. 369.
15 C.P.L.R. 143 Rel. I.L.R. 1941 Nag. 54 (F.B.).
16 C.P.L.R. 135 Rel. I.L.R. 1941 Nag. 203.

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2 Luck. 288 Ref. 43 Bom.L.R. 807.
———408 Ref.I.L.R. 1941 Nag. 164.
4 Luck. 26 Rel. I.L.R. 1941 Nag. 135.
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———643 Ref. 16 Luck. 1 (F.B.).
———667 Ref. I.L.R. 1941 Nag. 543.

5 Luck. 157 Dist. 16 Luck. 421.
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———649 Not Foll. I.L.R. 1941 Nag. 598.
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6 Luck. 158 Ref. 16 Luck. 484.
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7 Luck. 300 Ref. I.L.R. 1941 All. 443.
———350 Foll. 16 Luck. 1 (F.B.).
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———578 Ref. I.L.R. 1941 Lah. 100.
———601 (F.B.) Diss. I.L.R. 1941 Lah. 395 (F.B.).
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8 Luck. 1 (F.B.) Not Foll. 43 Bom.L.R. 800.
———185 Rel. I.L.R. 1941 Lah. 568.
———286 Foll. I.L.R. 1941 Nag. 506.
Ref. I.L.R. 1941 Kar. 171.
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9 Luck. 77 Ref. I.L.R. 1941 Nag. 150.
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10 Luck. 61 Rel. 16 Luck. 302.
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11 Luck. 5 Ref. 16 Luck. 515 (F.B.).
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———607 Foll. I.L.R. 1941 Nag. 437.
12 Luck. 211 Overr. A.I.R. 1941 Oudh 210 (F.B.).
———241 Ref. 16 Luck. 99.
13 Luck. 13 Ref. I.L.R. 1941 Bom. 483.
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———18 Foll. I.L.R. 1941 Nag. 96.
———61=(1938) 1 M.L.J. 41 (P.C.) Appl. (1941) 1 M.L.J. 270.
———628 (F.B.) Rel. I.L.R. 1941 Lah. 451 (F.B.).
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14 Luck. 49 Rel. 16 Luck. 188.
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———344 Foll. I.L.R. 1941 All. 323.
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14 Luck. 524 Rel. 16 Luck. 287.
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15 Luck. 26 Foll. 16 Luck. 72.
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———674 Ref. I.L.R. 1941 All. 543.
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10 O.C. 235 Ref. 16 Luck. 145.
11 O.C. 64 Ref. 1941 A.L.J. 43.
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12 O.C. 1 Rel. 16 Luck. 230.
14 O.C. 111 Ref. 16 Luck. 79.
16 O.C. 45 Ref. 16 Luck. 464 (F. B.).
17 O.C. 210 Ref. 16 Luck. 402.
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19 O.C. 75 Rel. 16 Luck. 266.
21 O.C. 180 Ref. 16 Luck. 145.
22 O.C. 194 Ref. I.L.R. 1941 All. 77 (F.B.).
23 O.C. 349 Ref. 16 Luck. 294.
24 O.C. 143 Ref. 16 Luck. 435.
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25 O.C. 115 Ref. 16 Luck. 99.
26 O.C. 121 Ref. 16 Luck. 464 (F.B.).
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27 O.C. 318 Ref. 16 Luck. 464 (F.B.).
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28 O.C. 65 Rel. 16 Luck. 266.

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2 Pat. 75 Dist. 20 Pat. 798.
———84 Dist. 20 Pat. 798.
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2 Pat. 708 Diss. I.L.R. 1941 Kar. 32.
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8 Pat. 323 (F.B.) Rel. 20 Pat. 306.
———439 Diss. I.L.R. (1941) 2 Cal. 209.
———478 Dist. I.L.R. 1941 Kar. 50; Ref. (1941) 2 M.L.J. 834.
———706 Rel. I.L.R. 1941 Nag. 144.
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9 Pat. 664 Not Foll. I.L.R. 1941 Nag. 588.
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10 Pat. 218 (F.B.) Rel. I.L.R. 1941 Nag. 397.
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12 Pat. 1 Foll. I.L.R. 1941 Nag. 304.
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12 Pat. 163 Dist. I.L.R. 1941 Nag. 410.
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———341 Rel. I.L.R. (1941) 1 Cal. 67.
———642 Ref. (1941) 2 M.L.J. 803 (F.B.).
———787 Dist. I.L.R. 1941 Lah. 377.
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13 Pat. 170 Diss. I.L.R. (1941) 1 Cal. 319.
———242 Foll. I.L.R. 1941 Nag. 513.
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14 Pat. 225 Rel. I.L.R. 1941 Lah. 423.
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15 Pat. 308 (F.B.) Dist. 20 Pat. 261.
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16 Pat. 290 Foll. I.L.R. 1941 Lah. 659.
———306 Doubted 20 Pat. 513.
———441 Foll. 20 Pat. 755.
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17 Pat. 89 Diss. I.L.R. 1941 Kar. 362.
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18 Pat. 114 Ref. (1941) 2 M.L.J. 968.
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1 P.L.T. 74 Ref. 22 P.L.T. 12.
2 P.L.T. 463 Dist 20 Pat. 481 (S.B.).
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3 P.L.T. 245 Ref. 22 P.L.T. 239.
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6 P.L.T. 53 Rel. 22 P.L.T. 98.
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7 P.L.T. 567 Rel. 22 P.L.T. 98.
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8 P.L.T. 95 Ref. 22 P.L.T. 545.
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9 P.L.T. 65 Ref. 22 P.L.T. 799.
———404 Ref. 22 P.L.T. 803.
———731 Foll. 20 Pat. 459 (S.B.). Appr. 22 P.L.T. 736.
10 P.L.T. 57 Foll. 22 P.L.T. 765.
———689 Rel. 22 P.L.T. 731.
———889 Ref. 22 P.L.T. 718.
11 P.L.T. 74 Ref. 22 P.L.T. 529.
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12 P.L.T. 493 Foll. 22 P.L.T. 799
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1 P.L.J. 69 Foll. 20 Pat. 162.
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3 P.L.J. 74 Rel. I.L.R. 1941 Nag. 467; Expl. 22 P.L.T. 549.
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5 P.L.J. 740 Appr. I.L.R. 1941 Bom. 460.
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6 P.L.J. 62 (F.B.) 20 Pat. 13 (F.B.)
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1 Rang. 176 Ref. I.L.R. 1941 Lah. 428.
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2 Rang. 163 Foll. (1941) 2 M.L.J. 263.
3 Rang. 322 (F.B.) Ref. 1941 Rang.L.R. 440.
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———560 Dist. 20 Pat. 373 (F.B.

4 Rang. 125 Ref. (1941) 2 M.L.J. 834.
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6 Rang. 417 Ref. (1941) 2 M.L.J. 520.
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8 Rang. 380 Ref. (F.B.) I.L.R. 1941 Nag. 563; Diss. I.L.R. 1941 Lah. 191 (F.B.).
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9 Rang. 561 Rel. 1941 A.L.J.225.
10 Rang. 176 Dist. 1941 Rang.L.R. 65 ; Ref. 1941 Rang. L.R. 403.
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11 Rang. 58 Rel. 1941 A.L.J. 508.
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———372 Rel. 22 P.L.T. 109.
———501 Foll. 1941 Rang.L.R. 45 ; I.L.R. 1941 Mad. 220 (S.B.).
12 Rang. 275 Ref. I.L.R. 1941 Lah. 100.
———477 Dist. I.L.R. (1941) 1 Cal. 562.
———483 Ref. 1941 Rang.L.R. 520.
———512 Ref. 1941 Rang.L.R. 512 (F.B.).
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13 Rang. 43 Appr. 1941 Rang.L.R. 1 (S.B.).
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14 Rang. 242 Ref. 1941 Rang. L.R. 268.
———254 Dist. I.L.R. 1941 Nag. 410.
———643 Ref. 1941 Rang.L.R. 138.
———666 Rel. 22 P.L.T. 443.
14 Rang. 704 Ref. 1941 Rang.L.R. 268.
1937 Rang.L.R. 26 Foll. 1941 Rang.L.R. 45.
———65 Ref. 45 C.W.N. 441.
———214 (F.B.) Ref. 1941 Rang. L.R. 512 (F.B.).
———268 (F.B.) Dist. I.L.R. 1941 Mad. 203 (F.B.).
———384 (F.B.) Ref. 1941 Rang. L.R. 138.
1938 Rang.L.R. 229 Ref. 1941 Rang.L.R. 14.
———385 (F.B.) Rel. I.L.R. 1941 Lah. 383 (F.B.).
———603 Ref. 1941 Rang.L.R. 7 (S.B.).
———635 Foll. I.L.R. 1941 Nag. 662.
1939 Rang.L.R. 275 Affirmed 1941 Rang.L.R. 7 (S.B.).
———548 (P.C.) Ref. 1941 Rang. L.R. 285.
———614 Ref. 1941 Rang.L.R. 400.
———731 Ref. 1941 Rang.L.R. 268.
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———685 Ref. 1941 Rang.L.R. 285.
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1941 Rang.L.R. 58 Ref. 1941 Rang.L.R. 239.
———65 Ref. 1941 Rang.L.R. 403.
———101 Foll. 1941 Rang.L.R. 321.
———366 Affirmed 1941 Rang. L.R. 371.

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I—INDIAN DECISIONS.

ABADI.

See (1) LANDLORD AND TENANT.
(2) CO-SHARERS.

——*Rights of riyayas in house in.*

A riyaya in a village *abadi* is entitled to retain the possession of his house appurtenant to his tenancy and his right to retain such possession continues until he is either ejected from his holding or he abandons the village. If the house in the *abadi* is not appurtenant to the agricultural holding of the tenant, then the person, who has built the house, has only a right of residence in it so long as the house does not fall down or the tenant does not abandon it. (*Yorke and Ghulam Hasan, JJ.*) KHAGGA *v.* HUMMA. **195 I.C. 381 = 14 R.O. 76 = 1941 A.L.W. 673 = 1941 O L.R. 579 = 1941 O.A. 555 = 1941 R.D. 492 = 1941 A.W.R. (Rev.) 537 = 1941 O.W.N. 823 = A.I.R. 1941 Oudh 449.**

ABANDONMENT.

——Of plea. *See* PRACTICE.

——Of holding. *See* (1) LANDLORD AND TENANT.
(2) THE VARIOUS TENANCY ACTS.

——*Absence of recorded co-tenant for number of years—Presumption, if any.*

Where a person is recorded as a co-tenant and claims to be still so recorded, abandonment cannot be presumed from his absence from the village for a number of years. (*Shirreff, S.M.*) INAYAT ALI *v.* CHHOTI. **1941 R.D. 722 = 1941 O.A. (Supp.) 620 = 1941 A.W.R. (Rev.) 680 = 1941 A.L.J (Supp.) 123.**

——*What will amount to—Molten wax escaping into river—Attempt to salvage given up by owner—Open dealing in salvaged wax by public at large—No protest by owner—Assertion of rights by owner after six weeks—Estoppel.*

Where molten wax escaped from the refinery of a company as a result of fire and found its way into the river and numerous creeks and the company after a futile attempt at salvaging gave it up and kept quiet for some time and in the meanwhile private individuals who had salvaged portions of the wax sold it openly to others without any protest from the company who were aware of such sales and who did not even then assert their title to the wax so sold, but six weeks after the fire published a notice to the general public that they were the owners of all the wax so salvaged and that people dealing in it did so at their peril, in a suit by the company against a purchaser of such wax, for its recovery or alternatively its value, it was *held*, that the company had abandoned the wax and that it became first the property of nobody and then the property of the first person to reduce it to possession, and that as the company had stood by and allowed purchases and sales of the wax in question without asserting their title, they had made the public believe that they had no further interest in the wax and to act upon that belief and hence the company was estopped from setting up title to the wax. (*Roberts, C.J. and Blagden, J.*) TAN SOON LI *v.* BURMA OIL CO., LTD. **1941 Rang. L.R. 153 = 194 I.C. 887 = 14 R.R. 11 = A.I.R. 1941 Rang. 166.**

ABATEMENT.

——Of Appeal. *See* PRACTICE.
C. P. CODE, O. 22.

——Of rent. *See* (1) LANDLORD AND TENANT.
(2) T. P. ACT—LEASES.
(3) VARIOUS TENANCY ACTS.

ACCOMPLICE—*Who is—Arsenic caused to be mixed in food through innocent girl of 13 years—Girl—If accomplice.*

An innocent person, *e.g.*, a girl of 13 years, through whom the accused caused arsenic to be mixed in the food of his victim cannot be regarded as an accomplice and the evidence of such a person cannot be rejected as being that of an accomplice. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* PAMANATHAN PILLAI. **1941 M.W.N. 790 = A.I.R. 1941 Mad. 832 (1).**

ACCOUNTS—"Dharm khata"—*Meaning—Presumption.*

It must be presumed that the '*dharm khata*' is no more than a separate "charity account" which usually exists in the account books of Hindu commercial trading firms and to which a part of the income is credited from time to time, when it is not shown when it was started, by whom and for what particular purpose or purposes, and there is nothing to show that the family had divested itself of its ownership of the moneys in the fund. The amount outstanding in the account is not dedicated to charity in the sense that it ceases to be the property of the firm. (*Tek Chand and Beckett, JJ.*) RAM KISHAN *v.* OM PARKASH. **43 P.L.R. 489 = A.I.R. 1941 Lah. 347.**

ACCOUNTS

——*Opening balance—If should be ignored.*

Where accounts are to be taken in respect of a partnership, the opening balance on the day of the commencement of the period of accounting, is just as much part of the account as any other entry, and provided they agree with the closing balance, ought to be taken into consideration. (*Davies.*) RAM PAL *v.* BHAG CHAND SONI. **1940 A.M.L.J. 125.**

ACCOUNT STATED — *Re-opening of—Grounds—Burden of proof.*

An account stated may be reopened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement. In the particular circumstances of each case, the parties are entitled to show that the account stated should be re opened on the ground of fraud or mistake—the question of onus depending on the nature of relationship between the parties and the surrounding circumstances which are established in the case. (*Manohar Lall and Chatterji, JJ.*) JAIGOBIND PRASAD SAHU *v.* MT. HIRIA.
20 Pat. 130 = 196 I.C. 220 = 14 R.P. 183 = 8 B.R. 8 = A.I.R. 1941 Pat. 433.

ACQUIESCENCE—*Doctrine of—Availability—Conditions—Building on another's land.*

Acquiescence which will deprive a man of his legal rights must amount to fraud, and a man is not to be deprived of his legal right unless he has acted in such a way as would make it fraudulent to set up such a case. If the defendant without any right whatsoever elects to erect a building on the land of the plaintiff he is himself to blame if he is asked to demolish that building. Before the plaintiff can be held to be disentitled to his legal right it should be shown that he acted in a fraudulent manner by allowing the defendant to make a construction without any objection whatsoever. (*Rachhpal Singh, C.J. and Janki Nath Wazir, J.*) HAR BHAGWAN *v.* GHULAM FATIMA. **43 P.L.R. J. & K. 257.**

———Essentials of. *See* 1939 Dig., Col. 2. KUWARJI *v.* BHURELAL. **I.L.R. (1941) Nag. 337.**

ACT OF STATE—*Cession of territory—Precession rights—Enforcement in Municipal Courts.*

When a territory is acquired by a sovereign state for the first time by cession following on treaty, that is an Act of State. Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers recognized. Such rights as he had under the rule of the predecessors avail him nothing. Nay, more, even if in the treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the high contracting parties. (*Lord Atkin.*) SECRETARY OF STATE *v.* RUSTAM KHAN. **195 I.C. 769 = 14 R.P.C. 21 = 54 L.W. 397 = 8 B.R. 1 = 1941 O.L.R. 641 = 1941 O.A. 703 = 1941 A.W.R. (Rev.) 743 = A.I.R. 1941 P.C. 64 (P.C.).**

———Confiscation by Crown in 1859—House sites in Lucknow City—Title to—Financial Commissioner's letter dated 7th August, 1868—Effect of. *See* 1940 Dig., Col. 3. RAHAS BEHARI LAL *v.* KANHAIYA LAL. **16 Luck. 123 (F.B.).**

———*Cession, treaty of—Rights conferred by—Enforceability in Courts.*

When a territory is acquired by a sovereign state for the first time, that is an Act of State. When it is acquired by a treaty of cession, any rights purporting to be conferred by such a treaty cannot be enforced in the Courts, except in so far as they have been incorporated in the Municipal law. (*Lord Chancellor.*) HOANI TE HEUHEU TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD. **196 I.C. 567 = 14 R.P.C. 45 = 1941 P.W.N. 522 = 1941 O.L.R. 753 = 1941 A.W.R. (P.C.) 42 = 1941 O.A. 594 = A.I.R. 1941 P.C. 109 (P.C.).**

ADMINISTRATION.

See also (1) INSOLVENCY.
(2) PRESIDENCY TOWNS INSOLVENCY ACT.
(3) PROVINCIAL INSOLVENCY ACT.
(4) SUCCESSION ACT.
(5) TRUSTS.

———Administration suit—Suit based on decree—Decree unenforceable owing to absence of leave of Court of Wards as required by Statute—Suit for administration to obtain satisfaction of decree—Maintainability. *See* 1940 Dig., Col. 3. LACHMI NARAYAN *v.* MAHOMED MEHDI. **20 Pat. 223 = 192 I.C. 387 = 13 R.P. 455 = 7 B.R. 385 = A.I.R. 1941 Pat. 70.**

———*Contract of suretyship—Maladministration—Discharge of surety—Powers of Court.*

A Court has no power to cancel a surety bond and release the surety from liability for future transactions on the ground of mal-administration. But it has power to require fresh security where the existing security fails or revoke a grant where such fresh security is not given. (*Mya Bu and Mosely, JJ.*) GULAM ALI *v.* RAHMATULLA KHAN. **1941 Rang.L.R. 376 = A.I.R. 1941 Rang. 259.**

ADVERSE POSSESSION.

Acquisition of title.
Burden of proof.
Commencement.
Co-mortgagors.
Constructive pssession.
Co-owners.
Co-sharers.
Dispossession.
Essentials.
Evidence.
Exercise of rights of ownership.
Interruption.
Landlord and tenant.
Limited interest.
Minor co-sharer.
Minor involved.
Mortgage.
Possession—Nature of.
Possession of Mutwalli.
Possession under invalid title.
Requirements.
Right to collect rent.
Starting point.
Tenancy right.

See also LIM. ACT, S. 28 AND ARTS. 142 AND 144.

———*Acquisition of title—Discharging rain water from roof over neighbour's land—Title to that land—If acquired.*

Discharging rain water from one's roof over a neighbour's land may at best give rise to a right of easement, but cannot create title to that land by adverse possession, for, such enjoyment of the land is quite consistent with recognition of the real owner's title to the land. Adverse possession, as is well-established, pre-supposes an assertive enjoyment of a right of property to the exclusion or in denial of the title of the real owner : in other words, the acts of possession or enjoyment by or on behalf of the adverse possessor must be of an unequivocal character referable only to a claim of right. (*Biswas, J.*) MAHINDRA NATH GUIN *v.* SURAJMAL. **45 C.W.N. 17.**

———*Acquisition of title—Fluctuating and indefinite body—Non-secular property—Effect of long possession by members of a particular caste.*

Where possession of a fluctuating and indefinite body goes back to time immemorial or 'so far as the memory of man runneth', a legal origin can always be found for such possession and it can be protected and maintained.

ADVERSE POSSESSION—Acquisition of title.

But apart from such ancient possession and incorporation and trust and like cases, the law in India does not allow such a body to own and hold real property; nor does the law allow such a body to acquire property by mere prescription and adverse possession. In the case of property on the face of it not of a secular nature and which is a subject of religious use where the possession of it by members of a caste goes back to time immemorial, their possession must be presumed to have a legal origin and must be respected though it may not be possible in a particular case to find the nature and the extent of this possession. (*Bajpai and Dar, JJ.*) ORENDRA CHANDRA SINGH *v.* BULAQI RAM.

1941 A.W.R. (Rev.) 1016 (2) = 1941 A.L.W. 1014 = 1941 A.L.J. 688.

———Acquisition of title—Law of limitation before 1877. *See* 1940 Dig., Col. 4. RAJNANDINI DEBI *v.* MANMATHA PAL. **A.I.R. 1941 Cal. 223.**

———*Acquisition of title—Projecting cornice over neighbour's land—Title to that land—If acquired.*

In order to constitute adverse possession, there must be effective exclusion of the real owner from the property, and as a rule, the extent of such exclusion is the measure of the right which is acquired by adverse possession. By projecting a cornice over a neighbour's land for the statutory period and under conditions which would permit a title to grow by prescription, it may be thus possible to acquire a right by adverse possession, but it will be merely a right to maintain the projection. The possession will in fact be merely of the space covered by the cornice, and the prescriptive right arising in consequence will, therefore, be limited to this space only. So far as the land beneath, or so far even as the column of air below the cornice or the super-incumbent air above it is concerned, there will be no occupation, and consequently no ouster of the real owner. Ouster from the cornice-space will not necessarily operate as ouster from anything beyond it, either above or below. (*Biswas, J.*) MAHINDRA NATH GUIN *v.* SURAJMAL. **45 C.W.N. 17.**

———*Acquisition—Possession under invalid title.*

If possession is acquired by a person under an invalid title and he continues in possession for over the statutory period, the title becomes an unassailable one. Where in a suit for rent the defendant sets up an adverse title and it is decided that he is not a tenant of the plaintiff and the suit is dismissed, the defendant's title becomes adverse to the plaintiff capable of being perfected by possession for the requisite period. (*Agarwal, J.*) RAM CHARAN SINGH *v.* CHUNNI LAL. **195 I.C. 168 = 14 R.O. 57 = 1941 O.L.R. 545 = 1941 O.A. 585 = 1941 A.W.R. (Rev.) 604 = 1941 R.D. 559 = 1941 O.W.N. 843 = A.I.R. 1941 Oudh 454.**

———*Burden of proof—Finding as to absence of proof—Agitation in second appeal.*

It is the person who alleges adverse possession that has to prove it and a finding that he has failed to prove it is a finding of fact which cannot be reagitated in second appeal. (*Harper, S.M.*) RAM MANZOOR PANDEY *v.* SPECIAL MANAGER, COURT OF WARDS, SHAHPUR. **1941 R.D. 325 = 1941 O.W.N. 674 = 1941 A.W.R. (Rev.) 450 (2).**

———Burden of proof—Waste and jungle land and tank—Presumption of possession. *See* 1940 Dig., Col. 4. MAHOMED MAHDI *v.* JAGAT SINGH.

16 Luck. 223 = 191 I.C. 157 = A.I.R. 1941 Oudh 45.

———*Commencement—Donee of zamindari from trespasser in possession—Possession of—If adverse to real owner—When becomes adverse — Subsequent decision declaring rights of true owner—Effect on donee not party to suit.*

ADVERSE POSSESSION—Co-owners.

A person taking a gift of a zemindari under an unregistered deed of gift from a trespasser in possession must be held to be in possession adversely to the donor as well as to the rightful owner of the zemindari. If the donee takes possession and continues to be in possession for the statutory period, he acquires a valid title to the property even as against the rightful owner. The fact that the latter is subsequently declared to be entitled to the property in a suit to which the donee from the trespasser is not a party cannot affect the right of the donee who has already acquired title by adverse possession. The possession becomes adverse from the time the donee from the trespasser takes possession and not merely from the date of the decision declaring the rights of the true owner. (*Harries, C.J. and Meredith, J.*) PADMA KUMARI *v.* NANDA PADHANO.

195 I.C. 203 = 14 R.P. 91 = 7 Cut.L.T. 14 = 22 P.L.T. 514 = 7 B.R. 881 = 1941 P.W.N. 33 = A.I.R. 1941 Pat. 219.

———*Co-mortgagors — Possession of redeeming co-mortgagor.*

A co-mortgagor who redeems the mortgage is not entitled to deny the right of redemption of the other co-mortgagors and to put forward a claim of adverse possession in regard to such co-mortgagors. (*Abdul Qayoom, C.J. and Wazir, J.*) BACHITRU *v.* MANGHA. **42 P.L.R.J. & K. 404.**

———*Constructive possession—Doctrine of—Availability to trespasser.*

The doctrine of constructive possession is not available to a trespasser. Dispossession of a trespasser by *vis major* has the same effect as voluntary abandonment of possession by him. (*Nasim Ali and Pal, JJ.*) HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARY CO., LTD. **I-L.R. (1941) 2 Cal. 298 = 45 C.W.N. 782.**

———Co-owners. *See* 1940 Dig., Col. 5. MURLIDHAR *v.* AMAR NATH. **I.L.R. (1941) Lah. 340.**

———*Co-owners—Essentials of adverse possession—Mere possession by one for long time—If sufficient—Possession—If to be brought to the knowledge of the other co-owners.*

Possession is never considered adverse if it can be referred to a lawful title. Possession of common property by one co-owner is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result. There must be, in other words, a disclaimer of the title of the other co-owners by an open assertion of hostile title on the part of the co-owner in possession. Where a co-sharer deals with property in which some women are interested, it will be presumed that the acts done by him are as manager, and agent of the latter. Possession, to be adverse, must be actual, visible, exclusive, hostile and continued for the time necessary to create the bar of limitation. While mere acts of possession will not, on the one hand, be sufficient to constitute adverse possession, it is not necessary also on the other hand to show that adverse possession has been brought to the knowledge of the person against whom it is claimed. It is sufficient that the possession is adverse and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. (*Lobo, J.*) KHEMCHAND *v.* DAYARAM.

I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.

———*Co-owners—Essentials—Proof of ouster—Necessity.*

ADVERSE POSSESSION—Co-owners.

Prima facie the possession of one joint tenant or tenant-in-common is the possession of all, and is not to be regarded as adverse to the other joint tenants or tenant-in-common, in the absence of evidence of ouster. In order that the possession of one may be held to be adverse to his co-tenants, it must be shown that the co-tenant has been ousted. (*Beaumont, C.J. and Sen, J.*) VISHNU JANARDAN *v.* MAHADEV KESHAV.
43 Bom.L.R. 971.

——Co owners—Onus—Person becoming co-owner by taking joint possession under decree. *See* 1940 Dig., Col. 5. MUZAFFAR SARFRAZ *v.* RAHIM JANA.
13 R.Pesh. 25.

——*Co-owners—Possession of one—When adverse—Presumption—Ouster—Proof of—Onus—Non-participation in profits—Effect of.*

In order to establish adverse possession by one tenant-in-common against his co tenants, there must be exclusion or ouster, and the possession subsequent to that must be for the statutory period. What is sufficient evidence of ouster must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to adverse possession; but such non participation or non-possession may, in the circumstances of a particular case, amount to adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time. Actual knowledge on the part of the co-sharer sought to be excluded is not necessary to be proved. It is sufficient if the acts of ouster relied on are overt acts so visible and publicly hostile to a co-sharer that he must have had knowledge of them. The burden of proving adverse possession or ouster is on the party who claims to defeat the title of his co sharer by adverse possession. (*Lobo, J.*) KHEMCHAND *v.* DAYARAM.
I L.R. (1940) Kar. 534 = 194 I.C 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.

——*Co-owners—Possession on behalf of all—Presumption—Ouster — Proof—Muhammadan family—Non-receipt of profits—Inference of ouster.*

Where one of the co-owners enters into possession, the law presumes that he did so for and on behalf of all. Before he can succeed in depriving the others of their interests in the estate, it is necessary for him to prove ouster; the proof of ouster has to be extremely strong and ordinarily can only be sustained by actual exclusion of rights to the knowledge of the person excluded. This knowledge can no doubt be presumed in cases of laches or negligence on the part of the co-owner. The mere entry of a name in the mutation register is no indication of adverse possession, unless it is shown to have been obtained after a clear declaration of hostile title. In the case of Mahomedan families, it is unusual for ladies to insist on their rights and a partition of their shares without reference to them does not go to prove their ouster from their rights. There must be a clear demand and refusal of profits before a non-payment of profits can be taken as an indication of ouster. Mere non-payment by itself does not constitute ouster and still less so when something though not the whole is paid. (*Bose, J.*) MAHOMED AMINUDDIN *v.* MAHOMED ABDUR. **1941 N.L.J. 467 = A.I.R. 1941 Nag. 343.**

——*Co-owners—Proof of ouster—Necessity.*

Unless there is a proof of ouster of clear denial of title of a co owner, the possession held by the other co-heirs must be deemed to be on her behalf and for her benefit. (*Niyogi, J.*) GULABCHANDSAO *v.* BASHIRUDDIN. **I.L.R. (1941) Nag. 244 = 195 I.C. 44 = 14 R.N. 28 = 1941 N.L.J. 127 = A.I.R. 1941 Nag. 141.**

ADVERSE POSSESSION—Essentials.

——*Co-sharer—Ouster—Fact of one co-sharer building extensively on portion of joint land—If amounts to.*

The act of a co-sharer in building extensively on a portion of the joint land cannot by itself amount to an ouster of the other co-sharer who was a minor at that time. (*Almond, J. C.*) MIAN SHARIFF GUL *v.* SAID GUL. **196 I.C. 444 = 14 R. Pesh. 30 = A.I.R. 1941 Pesh. 65.**

——*Co-sharers—Shamilat—Exclusive possession by some.*

In the case of shamilat land which is jointly owned by all the village proprietors, exclusive possession by one or two co-sharers, however long, cannot confer any title on them. To acquire title by prescription they must prove some overt act or acts amounting to the ouster of the rest of the proprietary body for a period of more than twelve years. (*Tek Chand and Din Mahomed, JJ.*) JAWALA SINGH *v.* JAGDISH SINGH.
195 I.C. 244 = 14 R L. 49 = 43 P.L.R. 41 = A.I R. 1941 Lah. 144.

——*Co-sharers—Shamilat land—Transfer of portion by one of proprietors—Transferee in exclusive possession for 12 years—If acquires prescriptive title.*

Uninterrupted sole possession of one co-sharer of a part of the joint property cannot, by itself and without more, amount to ouster of the others. In such circumstances the possession of one co-sharer is presumed to be the possession of all and it is only when a co-sharer in assertion of a hostile title does a hostile overt act that the statute begins to run against the other co-sharers. Accordingly a transferee of a part of a Village Shamilat from one of the proprietors in the Village, who was in exclusive possession thereof, cannot acquire a prescriptive title by his exclusive possession for 12 years after the purchase, when he has neither denied the joint character of the property nor done any other act amounting to an ouster of the other co-proprietors. (*Tek Chand and Beckett, JJ.*) GHULAM NABI *v.* UMER BAKHSH. **43 P.L.R. 337 = A.I.R. 1941 Lah. 307.**

——*Dispossession—What amounts to—Person having right to collect rent of zamindari—When ousted from possession.*

A person who has been collecting rents from the tenants in a zamindary cannot be said to be ousted from possession unless and until a claim of such person for recovery of rent has failed. He can assert his possession only by recovery of rents and until he has failed to recover rent it cannot be said that he has been ousted from possession. (*Harries C.J. and Meredith, J.*) PADMAKUMARI *v.* NANDA PADHANO.
195 I.C. 203 = 14 R.P. 91 = 7 Cut. L T. 14 = 7 B.R. 881 = 22 P.L.T. 514 = 1941 P.W.N. 38 = A.I.R 1941 Pat. 219.

——*Essentials—Actual knowledge of real owner—If essential—Real owner absent from British India not voluntarily but under sentence of transportation—Relevancy.*

Possession, to be adverse, need not be known by the real owner to be adverse as long as it is open and capable of being known by the parties to be interested in the property. The fact that the real owner was absent from British India and that his absence was not voluntary but enforced, under a sentence of transportation, is not a ground of exemption from limitation, and would not prevent the starting of adverse possession. (*Abdur Rahman, J.*) KUPPUSWAMI NAIDU *v.* KUPPUSWAMI NAIDU. **1941 M.WN. 738 = 54 L.W. 502 = A.I.R. 1941 Mad. 866 = (1941) 2 M.L.J. 255.**

——*Essentials—Continuity of possession—Proof required.*

ADVERSE POSSESSION—Essentials.

To constitute adverse possession, the possession must be actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for 12 years, it confers an indefeasible title upon the possessor. In order to prove the continuance of possession it is not necessary to prove an actual bodily continuous possession. Possession may be continuous even though the actual acts of possession are at considerable intervals. How many acts of possession will lead to the inference of continuity of possession would depend upon the nature of the subject possessed. The will itself may be sufficient if manifested in an appropriate environment of facts. Where the land in possession of a trespasser is capable of yielding only two crops a year and its flooding during the rainy season does not interfere in any way with the raising of these two crops, it cannot be held that his possession is not continuous throughout the year. (*Nasim Ali and Pal, JJ.*) HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARY CO., LTD.
I.L.R. (1941) 2 Cal. 298 = 45 C.W.N. 782.

———*Essentials—If should be brought to the knowledge of the owner.*

It is not required that to constitute adverse possession it must have been brought to the knowledge of the owner of the property. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware of what is happening. If the rights have been openly usurped, it cannot be pleaded that the fact was not brought to the notice of the owner. (*Niyogi, J.*) RAGHUBAR PRASAD *v.* BALOO SHEOCHARAN. **I.L.R. (1941) Nag. 691 = 1941 N.L.J. 407 = A.I.R. 1941 Nag. 311.**

———Essentials—Mortgage—Sale by mortgagor without knowledge of mortgagee—Vendee taking possession—Possession—If adverse to mortgagee under English mortgage. *See* 1940 Dig., Col. 6. JASRAJ FAOOJI *v.* SUGRABAI. **191 I.C. 483.**

———*Essentials—Onus—Temporary acts—If can constitute.*

To constitute a title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent and is displaced by evidence of partial dispossession by the other party. The onus of establishing these essential elements is upon the adverse possessor. In determining the question whether possession was hostile and notorious so as to charge the real ower with notice of the adverse claim, the nature, the situation and the user of the property must be considered. It was held on the facts that acts of temporary and flimsy character like the use of the place for playing, cooking on occasions and keeping cattle and hens do not destroy the title of the owner. (*Yorke and Ghulam Hasan, JJ.*) IQBAL ALI *v.* HUMAYUN QADAR. **194 I.C. 50 = 13 R.O. 515 = 1941 O L.R. 374 = 1941 O.W.N. 537 = 1941 O.A. 320 = 1941 A.W.R. (Rev.) 289 = A.I.R. 1941 Oudh 436.**

———*Essentials—Publicity—Knowledge of true owner—If necessary.*

In order to constitute adverse possession it has to be established that the possession of the defendant was in denial of the plaintiff's right and that it was adequate in continuity, in publicity and in extent. It is not, however, necessary that the acts of possession should be exercised to the knowledge of the plaintiff. (*Mukherjea and Lodge, JJ.*) SAROJ BASINI DEBI *v.* KUMAR KAMALA RANJAN ROY. **45 C.W.N. 126.**

———*Evidence—Compact plot of land—Test of adverse possession—Proof of possession of every inch of land—*

ADVERSE POSSESSION—Interruption.

If necessary—Part of land tenanted and part untenanted—Proof necessary.

The proper test to be applied in a case of adverse possession relating to a compact plot of land is whether the person in adverse possession or his predecessors exercised such dominion over the property for a period of twelve years or more as to justify an inference of fact that they were in possession of the whole. It is not necessary that he should prove affirmatively that his predecessors had actually been in physical possession of every square inch of this land, but it should be considered whether the acts of possession which had been proved would legitimately show that his predecessors had enjoyed dominion over this property in the manner in which such dominion is normally exercised. If part of the land had been let out to tenants and part of it was vacant, it would be sufficient for him to show that for a period of twelve years or more his predecessors held the tenanted land through tenants who had attorned to them or through licensees whom they had permitted to remain on the land, and that, in respect of untenanted land, they had asserted their possession from time to time in some suitable manner, for instance, by taking or selling the produce of such land. Mere interference with their possession by the rightful owner would not be sufficient to show that they had been dispossessed unless such interference had resulted in their being definitely ousted from any portion of the land. There is also authority for the proposition that, even if they had been dispossessed from a certain portion of the land by another trespasser and ultimately recovered possession, such dispossession would not be deemed to constitute a break in their possession. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

——— *Exercise of rights of ownership—True owner having no knowledge—Tenant* bila tasfia, *possession of, if can become adverse.*

The mere fact that a person, who is not the true owner professes to exercise the rights of ownership and proceeds to transfer property which he has no right to transfer without the knowledge of the true owner does not lead to the inference that the transferor's unauthorised act invests him with any adverse title and clothes him with the right which he otherwise does not possess. Where a person is in possession of a plot as a tenant, his possession cannot become adverse to the rightful owner merely because he is entered as tenant *bila tasfia* and has held it for over 12 years. (*Ghulam Hasan, J.*) MAHOMED TAQI *v.* EWAZ MAHOMED.
196 I.C. 421 = 14 R.O. 165 = 1941 O L.R. 681 = 1941 R.D. 802 = 1941 O.A. 753 = 1941 A.W.R. (Rev.) 819 = 1941 O.W.N. 1057.

———*Interruption—Adverse decision by Survey Officer under Madras Survey and Boundaries Act—If breaks continuity of possession of trespasser.*

An order of the Survey Officer under S. 11 of the Madras Survey and Boundaries Act or of the appellate authority under S. 12 has not, in itself, the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude him from making use of his prior possession to make up the period of limitation required to complete his title. The decision may be conclusive under S. 13 of the Act, but it is merely a decision with regard to the boundary. The unsuccessful party's adverse possession as a trespasser would not necessarily be inconsistent with that decision or affected by it. (*Meredith, J.*) SATYANARAYANA SIDHANTI *v.* BERHAMPUR MUNICIPAL COUNCIL.
7 Cut L T. 38.

———*Interruption—Adverse possessor inheriting property before 12 years—Effect on adverse possession.*

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A person claiming to be in adverse possession of property, who subsequently inherits that property before the expiry of 12 years from the commencement of such possession, cannot perfect his title by adverse possession, as the legal consequence of the vesting by inheritance is to put an end to the adverse possession running against the owner. (*Venkataramana Rao. J.*) SRINIVASA RAO *v.* SESHACHARLU.

54 L.W. 250 = (1941) 2 M.L.J. 406.

———*Interruption—Decree of Court declaring possession wrongful—Effect of.*

Obiter.—Where a trespasser is in possession and the Court makes a declaration showing that his possession is wrongful, that does not affect the quality of his possession, but merely advertises the fact that it is adverse. (*Beaumont, C.J. and Sen, J.*) VISHNU JANARDAN *v.* MAHADEV KESHAV. **43 Bom.L.R. 971.**

———*Interruption—Submerged land—Seasonal submersion of land—Effect on continuity of possession of trespasser—Title by adverse possession—If can be acquired.*

In order to establish title by adverse possession to land which is subject to seasonal submergence, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. There is no difference between seasonal submersion and one which continues for a length of time. During the time the land is submerged under water, it is in the constructive possession of the rightful owner and a title by adverse possession cannot be acquired by a trespasser. It would be contrary to principle and authority to imply constructive possession of the trespasser (claimant) through the rightful owner as his tenant while the land is submerged so as to enable the trespasser as a wrong-doer to obtain title by adverse possession. For submergence to interfere with continuous adverse possession it is not necessary to show that the submergence is of such a nature as to interfere with the usual agricultural operations in the neighbourhood. It is enough if the submergence prevents such use as the possessor would normally have but for the flooding and submergence. On the dispossession of the trespasser by *vis major* of floods, the constructive possession is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be acquired against the true owner. The submersion interrupts the continuity of the possession of the trespasser, when it deprives the trespasser of the use and occupation of that land as agricultural land during the months of submersion. He cannot be then said to be in effective possession of that land during that time; the possession of the true owner revives, and the trespasser gets no title by adverse possession. (*Harries, C.J. and Manohar Lall, J.*) SECRETARY OF STATE FOR INDIA *v.* RAM BACHAN LAL.

20 Pat. 497 = 195 I.C. 746 = 14 R.P. 151 = 7 B.R. 969 = 22 Pat.L T. 35 = A.I.R. 1941 Pat. 422.

———*Landlord and tenant—Acquisition of rent-free title—Assertion of hostile title—If to be brought to notice of landlord.*

Assuming that a tenant can acquire a rent-free title to land adversely to the landlord by asserting a hostile title, he can acquire an adverse title if his assertion has been brought to the notice of the landlord. (*Harries, C.J. and Fazl Ali, J.*) CHINTI KAHARIN *v.* KRIPA SHANKAR WARRAT. **194 I.C. 300 = 13 R.P. 698 = 7 B.R. 750 = 1941 P.W.N. 513 = A.I.R. 1941 Pat. 488.**

———*Landlord and tenant—Claim to higher status—Tenant, if can set up.*

A landlord who allows a tenant to assert the validity of an invalid lease for the statutory period may be

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debarred from subsequently questioning the right of the tenant to hold under the lease. The principle is that in such a case, the person coming into possession under a lease which is invalid or void as against the person seeking to eject him becomes a trespasser, and as such, after the expiry of the statutory period, he acquires by prescription the limited right under the lease, whether it be a lease for a term or a lease in perpetuity. But where there is no question of the tenant holding under an invalid or void lease and the possession of the tenant originates in lawful title it is doubtful whether he could set up a claim to a higher status as tenant by right of adverse possession. (*Biswas, J.*) SERAJUL HOQUE *v.* DWIJENDRA MOHAN SEN. **192 I.C. 751 = 13 R.C. 345 = 45 C.W.N. 240 = A.I.R. 1941 Cal. 33.**

———*Landlord and tenant—Interest of permanent tenant—Acquisition of—Non-permanent tenancy, created before T.P. Act transferred to landlord's knowledge—Transferee in possession for over 12 years.*

Where a non-permanent tenancy was created before the T. P. Act and was, therefore, not transferable, the transfer of the tenancy to the knowledge of the landlord and the relinquishment of possession in favour of the transferee would amount to forfeiture or abandonment of the tenancy, and the possession of the transferee would be adverse. The transferee would acquire the limited interest of a permanent tenant by adverse possession for more than 12 years. (*Nasim Ali and Pal, JJ.*) JOGENDRA KRISHNA *v.* SUBASHINI.

I.L.R. (1941) 2 Cal. 44 = 74 C.L.J. 145 = 45 C.W.N. 590 = A.I R 1941 Cal. 541.

———*Landlord and tenant—Possession of tenant—When may become adverse.*

The general rule is that the possession of the tenant is that of his landlord. To enable him to hold adversely to his landlord, it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. (*Syed Nasim Ali and Rau, JJ.*) SAMBHU NATH BHAKAT *v.* SREE SREE SRIDHAR THAKUR. **73 C.L.J. 76.**

———*Limited interest—Burden of proof.*

When the defendant in possession sets up a title acquired by adverse possession only to a limited interest which even if completed would not extinguish the title of the plaintiff, it is for the defendant to establish his title in order to defeat the claim of the plaintiff. (*Nasim Ali and Pal, JJ.*) HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARY CO., LTD.

I.L.R. (1941) 2 Cal. 298 = 45 C.W.N. 782.

———*Limited interest—Extent of title acquired.*

The extent of the title acquired by adverse possession depends on the extent of the claim or right under which possession is obtained and kept. If claim is restricted to a limited interest in the property, *e.g.*, tenancy right in the property, possession is adverse to the extent of that limited interest only. There can be no question of absolute title by adverse possession when only a limited interest has been asserted. (*Nasim Ali and Pal, JJ.*) HEMANTA KUMARI DEBI *v.* MIDNAPORE ZAMINDARY CO., LTD. **I.L.R. (1941) 2 Cal. 298 = 45 C.W.N. 782.**

———*Limited interest—Landlord and tenant—Notice to quit—Subsequent acceptance of rent from tenant for over 12 years—Adverse title to remain in land—If acquired.*

If a landlord serves a notice to quit on his tenant, and instead of taking steps to evict him when the notice is disobeyed, accepts rent from him for a period of more

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than 12 years, the tenant cannot, in a subsequent ejectment suit, plead that he has acquired the right to remain in occupation of the land by adverse possession. (*Shearer, J.*) CHAGGANLAL MARWARI *v.* INDRA KEOT. **194 I.C. 459 = 13 R.P. 723 = 7 B.R. 775 = A.I.R. 1941 Pat. 495.**

——*Limited interest—Tenant settled on land under unregistered patta—Possession of—If adverse.*

Where a tenant is settled on land under a patta which is invalid for want of registration, his possession is that of a trespasser, and if he and his successors in interest remain on the land and assert the rights of tenants over the land for more than 12 years, they undoubtedly acquire a limited interest in the land by adverse possession. (*Harries, C.J. and Fazl Ali, J.*) SHIVA SHANKAR BHARTHI *v.* BENI RAM. **22 Pat.L.T. 200.**

——*Minor co-sharer—Exclusive possession by major co-sharers—If and when adverse—Non participation in enjoyment and possession by minor—Effect of on title—If amounts to ouster of minor.*

It cannot be stated as a general proposition that there can be no adverse possession of property which belongs to a minor during the continuance of the minority of the owner. Minority is no bar to acquisition of title by adverse possession if the person claiming such adverse possession does not bear to the person against whom he claims it any anterior relationship such as that of agent, bailiff, trustee, etc. Where a minor girl, who is a co-sharer in property with the manager of a joint Hindu family, who is her relation, being a member of a branch which has separated from her deceased father and grandfather, has not participated in the possession and enjoyment of the property for a period of over 26 years, her failure to claim or demand such participation would not amount to ouster or exclusion. The other co-sharer who has been collecting the rents and profits is in law a constructive trustee. When the female co-sharer has been ignorant of her rights till shortly before suit and has attained majority only about 8 or 9 years before suit, the other co-sharer cannot claim title by adverse possession merely because of his exclusive possession. In order to succeed in his plea of adverse possession, he must prove further acts of ouster. Title by adverse possession cannot originate during the minority of the person sought to be defeated by adverse possession. To acquire title by adverse possession, there must be acts of exclusion or ouster amounting to open assertion of hostile title, knowledge of which must be attributable to the person sought to be excluded so as to entitle him to resist the acts. A minor is not in a position to know of or to resist acts of ouster, and therefore there cannot be overt acts amounting to open assertion of a hostile title against a minor. (*Lobo, J.*) KHEMCHAND *v.* DAYARAM.

I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.

——*Minor involved—Considerations if different—Ouster of minor—What would constitute.*

Strictly speaking there can be no such thing as possession by a minor *qua* minor, because he is incapable of having an *animus possidendi* and of exercising legal rights of ownership. They are always exercised by others for him. And if they are so exercised the question of minor's occupation would not matter. Possession in this sense will be imputed to him so long as somebody is in possession on his behalf. But if a stranger enters on the land and physically ousts the minor from occupation as well as from possession and sets up an adverse title in himself, then from that moment time begins to run against the minor. If the person so entering happens to do so in a fiduciary capacity, he will not be allowed to set up an adverse title. There is no difference in law when the person ousted is a minor. The ouster would be effected by turning out the guardian out of effective possession and control of the property. (*Stone, C.J. and Bose, J.*) SETH NARAINBHAI *v.* NARBADA PRASAD.

1941 N.L.J. 534 = A.I.R. 1941 Nag. 357.

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——*Mortgaged land—Usufructuary mortgagee—Possession adverse to—If adverse to mortgagor or to vendee from mortgagor.*

In the case of a usufructuary mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. The mortgagor or a vendee from the mortgagor is not entitled to possession until redemption of the mortgage, and therefore possession which is adverse to the mortgagee would not be adverse to the mortgagor or his vendee who stands in the shoes of the mortgagor. (*Agarwala, J.*) QAMARUNNISA *v.* BADRI RAM KAHAR. **1941 P.W.N. 68.**

——*Mortgagor and mortgagee—Mortgagee's possession when can become adverse to that of the mortgagor.*

A necessary party to a mortgage suit, if not impleaded, will not be bound by any decree that might be passed therein. He would have his right to redeem within 60 years. But that right could be extinguished by adverse possession on the part of the mortgagee, which in its turn depends upon the nature of the right which the mortgagee asserts while entering into possession. If he enters into possession under color of his right as a mortgagee, it will not be adverse. It is only when he enters into possession in assertion of a right independently of the mortgage, that his possession will become adverse. When a sole mortgagor assigns his equity of redemption to the mortgagee, he becomes the owner and his possession would become adverse to that of the mortgagor. This is so whether the transfer was valid or invalid in form. The mortgagee's possession originates independently of the mortgage and hence it is not derivative or permissive possession. (*Niyogi, J.*) GULABCHANDSAO *v.* BASHIRUDDIN.

I.L.R. (1941) Nag. 244 = 195 I.C. 44 = 14 R.N. 28 = 1941 N.L.J. 127 = A.I.R. 1941 Nag. 141.

——*Possession—Nature of—What is connoted by adverse possession.*

Bare occupation and possession are two different things. The concept of possession, at any rate as it is understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely, the *animus possidendi*, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession of which the law speaks does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. It is true that physical occupation is ordinarily the best and the most conclusive proof of possession in this sense but the two are not the same. It is also true that there must always be physical ouster from these *rights* but that does not necessarily import physical ouster from *occupation* especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum necessary naturally varies in each case. (*Stone, C.J. and Bose, J.*) SETH NARAINBHAI *v.* NARBADA PRASAD. **1941 N.L.J. 534 = A.I.R. 1941 Nag. 357.**

——*Possession of Mutwalli under void wakf—Nature of.*

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Per *Mitter, J.*—The possession of a Mutwalli under a void wakf will be possession on behalf of the persons who will be entitled to those properties on that contingency. If the wakif is in possession as Mutwalli, he cannot prescribe against himself as owner. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

———Possession under invalid title—Wakf invalid—Possession of mutwali—Nature of. *See* 1940 Dig., Col. 8. MOHIUDDIN AHMED *v.* SOFIA KHATUN.
192 I.C. 693=13 R.C. 339.

———*Right to collect rent of land—Assignee of—If can acquire title by prescription and adverse possession.*

A transfer of a right to collect rent of immovable property is a transfer of an interest in immovable property. It is not a mere personal right, but a sort of jagir, and the transferee of such a right can acquire title by prescription and adverse possession. (*Harries, C.J. and Meredith, J.*) PADMAKUMARI *v.* NANDA PADHANO. **195 I.C. 203=14 R.P. 91=7 Cut L.T. 14=22 P.L.T. 514=7 B.R. 881=1941 P.W.N. 33=A.I.R. 1941 Pat. 219.**

———*Starting point—Co-sharers—Denial of title—Subsequent refusal of mutation.*

Where the predecessors in interest of the parties were co-sharers and the title of the plaintiff was denied by the father of the defendant and later on mutation was refused to the plaintiff, it was held that adverse possession commenced from the time when plaintiff came to know of the denial of title and not from the date of the refusal of mutation. (*Agarwal, J.*) JWALA PRASAD *v.* LAKSHMI NARAIN. **193 I.C. 686=13 R.O. 499=1941 R.D. 466=1941 O.L.R. 356=1941 O.W.N. 615=1941 A.W.R. (Rev.) 367=1941 A.L.W. 459=1941 O.A. 391=A.I.R. 1941 Oudh 415.**

———*Tenancy right—Overt Act—Mere payment of rent of part of holding.*

Where there is no other overt act which would go to show denial of the rights of the tenants, mere payment of rent of a portion of the holding by another can hardly be regarded as an overt act asserting adverse possession. (*Shirreff, J. M.*) MAHARAJI *v.* JAGATPAL SINGH.
1941 A.W.R. (Rev.) 754 (1)=1941 O.A. (Supp.) 675 (1)=1941 R.D. 739 (2).

AGENCY *See* PRINCIPAL AND AGENT.
CONTRACT ACT, CH. X.

AGRA PRE-EMPTION ACT (XI OF 1922), S. 4—Co-sharer—Mahomedan who has made a wakf alal-aulad—If can maintain suit for pre-emption. *See* 1940 Dig., Col. 9. BANWARI RAM *v.* MAHOMED YAR KHAN.
I.L.R. (1941) All. 74=194 I.C. 72=13 R.A. 469=A.I.R. 1941 All. 49.

———**S. 4 (1)**—Suit for pre-emption—Conditions necessary—Vendee becoming co-sharer by virtue of an exchange—Deprivation of that property during pendency of pre-emption suit—Right of pre-emption, if can be exercised. *See* 1940 Dig., Col. 9. ALIMULLAH *v.* MAHOMED KHALIL. **191 I.C. 385=13 R.A. 258.**

AGRA TENANCY ACT (II OF 1901), S. 11—*Occupancy rights—Acquisition of—Mortgagee in long and continuous possession, before and after death of tenant—Payment of rent to landlord direct—Effect.*

Where a mortgagee of a holding had been in long and continuous possession, before and after the death of the tenant and had been paying rent direct to the landholder, and was treated as tenant it was held that he had acquired occupancy rights before the Act of 1926. (*Shirreff, J. M.*) BAHAL MISIR *v.* TARAPAT MISIR.
1941 R.D. 871=1941 A.W.R. (Rev.) 1035=1941 O.A. 882 (2).

AGRA TENANCY ACT (1926), S. 3.

[NOTE. *See also* CASES UNDER U.P. TENANCY ACT, 1939].

———**S. 11**—*Occupancy rights—If could be conferred by zamindar under.*

Under Agra Tenancy Act, 1901, the zamindar was not precluded from giving rights corresponding to those of an occupancy tenant and was liable to be held bound by the terms of his agreement in that respect. But the tenant would still be recorded as a non-occupancy tenant and not as an occupancy tenant. (*Harper, S.M. and Sathe, J.M.*) GANGA PRASAD *v.* NANHE.
1941 R.D. 266=1941 A.W.R. (Rev.) 277=1941 O.A. (Supp.) 226=1941 A.L.J. (Supp.) 85.

———**S. 11 and Agra Tenancy Act (III of 1926), S. 16**—*Partnership—Occupancy rights—Acquisition—Competency—Test.*

Where the partners do not regard themselves as a number of partners cultivating as partners and co-tenants under the Act, but regard themselves as an association engaged in the business of cultivating not in any personal capacity but as shareholders in a business, holding their shares on basis of 'anna' shares calculated on the capital of each partner, they cannot acquire occupancy rights. (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAK SINHA. **1941 R.D. 678.**

———**S. 22**—*Congenital deafness and dumbness—If a disqualification to succession.*

Under the old Rent Act of 1881 inheritance was according to personal law. Congenital and incurable deafness and dumbness would have been a bar to succession then. But after the Act of 1901, such a person can succeed to a holding under S. 22 of the Act. (*Shirreff, S.M.*) MISRI LAL *v.* NANHOO.
1941 A.W.R. (Rev.) 795 (1)=1941 O.A. (Supp.) 706=1941 R.D. 692.

———**S. 31**—*Mortgage of occupancy holding—Validity—Right of mortgagee to eject mortgagor's representatives taking forcible possession.*

A mortgage of occupancy plots is voidable under S. 31 of the Agra Tenancy Act of 1901 and not void *ab initio*. Hence such a mortgagee has a perfect title to sue against representatives of his mortgagor who have taken wrongful possession of the plot from him. (*Sathe, J.M.*) JHURRAOO *v.* RAM KUNWAR.
1941 A.W.R. (Rev.) 560 (1)=1941 R.D. 585 (2)=1941 O.A. (Supp.) 491 (1).

———**(III OF 1926)**—*Service of notice of ejectment—Several defendants—Technical defect as regards service on one—If can be condoned.*

Where in certain execution proceedings five of the defendants who were brothers were duly served and the sixth who was the widow of the sixth brother refused to receive the notice but the process-server failed to affix a copy of the notice to the widow's house, it was *held* that the interest of the widow of the sixth brother was fully and duly represented and that the technical defect in service of notice could be certainly condoned, the service having been otherwise duly proved. (*Harper, S.M. and Sathe, J.M.*) BHARAT SINGH *v.* DHARAM PAL.
1941 A.W.R. (Rev.) 262=1941 O.A. (Supp.) 211=1941 R.D. 113.

———**Ss. 3 (2), (11) and 12**—*Plot held by fixed rate tenant—Nature of—Building on it, when justified.*

The plot with a fixed rate tenant is 'land' as defined in S. 3 (2) of the Agra Tenancy Act and he is not entitled to make any construction on it which would not qualify as an 'improvement' within the meaning of S. 3 (11) of the Act and unless it is satisfied that test would amount to an actionable invasion of the landholder's right. (*Collister, Bajpai and Braund, JJ.*) SHANTI

AGRA TENANCY ACT (1926), S. 3.

SARUP DAS *v.* ASHARFI SINGH.
I.L.R. (1941) All. 250=192 I.C. 496=13 R.A. 327=1941 A.L.W. 18=1941 O.A. (Supp.) 34=1941 A.W.R. (H.C.) 34=1940 A.L.J. 906=1941 A.W.R. (Rev.) 45=1941 O.W.N. 12=A.I.R. 1941 All. 61 (F.B.).

——**S. 3 (3)**—Rent—Zaid mustalba—If legal rent. *See* U. P. TENANCY ACT, S. 3 (18) AND AGRA TENANCY ACT, S. 3 (3). **1941 R.D. 265.**

——**Ss. 3 (4) and 226**—*Sayar—Income derived by holding land for purpose of brick kiln—If can be taken into account in suit under S. 226.*

The words 'or the like' at the end of sub-S. (4) of S. 3 of the Agra Tenancy Act have to be interpreted as covering only such rights as are *ejusdem generis* or akin to the rights previously described. The right of a co-sharer to receive a certain income in respect of land which he holds for the purpose of a brick kiln is not akin to the rights described under the head of 'Sayar' in sub-S. (4) of S. 3. Such an income cannot be taken into consideration in a suit under S. 226 of the Agra Tenancy Act. (*Yorke, J.*) RAM DAS *v.* ATA HUSSAIN. **1941 A.L.J. 558=1941 R.D. 840=1941 O.A. (Supp.) 745=1941 A.W.R. (Rev.) 840=1941 A.L.W. 892=A.I.R. 1941 All. 397.**

——**S. 4 (d)**—*Entry as khudkasht for* 1333-*F—Plot in fact lying fallow for that year—Effect.*

An entry as khudkasht for a year is not incorrect simply because the plot was fallow for a particular year. As regards 1333-F the law merely requires that the record should be as khudkasht and not that it should be actually cultivated. (*Harper, S. M.*) SURJO *v.* UMRAO. **1941 A.W.R. (Rev.) 26=1941 R.D. 35=1941 O A. (Supp) 165.**

——**S. 4 (d)**—*Mortgagor cultivating land as thekadar—Cultivation if as 'landlord'.*

Where a mortgagor cultivates the land mortgaged as a thekadar the cultivation is not as landlord and the land does not become his *sir*. (*Harper, S. M.*) SURJO *v.* UMRAO. **1941 A.W.R. (Rev) 26=1941 R D. 35=1941 O.A. (Supp.) 165.**

——**S. 7**—*Joint* sir *holdings—Effect of transfer of some plots by some proprietors on the rights of others.*

Where some of the proprietors having joint *sir* holdings transfers some specific plots to a third person, if it can be shown that the remaining proprietor has agreed in fact to the division of the *sir* holding and to the transfer of certain specific plots to the vendee by the vendors then he would be precluded from claiming the whole holding as his *sir*. But in the absence of such a consent, the mere fact that the vendors have transferred certain specific plots to the vendee cannot extinguish the rights of the remaining proprietors in the plot so transferred unless the remaining proprietor's right to get back possession is extinguished by limitation. (*Shirreff, J. M. and Sathe, A.M.*) RAFIQ AHMAD *v.* MITTAR SEN. **1941 O A. (Supp.) 895=1941 A.W.R. (Rev.) 1102.**

——**Ss. 12 and 22**—*Fixed-rate tenant—Position and rights of.*

A fixed-rate tenant is in a privileged position. He has rights approximating to the rights of an owner; but his rights are not absolute inasmuch as the landholder retains the rights of proprietary reversion. In other words, notwithstanding such dominion as a fixed-rate tenant has over his holding, the landholder remains the proprietor. (*Collister, Baipai and Braund, JJ.*) SHANTI SARUP DAS *v.* ASHARFI SINGH.
I.L.R. (1941) All. 250=192 I.C. 496=13 R.A. 327=1941 A.L.W. 18=1941 O.A. (Supp.) 34=1941 A.W R. (H.C.) 34=1940 A.L.J. 906=1941 A.W.R. (Rev.) 45=1941 O.W.N. 12=A.I.R. 1941 All. 61 (F.B.).

AGRA TENANCY ACT (1926), S. 19.

——**S. 14**—*Joint* sir—*Sale of proprietary interest by one—Subsequent sale by another—Acquisition of ex-proprietary right.*

Where two brothers *held* certain plots as their *sir* and one of them sells his proprietary interest and the other becomes the sole *sir* holder and when he in his turn sells his *sir* interest he alone acquires an ex-proprietary title. (*Harper, S. M.*) WYIELLE PHILLIPS *v.* STANLEY PHILLIPS. **1941 A W.R. (Rev.) 512=1941 R.D. 536=1941 O.A. (Supp.) 471.**

——**S. 15**—*Scope and applicability.*

The Agra Tenancy Act introduced in S. 15 a restriction on the waiver of ex-proprietary rights. The restriction applies however to agreement executed within six months of a transfer. Where a partition made by an arbitrator was accepted by all parties by an agreement by which they all relinquished their rights to ex-proprietary right, and which was executed more than six years before the transfer of proprietary rights took place after the confirmation of partition, it was *held*, that ex-proprietary rights were given up. (*Shirreff, J. M.*) RAMSUBHAG RAM *v.* RAMLAKHAN.
1941 A.W.R. (Rev.) 509 (1)=1941 R.D. 535=1941 O.A. (Supp.) 468 (1).

——**S. 15 (2)**—*Requirements of.*

What S. 15 (2) requires is that the mortgage should not refer to *sir* in general but wholly to specific plots. (*Harper, S.M. and Sathe, J.M.*) NIADER *v.* KANHAIYA. **1941 R.D. 257=1941 O.A. (Supp.) 199=1941 A.W.R. (Rev.) 250=1941 A.L J. (Supp.) 53.**

——**S. 16**. *See also* AGRA TENANCY ACT (II OF 1901), S. 11.

——**S. 17**—*Occupancy rights, in plots forming part of statutory holding—If could be conferred.*

Where the plots form part of a statutory holding, occupancy rights could not be conferred in respect of those plots. (*Shirreff, J.M.*) PHAGOO RAM *v.* UDIT NARAIN SINGH. **1941 A.W.R (Rev.) 589 (2)=1941 R.D. 533=1941 O.A. (Supp.) 543.**

——**S. 18**—Application under—If governed by S. 296, U. P. Tenancy Act. *See* U. P. TENANCY ACT, S. 296 AND AGRA TENANCY ACT, S. 18.
1941 A.W.R. (Rev.) 972.

——**Ss. 18 and 19**—Proceedings under S. 296 of U. P. Tenancy Act, if applies to. *See* U. P. TENANCY ACT, S. 296. **1941 A W.R. (Rev) 929.**

——**S. 19**—*Statutory tenancy—Claim as to—Heirs holding over after expiry of lease—New lease in favour of mother of the heirs—Validity.*

Where on the death of a lessee his heirs continued in possession and held over after the expiry of the lease and after the Tenancy Act, 1926, came into force and a lease was executed thereafter in favour of the mother of the heirs, it was *held* that the heirs had acquired certain rights by holding on after the expiry of their father's lease, and it was not open to the zamindar to enter into a new contract over their heads ignoring their rights. (*Harper, S.M.*) HUSAIN BANU *v.* NATHUA. **1941 R.D. 262=1941 A.W.R. (Rev.) 346=1941 O.A. (Supp.) 260.**

——**Ss. 19, 40 and 41**—Statutory tenant—Tenant under deed prior to Act of 1926, conferring occupancy rights—Acquisition of lands—Section applicable. *See* 1940 Dig., Col. 14. RADHA PRASAD SHASTRI *v.* DIRYODHAN SINGH. **1941 A.W.R. (Rev.) 100=1941 O A. (Supp.) 88.**

——**S. 19 and U.P. Land Revenue Act, S. 131**—Suit for partition—Effect of partition proceedings—Loss of right subsequent to decree by trial Court—Effect—

AGRA TENANCY ACT (1926), S. 19.

Partition proceedings when complete. *See* 1940 Dig., Col. 14. JAIRAJ SINGH *v.* HAR NARAIN SINGH.
191 I.C. 759=12 R.A. 270.

——**S. 19, Third proviso, cl. (b)**—*Applicability—Land in river bed.*

Where the land in question is situated in the bed of a river and the rent is varying from year to year, according to the actual area cultivated every year the land cannot be *held* to be one under stable cultivation and it is covered by cl. (*b*) of the third proviso to S. 19 of the Agra Tenancy Act under which no statutory rights accrue in respect of such lands. (*Harper, S.M. and Sathe, J.M.*) LAKSHMI SAHAI *v.* BASDEO DUBEY.
1941 A.W.R. (Rev.) 504=1941 O A. (Supp.) 463=1941 R.D. 581.

——**S. 20 (2), Proviso 1 (b)**—*Scope and effect of—Right of heir of statutory tenant to slump remission—Admission of such heir, if constitutes new tenancy.*

Under proviso (1) (*b*) to S. 20 (2) of the Agra Tenancy Act the zamindar is given a period of 3 years for filing a suit for ejectment against the heir of a statutory tenant after the period of 5 years allowed to him under S. 20 (2) is over. It is after this period of 3 years is over that the right of the zamindar to sue for the heir's ejectment is extinguished and then the heir becomes a statutory tenant in his own rights under S. 19 (*b*) of the Agra Tenancy Act and till then he is entitled to the slump remission enjoyed by the deceased tenant.

Per *Harper, S.M.*—The admission to tenancy of the heir of a statutory tenant does not amount to a new contract of tenancy within the intention of the revision scheme. (*Harper, S.M. and Sathe, J.M.*) JAISI RAM *v* LAXMI SHANKAR. **1941 R.D. 584=1941 O.A. (Supp.) 575 (2).**

——**S. 20, Proviso (b)**—*Applicability—Ejectment proceedings not legal.*

The reference to ejectment proceedings in proviso (*b*) of S. 20, Agra Tenancy Act, refers to legal proceedings and legal ejectment. Where there is no legal proceeding and no legal ejectment, the proviso (*b*) to S. 20 has no application. (*Harper, S.M. and Shirreff, J. M.*) DUDHAI *v.* BINDESHARI.
1941 A.W.R. (Rev.) 1093=1941 O.A. (Supp.) 886.

——**S. 22**—*Permanent lessee of fixed-rate tenancy—Rights.*

A permanent lease purporting to transfer all the rights of a fixed-rate tenant, including the right to eject the sitting tenants is quite valid. And the lessee can exercise all the rights including the right to eject the sub-tenants. (*Shirreff, J. M.*) RAMDUTT RAI *v.* ABDUL AZIZ KHAN.
1941 A.W.R. (Rev.) 834 (1)=1941 R.D. 757=1941 O.A. (Supp.) 739 (1).

——**Ss. 23 (2) (b) and 44**—*Co-tenant admitted by widow, life tenant—Status after widow's death.*

Where a person is admitted as co-tenant by the widow in possession as a life tenant, he can only acquire the rights of a co-tenant during her lifetime, and after her death he becomes a trespasser. (*Sathe, J.M*) IDRIS *v.* MAULA BAKSH. **1941 A.W.R. (Rev.) 809=1941 R.D. 735=1941 O.A. (Supp.) 720.**

——**Ss. 23 (2) (b) and 44**—*Tenant with life interest admitting co tenant—Status of such co-tenant—Death of life tenant—Co-tenant's liability to ejectment.*

Where a stranger is admitted as a partner in an existing holding the rights of the tenant cannot be thereby enhanced in any way. Therefore when a widow with a life interest only in a holding admits a co-tenant with the consent of the landholder, she does so only for the duration of her own tenancy rights (*i.e.*) for her lifetime or up to the date of her remarriage. She could not transfer one iota more than the interest she herself held. On the termination of her tenancy rights by death, the new comer cannot assert any rights of his own as he came in the holding only as a partner or co-tenant of the existing tenant and not on account of his admission as a tenant in his own rights and hence he can be ejected as a trespasser. (*Harper, S.M. and Sathe, J.M.*) LAXMI CHAND *v.* JHANDU **1941 O.A. (Supp.) 95=1941 A.W.R. (Rev.) 107=1941 R.D. 33.**

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——**S. 23 (2) (b), Proviso**—Recognition contemplated by—Admission of consent to transfer by lambardar—If amounts to recognition. *See* U.P. TENANCY ACT, S. 33 (2) (*c*) AND AGRA TENANCY ACT, S. 23 (2) (*b*) PROVISO. **1941 R.D. 286.**

——**S. 24**—*Co-sharing—Clear proof of—Necessity.*

Where a person claims to succeed to an occupancy holding on the ground that he is the nearest co-sharing collateral, there must be clear proof of the fact of co-sharing. Where the proof consisted of the statements of three witnesses who merely stated in general terms that the cultivation was joint, it was held not sufficient to prove co-sharing. (*Harper, S.M. and Sathe, J.M.*) SHIAM LAL *v.* JUMMAN. **1940 R D. 600=1941 A.W R. (Rev.) 91=1941 O.A. (Supp.) 79**

——**S. 24**—*Co-sharing—Evidence of.*

Where during the minority of a tenant his uncle who was also his nearest collateral manages the holding, pays rent to the zamindar directly and shares the balance of profits with the minor, on the death of such a tenant, the uncle does not become a trespasser but is the nearest co-sharing collateral of the deceased tenant entitled to succeed him. (*Harper, S.M.*) RANJIT SINGH *v.* MUNNA KHAN. **1940 R.D. 607 (2)=1941 A.W.R. (Rev.) 93 (2)=1941 O.A. (Supp.) 81 (2).**

——**S. 24**—*Co-sharing — Pooling of resources—Limits to the rule.*

Pooling of resources is one of the criteria and not the sole criterion which goes to prove whether a person had co-shared in cultivation or not. Where therefore a claimant had no resources of his own which he could pool with those of the deceased but still actively took part in the cultivation of the latter's holding in all other respects he could not be held not to have co-shared simply because he had no agricultural stock or implements which he could pool with those of the deceased. (*Sathe, J.M.*) BHAGWATI PRASAD SINGH *v.* SHEO SHANKAR. **1941 A.W.R. (Rev.) 509 (2)=1941 R.D. 481=1941 O.A. (Supp.) 468 (2).**

——**S. 24**—*Re-marriage of widow of occupancy tenant—Rights of succession under S. 24—If affected by any recognition by the zamindar.*

On re-marriage the tenancy rights of the widow of an occupancy tenant terminate and no recognition by the zamindar can overrule any rights of succession acquired under S. 24 of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) CHUNNI *v.* JAMNA.
1940 R.D. 624=1941 A.W.R. (Rev.) 429=1941 R D. 663 (2).

——**S. 24**—*Succession*—Chela—*Lease of agricultural holding conferring heritable rights—Representative of lessor, if can question* chela's *right to succession.*

With or without a will a *chela* is not an heir to an agricultural holding under the Agra Tenancy Act. But where a lease purports to confer heritable rights, the lessor's representative is estopped from denying that a *chela* who succeeds as the heir to the deceased lessee, is a tenant in succession to the deceased lessee. This does not conflict with the principle that estoppel cannot operate against law for there is no express provision of

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law thata person who is not an heir under the Agra Tenancy Act but whom the landholder agrees to treat as an heir and admit to the tenancy, can be ejected as a non-occupancy tenant. (*Shirreff, J. M.*) BHAIRO KUMAR PRASAD *v.* MARKANDE GIR.
1941 A.W.R. (Rev.) 811 = 1941 O.A. (Supp.) 748 = 1941 R.D. 891.

——**Ss. 24 and 26**—*Succession on death of widow of statutory tenant—Rights of brothers of statutory tenant—Preferential claim on basis of co-tenancy—If can arise.*

Where there are four brothers of a statutory tenant surviving on the death of the widow, even if three of them are found to have lived separate from the statutory tenant and only one remained joint with him, succession is governed strictly by S. 24 of the Agra Tenancy Act which gives all brothers an equal right. S. 26 specifically excludes any claim on the basis of co-tenancy except when there is no other heir under S 24. (*Harper, S. M. and Shirreff, J. M.*) DUDHAI *v.* BINDESHRI. **1941 O.A. (Supp.) 886 = 1941 A.W.R. (Rev.) 1093.**

——**Ss. 24 and 35 (1) (a)**—Widow of occupancy tenant—Re-marriage—Effect. *See* 1940 Dig., Col. 16. SANGRAM *v.* KESHO DAS. **1941 A.L.J. (Supp.) 12 = 1941 R.D. 118.**

——**S. 24, Class (vii)**—*Nearest collateral—Crucial point of time.*

Under S. 24, Class (vii), Agra Tenancy Act, the rights of the collaterals arises for the first time when the widow dies or remarries. When succession opens in such a case, the question to be examined is whether the claimant is at *that* time the nearest of all the surviving collateral male relatives of the deceased male tenant and whether he had co-shared in the cultivation of the holding at the time of the death of the deceased male tenant. (*Harper, S.M. and Sathe, J.M.*) SIARAM *v.* BALDEO. **1941 R.D. 233 = 1941 O.A. (Supp.) 205 = 1941 A.W.R. (Rev.) 256 = 1941 A.L.J. (Supp.) 58.**

——**S. 25 and U. P. Tenancy Act (1939), Ss. 36 and 37**—*Scope and applicability of S. 25—Hindu daughter having life interest in occupancy holding—Succession on her death when Tenancy Act of 1926 was in force.*

The two sub-clauses to S. 25 of the Agra Tenancy Act governed all cases of female tenants: one clause governed those with an absolute right and the other clause governed those with a limited right. Females of Mahomedan families having absolute estates would come under S. 25 (2) and their inheritance would descend to their sons. Females of Hindu families having only life interests would come under S. 25 (1) and their succession would go to the heirs of the last male tenants. Hence, where on the death of a Hindu occupancy tenant, his daughter inherits the holding under the Rent Act of 1881 and dies at a time when the Agra Tenancy Act of 1926 was in force, her son could succeed to the holding only if he proved co-sharing with the last male tenant. (*Harper S.M.*) MANGE *v.* MANI.
1941 R.D. 163 = 1941 O.W.N. 469 = 1941 A.W.R. (Rev.) 342 = 1941 O.A. (Supp.) 256.

——**S. 25 (2)**—*Applicability—Death of widow whose name was entered by way of consolation—Effect.*

Where a widow who according to the personal law is not an heir to her husband in the presence of sons, happens to be only a sleeping partner in the holding and whose name is entered by way of consolation dies, succession is not governed by S. 25 (2) of the Agra Tenancy Act. On her death her name should be expunged and no rights can pass to her daughter's sons,

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from her. (*Sathe, A.M.*) CHAIT RAM *v.* JASWANT SINGH. **1941 O.A. (Supp.) 739 (2) = 1941 A.W.R. (Rev.) 834 (2) = 1941 R.D. 896.**

——**S. 26**—*Co-sharing—Requisites.*

A boy of 12 or 13 years reading in a school is not likely to be of any material assistance in agricultural operations and hence he is incapable of co-sharing in cultivation. The requisite as to pooling of resources is necessary. The removal of the condition as to co-sharing in the new Act is no ground for giving retrospective effect to that view when that Act itself does not authorise that. (*Harper, S.M. and Sathe, J. M.*) BHOLA SINGH *v.* JAGDISH NARAIN SINGH.
1941 A.W.R. (Rev.) 269 = 1941 O.A. (Supp.) 218 = 1941 R.D. 290 = 1941 A.L.J. (Supp.) 65.

——**S. 35 (1) (f)**—*Extinguishment of rights under—Onus.*

To establish a case of an extinguishment of tenant's rights under S. 35 (1) (*f*) of the Agra Tenancy Act, it is for the plaintiff to show that the defendant has been out of possession for so long that he has lost his rights under the section. (*Sathe, A.M.*) SALIK *v.* MAUJI LAL. **1941 A.W.R. (Rev.) 923 (2) = 1941 O.A. (Supp.) 797 (2) = 1941 R.D. 814.**

——**S. 36 and U. P Tenancy Act (1939), S. 46**—*Tenant with non-occupancy rights—Acquisition of mortgagee rights—Termination of mortgage—Status of tenant.*

Where the question was whether a tenant with non-occupancy rights under the Act of 1901 whose rights terminated by the acquisition of mortgagee rights became a trespasser when the mortgage terminated, it was held:

Per *Harper, S.M.*—That the tenants' rights were in abeyance and under the new Act he became a tenant again but with statutory rights.

Per *Shirreff, J.M.*—That the mortgage must be regarded as terminating the tenancy which existed merely as a tenancy from year to year. (*Harper, S.M. and Shirreff, J.M.*) JAGDISH NARAIN SEWAK PANDEY *v.* KALI CHARAN RAM. **1941 R.D. 665 = 1941 O.A. (Supp.) 613 = 1941 A.W.R. (Rev.) 673.**

——**S. 37**—*Division of holding—Plea of a prior division of certain plots and prayer for their exclusion—Procedure to be followed.*

When the representatives of one of the two tenants having occupancy rights in a holding sue for equal division but the other tenant pleads a prior division of certain plots and claims exclusive tenancy therein and equal division in the rest, to allow such a claim would make the division unequal and hence the whole holding should be divided half and half. (*Shirreff, J.M.*) TAMESHAR AHIR *v.* LAL BEHARI AHIR.
1941 A.W.R. (Rev.) 568 = 1941 O.A. (Supp.) 499.

——**Ss. 37 and 44**—*Partition decree under S. 37—Effect on rights of parties in divided shares—Decree, if capable of execution—Party in possession of the share of another after decree—If can be ejected under S. 44—Proper remedy.*

The rights of the respective parties of a case under S. 37 of the Agra Tenancy Act do not cease in the divided shares until actual separation takes place on the spot in pursuance of the decree whether through Court or by private arrangement. Therefore, if the parties do not obtain separate possession in accordance with the decree by mutual arrangement, the aggrieved party can and should take out execution proceedings to have the S. 37 decree executed through Court. Until the parties obtain separate possession either by mutual arrangement or through Court in pursuance of a decree under S. 37, the rights of both the parties in the whole holding continue

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unaffected and till then they cannot be deemed to be trespassers in respect of plots in their possession, though it might belong to the share of another under the decree, and against such persons a suit under S. 44 of the Tenancy Act does not lie. The only remedy open to a person who cannot take out execution of a decree under S. 37, owing to limitation is to have his share partitioned under S. 49 of the U. P. Tenancy Act, corresponding to S. 37 of the old Act, as the cause of action under that section is a continuing one. (*Harper, S.M. and Sathe, J.M.*) JEOT *v.* BHAGELU. **1941 R.D. 37 = 1941 A.W.R. (Rev.) 160 = 1941 O.A. (Supp.) 112.**

——**S. 37**—Private partition—Subsequent suit for division of holdings—All holdings, if should be included. *See* U. P. TENANCY ACT, S. 49 AND AGRA TENANCY ACT, S. 37. **1941 R D. 501 (2).**

——**S. 37**—*Suit under—Prior private partition—Effect of.*

There is nothing in law against joint holders of a tenancy effecting a private partition, but only it must be satisfactorily proved. If agreement to divide the holding is clear and definite and is intended to provide a permanent division and has been acquiesced in by the zamindar, it cannot be challenged afterwards. (*Harper, S.M. and Shirreff, J.M.*) DWARKA *v.* MANOHAR. **1941 A.W.R. (Rev.) 500 = 1941 R.D. 524 = 1941 O A. (Supp.) 459.**

——**Ss. 37 and 121**—*Suit under S. 37—Division—Rights of parties—One of the parties admitting co-tenant with consent of Zamindar—Right of the other to sue under S. 121.*

Where one of two co-tenants brings a suit under S. 37 of the Agra Tenancy Act for division of the holding and the holding is divided but without the consent of the zamindar, the responsibility for the rent of whole of the holding remains joint and the rights of both parties continue in both portions of the holding even after the division. Hence, if one of them later on admits another as his co-tenant with the consent of the zamindar, the other has every right to sue under S. 121 for the declaration of his rights as the act of the other admitting a new co-tenant affects his rights. (*Sathe, J.M.*) PAN KUNWARI *v.* BALJOR TEWARI. **1941 R.D. 66 = 1941 A.W.R. (Rev.) 248 = 1941 O.A. (Supp.) 197.**

——**S. 40**—*Acquisition for farming on improved lines—Absence of land to be given in exchange—Money compensation—When justified.*

Where in the case of an acquisition of land for purposes of better farming, it is found that there is no land in the same village to be given in exchange and the applicant holds joint *sir* and *khudkasht* in a neighbouring village with another who could not be legally compelled to part with his share in any of the joint *sir* or *khudkasht*, and where the tenants are not resident in the village in suit and will retain a considerable amount of cultivated land in the village in suit as well as in the neighbouring village in which they reside, the acquisition of their land on cash compensation is not unreasonable. (*Shirreff, J.M.*) BIJAI BAHADUR SINGH *v.* ISLAM AHMAD. **1941 O.A. (Supp.) 605 (2) = 1941 R.D. 660 = 1941 A.W.R. (Rev.) 665.**

——**S. 44 and U. P. Tenancy Act, S. 180**—*Damages on ejectment—Necessity.*

Per *Harper, S.M.*—S. 44 of the Agra Tenancy Act says that the trespasser shall be liable to pay damages. The amount is at the discretion of the Court.

Per *Sathe, J.M.*—It is not mandatory under S. 44 of the Tenancy Act to award damages in every case where ejectment is decreed. It would be wrong however to refuse damages for inadequate or no reasons. For, in that case a subsequent suit for damages on the part of the plaintiff is barred. (*Harper, S.M. and Sathe, J.M.*) SHER SINGH *v.* MAHENDRA PRATAP. **1941 R.D. 177 = 1941 A.W.R. (Rev.) 341 = 1941 O.A. (Supp.) 255.**

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——**S. 44 and U. P. Tenancy Act, S. 180**—*Damages on ejectment—Necessity—Limit to the discretion of Court.*

According to S. 44 of the Agra Tenancy Act, the trespasser shall be liable to pay damages and discretion is given to the Court to decree those damages up to four times the annual rental. Hence normally some damages should be allotted, but the amount only is left to the discretion of the Court. (*Harper, S.M. and Sathe, J.M.*) PIRTHI SINGH *v.* MADAN LAL. **1941 R.D. 170 = 1941 O.W N. 508 = 1941 A.W.R. (Rev.) 340 = 1941 O.A. (Supp.) 254.**

——**S. 44**—*Ejectment and immediate reinstatement—If effects a break in the tenancy—Tenant, if a trespaseer.*

Where a tenant is ejected but is reinstated immediately thereafter, the ejectment does not constitute a break in his tenancy and his possession does not become that of a trespasser. (*Harper, S.M.*) NAUBAT SINGH *v.* SAHEB SINGH. **1941 O.W.N. 255 = 1941 R.D. 86 = 1941 A.W.R. (Rev.) 266 = 1941 O.A. (Supp.) 215.**

——**S. 44**—*Lambardar's right to eject co-sharer—Terms of wajib-ul-arz, if can affect.*

The terms of a wajib-ul-arz cannot prevail against the common and statutory right of the lambardar to sue for the ejectment of a co sharer who takes possession of a plot against his will in an undivided lambardari mahal. (*Sathe, A.M.*) FASI ULLA *v.* WASI ULLA. **1941 R.D. 819 = 1941 O.A (Supp.) 741 = 1941 A.W.R. (Rev.) 836.**

——**S. 44**—Lease of theka land to sons of thekadar—Termination of theka—If renders the lessees liable to ejectment as trespassers. *See* 1940 Dig., Col. 20. AJODHYA NATH *v.* ROSHAN LAL. **1941 A.W.R. (Rev.) 61 = 1941 O.A. (Supp.) 48.**

——**S. 44**—Liability to ejectment—Co-tenant admitted by life tenant with landholder's consent—Death of life tenant. *See* AGRA TENANCY ACT, SS. 23 (2) AND 44. **1941 A.W.R. (Rev.) 107.**

——**S. 44 and U. P. Tenancy Act (1939), S. 180**—*Liability to ejectment—Lessees under fictitious permanent lease by widow—Civil Court declaring lease to be without consideration—Ejectment of lessee—Limitation—Starting point.*

Where a permanent lease executed by a Hindu widow has been declared by a Civil Court to be one without consideration in a suit by the reversioners, the lessees are trespassers and liable to ejectment, The period of limitation would run not from the date of the lease but from the date of the widow's death. (*Harper, S.M. and Shirreff, J.M.*) BHIRGU NATH PANDE *v.* KAWAL PATTI KUAR. **1941 R.D. 873.**

——**S. 44**—*Liability to ejectment—Tenants of* sir *on disallowance of claim of ex-proprietary rights—Their status.*

Where ex proprietary rights are claimed by the owner and disallowed on the ground that it was made too late, the tenants become non occupancy tenants of khalsa land from the date of the disallowance of the claim for ex-proprietary rights and are not trespassers who could be ejected under S. 44 of the Tenancy Act. (*Shirreff, S.M. and Sathe, J.M.*) SITA RAM *v.* BANKATESHWAR TEWARI. **1941 A.W.R. (Rev.) 786 = 1941 O.A. (Supp.) 697 = 1941 A.L.J. (Supp.) 126 = 1941 R.D. 810.**

——**S. 44 and C. P. Code, O. 21, Rr. 89 and 100**—*Liability to ejectment under S. 44—Person not party to decree, in possession—Formal delivery of posses-*

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sion to decree-holder—Person in possession if bound to apply under O. 21, R. 89, C. P. Code.

Where immovable property is sold in execution of a decree and a person who is not a party to the suit and against whom no decree has been passed is in possession of that immovable property and formal possession is given to the decree-holder, two courses are open to the person in possession. He can either give up possession in accordance with the formal order in which case he would have a right to object under R. 100 of O. 21, C.P Code, or he might refuse to comply with the formal order of dispossession and continue to remain in possession in which case he will have committed no offence as he is unaffected by the decree and he is not liable to ejectment under S. 44 of the Agra Tenancy Act. He was not bound to have applied under O 21, R. 89. (*Harper, S.M. and Sathe, J.M.*) ANAND PRASAD *v.* RAGHUBIR TEWARI.

1941 O.A. (Supp.) 93 = 1941 A.W.R. (Rev.) 105 = 1941 A.L.J. (Supp.) 38 = 1941 R.D. 238 = 1941 O.W.N. 492.

——Ss. 44 and 99—*New tenant—If bound by judicial orders passed on old tenant's application—Ejectment of new tenant—Proper remedy.*

A new tenant who takes land vacated by a former tenant does so at his own risk and subject to any orders which may be passed by a Judicial Court in favour of the former tenant. Hence where a tenant was ejected and a new tenant let into possession and the former tenant applied for review and succeeded in setting aside the ejectment order and obtained formal *dakhal dihani* it was *held* that he can sue the new tenant for ejectment under S. 44 of the Tenancy Act and that it was not open to the new tenant to plead that they were put into possession by the Zamindar and that the suit should have been filed under S. 99 of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) KHUSHALI *v.* GOVIND.

1941 A.W.R. (Rev.) 493 = 1941 R.D. 485 = 1941 O.A. (Supp.) 452.

——S. 44—*Occupancy lease of specific* sir *plots—Liability of lessee to ejectment.*

In the case of an occupancy lease by a *sir* holder of specific plots, it is the conferment of occupancy right and not the admission to tenancy which is invalid. In such case the landlord cannot repudiate the defendant's admission to the holding as a tenant and so the latter could not be ejected as a trespasser. But if the lease was legally null and void there would be no estoppel against the landlord, pleading the invalidity of the lease. (*Shirreff, J.M.*) RAM LAGAN SINGH *v.* SARJU.

1941 A.W.R. (Rev.) 559 = 1941 O.A. (Supp) 490 = 1941 R.D. 534.

——Ss. 44 and 266—*Purchaser of Zamindari share acting as sole landholder—Ejectment of ex-proprietor—Suit to eject subsequent trespasser—If defective under S. 266.*

Where a purchaser of Zamindari share acts for a long time as the sole landholder and also gets the ex proprietary tenant ejected under S. 79 of the Agra Tenancy Act, he can sue alone to eject another as a trespasser who takes possession of the land on the plea that another co-sharer had settled it with him Such a suit is not defective under S. 266, for the plaintiff must be considered to be the sole landholder even in respect of the trespassers. (*Shirreff, J.M. and Sathe, A. M.*) MUNNA LAL *v.* MULAIM SINGH.

1941 A.W.R. (Rev.) 813 (2) = 1941 O.A. (Supp.) 737 (2) = 1941 R.D. 834.

——Ss. 44 and 99—*Relative applicability.*

While dispossession by even one or some of the recorded co-sharers in a patti brings the case under S. 44 of the Agra Tenancy Act, before a case can come under

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S. 99 of the Act, it must be proved that the dispossession was the act of all the recorded co-sharers entitled to collect rent from the tenant and not of only some of them. (*Harper, S.M. and Sathe, J.M.*) GOPI CHAMAR *v.* MADHUBAN CHAMAR.

1941 A.W.R. (Rev.) 104 = 1941 O.A. (Supp.) 92 = 1941 R.D. 39.

——Ss. 44 and 99—*Relative applicability—Realisation of rent by Zamindar from sub-tenant after death of tenant—Effect on rights of chief tenant's successor.*

Where certain sub-tenants become the sub-tenants of the successor of the chief tenant and the Zamindar realises rent from them directly, it cannot have the effect of either extinguishing the chief tenant's rights or of making the possession of the sub-tenants as one through the Zamindar, so as to bring the case under S. 99 of the Agra Tenancy Act. Even if the sub-tenants begin to exercise adverse possession from the date of the death of the chief tenant, their status remain only that of trespassers and the period of limitation for the successor of the chief tenant to file a suit for their ejectment is 12 years under S. 44 of the Act. (*Sathe, A.M.*) SALIK *v.* MAUJI LAL.

1941 A.W.R. (Rev.) 923 (2) = 1941 O.A. (Supp.) 797 (2) = 1941 R.D. 814.

——Ss. 44 and 99 — *Remedy of dispossessed tenant.*

Where the dispossession of a tenant is by a process of law, even if it was by fraud, his remedy is under S. 99 of the Agra Tenancy Act. (*Shirreff, J. M.*) RAM ASREY *v.* NOOR MAHOMED.

1941 A.W.R. (Rev.) 513 (1) = 1941 R.D. 550 (1) = 1941 O.A. 472 (1).

——S. 44 and U. P. Tenancy Act, S. 180—*Right to sue to eject trespasser—Person in possession of grove land though not as grove holder.*

Where a person in possession of grove land is treated only as some kind of tenant, but is not a grove holder, it does not safeguard him when he takes his stand as a landholder possessing specific rights under the Tenancy Act and seeks to utilize the provisions given to a landholder in seeking a remedy against those who encroached upon his rights. (*Harper, S.M.*) GULZARI *v.* MEWA RAM.

1941 R D. 172 = 1941 O W.N 462 = 1941 A.W R. (Rev.) 339 = 1941 O.A. (Supp.) 253.

——S. 44—*Right to sue under—Death of occupancy tenant—Lands cultivated as khudkasht by the co-sharers—Suit by one to eject trespasser on plot in his khudkasht—Maintainability.*

The mere fact that a plot lies in the khudkhasht of a co-sharer does not establish him as the landholder thereof. Where on the death of an occupancy tenant, various co-sharers took possession of the various plots comprised in the holding and cultivated them as khudkasht that would not entitle one of them alone to sue for ejectment of a trespasser in the absence of proof that the division of the holding was otherwise than a mere matter of convenience among the co-sharers or that in the allotment of certain plots to the plaintiff, the rights of the coparcenary body were permanently waived. (*Harper, S.M.*) PIRAN KOER *v.* DALLU.

1940 R.D. 623 = 1941 A.W.R. (Rev.) 433 = 1941 R.D. 480 = 1941 O.A. (Supp.) 559.

——S. 44—*Right to sue under—Lambardar collecting rent, if can sue alone.*

In an undivided lambardari mahal rents are not only paid to the lambardar but they are also payable to him on behalf of all the other co-sharers, in the absence of any custom or usage to the contrary. In such cases each individual co-sharer is not, while the lambardar is the landholder *vis-a-vis* the tenants and other occupiers

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of land. The right to file a suit for arrears of rent and ejectment therefore vests in such mahals on the lambardar who can exercise it on behalf of the whole coparcenary body even against individual co-sharers. (*Harper, S.M. and Sathe, J.M.*) TEJ SINGH *v.* KHEM CHAND.

1941 A.W.R. (Rev.) 180 = 1941 O.A. (Supp.) 124 = 1941 A.L.J. (Supp.) 40 = 1941 R.D. 110.

——**S. 44**—*Right to sue under—Mortgagee in possession of specific plots.*

In the absence of clear proof of any private partition, a mortgage with possession of specific plots becomes invalid and such a mortgagee cannot sue to eject any of the representatives of the original proprietors as trespassers when they happen to take possession on an abandonment or surrender. (*Shirreff, J.M.*) DEO NARAIN SINGH *v.* GAYA PRASAD SINGH.

1941 A.W.R. (Rev.) 557 = 1941 O.A. (Supp.) 488 (2) = 1941 R.D. 669.

——**S. 44**—Sir holder—If a 'landholder' under S. 44. *See* 1940 Dig., Col. 21. RAMPAT SINGH *v.* NAGESHAR SINGH. **I.L.R. (1940) All. 678.**

——**Ss. 44 and 107**—Suit against trespasser—Latter if can plead that holding has been abandoned. *See* 1940 Dig., Col. 22. SAHDEI KUNWAR *v.* USMAN.

1941 A.L.J (Supp.) 16.

——**S. 44**—*Suit for ejectment—Plea of admission to tenancy—Entry in Khatauni as tenant of seven years standing—Presumption if any—Liability to ejectment.*

Where in a suit for ejectment under S. 44 of the Agra Tenancy Act, the defendant pleaded that he had been admitted to tenancy and produced no evidence apart from an entry in the 1349 Khatauni showing him as a tenant of seven years standing and certain rent receipts which did not show that the payment was in respect of the holding but there was evidence to show that the defendant was a sub-tenant of the holding and was holding on after the abandonment of the holding by the former tenant, it was held that the entry in the Khatauni was consistent with the evidence and did not raise any presumption as to existence of a contract of tenancy and that the defendant was liable to ejectment. (*Shirreff, J.M.*) MAHANGI CHAMAR *v.* KESHO PRASAD PANDEY. **1941 R.D. 865 = 1941 O.A. (Supp.) 744 = 1941 A.W.R. (Rev.) 839.**

——**S. 44**—Suit to eject sub-tenants as trespassers—Starting point of limitation—Collector in possession of holding. *See* U. P. TENANCY ACT (1939), S. 180 AND AGRA TENANCY ACT, S. 44. **1941 R.D. 240.**

——**S. 44 and Evidence Act, S. 114**—*Suit to eject as trespassers—Defendants in possession after ejectment under S. 86—Plea of execution proceedings being fictitious—Onus—Presumption as to legal proceedings.*

Where a zamindar filed a suit under S. 44 of the Agra Tenancy Act to eject as trespassers the heirs of a statutory tenant who continued to remain in possession even after ejectment under S. 86 of the Tenancy Act and the defendants pleaded that the ejectment proceedings were fictitious, it was *held* that the burden of proving that the proceedings in ejectment were fictitious lay on the defendants, that all legal proceedings must be presumed to have been taken with due care and in accordance with the provisions of law until the contrary was proved and that in the absence of any evidence to the contrary the order of ejectment and the *dakhal dihani* must be accepted as genuine and to have been correctly carried out and that the defendants were trespassers liable to ejectment. (*Harper, S.M. and Sathe, J.M.*) BASHIR AHMAD KHAN *v.* MARKANDE. **1941 R.D. 198 = 1941 A.W.R. (Rev.) 350 = 1941 O.A. (Supp.) 264.**

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——**S. 44**—*Suit under — Contract of tenancy—Desirability of framing issue as to factum.*

In suits under S. 44, Agra Tenancy Act, it would be better to have an issue as the existence or otherwise of a contract of tenancy, properly framed. (*Shirreff, J.M.*) GOVIND RAO *v.* ALMIKURMI.

1941 A.W.R. (Rev.) 556 (2) = 1941 O.A. (Supp.) 487 (2) = 1941 R.D. 675 (1).

——**S. 44**—Suit under—Maintainability—Party in possession of share of another after decree under S. 37. *See* AGRA TENANCY ACT, SS. 37 AND 44.

1941 R.D. 37

——**S. 44**—*Suit under—Plea in defence of admission to tenancy—Onus—Presumption of tenancy, if justified.*

Where in a suit under S. 44 of the Agra Tenancy Act the defendant pleads an admission to tenancy, it is for him to prove the contract which he asserts. From the mere fact alone of the plaintiff being a small Zamindar, it should not be inferred that he would not have allowed the defendant to remain in possession for a long time but for a contract of tenancy. (*Harper, S.M. and Shirreff, J.M.*) RAM DASS *v.* RASIAWAN LONIA.

1941 A.W.R. (Rev.) 508 = 1941 R.D. 546 (1) = 1941 O.A. (Supp.) 467.

——**S. 44**—*Suit under—Plea of adverse possession—Starting point—Formal* dakhal dihani, *not followed by actual physical dispossession—Effect.*

A formal *dakhal dihani* even though it may not be followed by an actual physical dispossession extinguishes all the rights of the defendant. Hence, if the latter continues to remain in possession a fresh cause of action arises. Where a tenant though ejected under the provisions of the Agra Tenancy Act of 1901 continued in possession and a fresh suit was filed for his ejectment under S. 44 of the Tenancy Act of 1926 and decreed and the zamindar given a formal *dakhal dihani* but the tenant still continued in possession and a fresh suit was filed again under S. 44 and the defendant pleaded adverse possession from the date of his ejectment under the old Tenancy Act, it was held that adverse possession started only from the date of the formal *dakhal dihani* obtained by the zamindar in his first suit under S. 44 of the Act of 1926. (*Harper, S.M. and Sathe, J.M.*) VIBHUTI NARAIN SINGH *v* KANDHIYA.

1941 R.D. 26 = 1941 A.W.R. (Rev) 103 = 1941 O.A. (Supp.) 91 = 1941 A.L.J. (Supp.) 28.

——**S. 44**—*Suit under—Plea of limitation in defence—Facts to be proved.*

In a suit under S. 44 of the Agra Tenancy Act, before the defendant could plead limitation he had to show that he was in possession of the holding for at least 12 years to the knowledge of the plaintiff. (*Sathe, J.M.*) BANSU *v.* RAMADHANI. **1941 O.A. (Supp.) 443 = 1941 A.W.R. (Rev.) 484 = 1941 R.D. 582.**

——**Ss. 44 and 99**—Suit under S. 44—If can be decreed under S. 99. *See* AGRA TENANCY ACT, SS. 192, 44 AND 99. **1941 R.D. 317 = 1941 A.W.R. (Rev.) 358.**

——**S. 44**—Suit under—Stay of proceedings Act, if applies. *See* U. P. STAY OF PROCEEDINGS ACT AND AGRA TENANCY ACT, S. 44. **1940 R.D. 622.**

——**S. 44**—*Suit under—Tenant in adverse possession for over 12 years—Effect.*

A tenant in adverse possession for over 12 years cannot be sued under S. 44, Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) BISHNATH SINGH *v.* RAGHUNATH SINGH. **1941 A.W.R. (Rev.) 454 = 1941 O.A. (Supp.) 386 = 1941 R.D. 414.**

——**S. 44**—*Suit under—Who can bring—Tenant, when can sue.*

AGRA TENANCY ACT (1926), **S**, 50.

A suit under S. 44 of the Agra Tenancy Act must be brought by a landholder. The latter term includes a tenant who can sue a trespasser for ejectment. (*Harper, S.M. and Shirreff, J.M.*) TUFANI *v.* DEOKALI.

1941 O.A. (Supp.) 808 (2)= **1941 A.W.R.** (Rev.) 1934 (2)= **1941 R.D.** 916= **1941 A L.J.** (Supp.) 124.

——**S.** 50—Enhancement—Agreement not registered —Effect. *See* U. P. TENANCY ACT, S. 98 AND AGRA TENANCY ACT, S. 50. **1941 R.D.** 265.

——**S.** 54 (a)—*Abatement of rent—Basis of calculation.*

Per *Harper, S.M.*—There are no provisions and no rules framed by Government to say how abatements are to be made under S. 54 (*a*) of the Agra Tenancy Act. The policy of the Act by the introduction of roster rates clearly was to encourage the use of these rates and it is not illegal to place reliance on rates arrived at as a result of a special inquiry, for the purposes of abatement. Courts should have up to-date rates to guide them and the rent should not be abated proportionately to the fall in prices. This however is not the same thing as to say that all rents must be reduced to the absolute valuation. Special reasons for not doing so exist in individual cases and the law in the Tenancy Act both previously and now permits Courts to take account of them.

Per *Sathe, J.M.*—In suits filed under S. 54 (*a*) of the Agra Tenancy Act, the abatement should ordinarily be based on the fall in prices though it need not necessarily be exactly proportionate to it. The reduced expenses of cultivation should be taken into account and the new rent should be checked by comparing it with the rent arrived at by applying the standard fair and equitable rates. (*Harper, S.M. and Sathe, J.M.*) KASHIPAT TEWARI *v.* BIHARI. **1940 R.D.** 570= **1941 A.W.R.** (Rev.) 83= **1941 O.A.** (Supp.) 71.

——**S.** 60—*Right to commutation—If affected by variation of produce from year to year.*

S. 60 of the Agra Tenancy Act gives a right to a tenant to have the rent commuted which cannot be taken away from him merely on the ground that the produce varies from year to year. (*Shirreff, S. M. and Sathe, J. M.*) JATAN TELI *v.* RAJ NARAIN RAI. **1941 R.D.** 743= **1941 O.A.** (Supp.) 621 (2)= **1941 A.W.R.** (Rev.) 681 (2).

——**S.** 80—*Ejectment after period of grace—Deposit a couple of hours after ejectment—Refusal to receive deposit—If irregular or illegal.*

Where after the notice under S. 80, Agra Tenancy Act, was served and after the expiry of the period of grace an order for ejectment is passed, and a couple of hours later the judgment-debtor brings the money into Court and asks permission to deposit and it is refused, there is noth asks permission to deposit and it is refused, there is noth ing irregular or illegal in the procedure to justify interference in revision. (*Shirreff, J.M. and Sathe, A.M.*) SHIAM LAL *v.* RAJ KUMAR SINGH. **1941 O.A.** (Supp.) 817= **1941 A.W.R** (Rev.) 973.

——**S.** 80—*Notice under—Formal defect in service—Judgment-debtor aware of proceedings—Effect.*

A formal defect in the service of notice will not matter, if as a matter of fact the judgment-debtor had knowledge of the proceedings. (*Shirreff, J.M. and Sathe, A. M.*) SURYAPAL SINGH *v.* ADRAM. **1941 O.A.** (Supp.) 792= **1941 A.W.R.** (Rev) 918= **1941 R.D.** 935.

——**S.** 80 (2)—*Ejectment, technically before expiry of* 15 *days—Defect, if can be taken advantage of by judgment-debtor who failed to pay arrears after two years.*

Though an ejectment just before the expiry of the 15 days is technically irregular, the judgment-debtor who for 2 years thereafter does not pay the arrears of rent, cannot take advantage of the technical defect and claim to have the ejectment set aside. (*Braund, J.*) RATI RAM *v.* NIADER MAL. **194 I.C.** 640=14 **R.A.** 4= **1941 O.W.N.** 546 (2)=**1941 A.W.R.** (Rev.) 308= **1941 O.A.** (Supp.) 238= **1941 A.L J.** 230= **1941 R D.** 462=**1941 A.L W.** 397 (2)= **1941 A.W.R.** (H.C.) 130=**A.I.R.** 1941 **All.** 215.

——**S.** 80 (3)—Extension against provisions of—Illness and other domestic difficulties of the tenant—If justifying circumstances. *See* U. P. TENANCY ACT S. 170 (5) AND AGRA TENANCY ACT, S. 80 (3). **1941 R.D.** 336 (1).

——**S.** 80(3)—Extensions of time under—Inadequacy —Revision—Grounds. *See* U. P. TENANCY ACT, S. 170 (5) AND AGRA TENANCY ACT, S. 80 (3). **1941 R.D.** 342.

——**Ss 85 and 84**—*Applicability—Fixed rate tenant.*

The words 'notwithstanding anything contained in this section' in sub-S. (3) of S. 85 of the Agra Tenancy Act makes it quite clear that what was meant by the Legislature was that while the landlord was at liberty under S. 84 of the Act to sue for a decree for ejectment such as is referred to in Cls. (1) and (2) of S. 85, he might also add a prayer in his suit under S. 84 for one of the reliefs mentioned in the sub-clauses to Cl. (3) or he might sue exclusively under S. 84 for one of such reliefs or for a combination of them. The words 'in this section' show clearly that Cl. (3) of S. 85 is referable to S. 84 equally with Cls. (1) and (2). A fixed rate tenant having been specifically exempted from ejectment by S. 84, it is obvious that the provision in S. 85, which allows a landholder to sue for injunction, etc., in lieu of or in addition to suing for ejectment, can have no application whatsoever to a fixed rate tenant. (*Collister, Bajpai and Braund, JJ.*) SHANTI SARUP DAS *v.* ASHARFI SINGH. **I.L.R.** (1941) **All.** 250= **192 I.C.** 496=**13 R.A.** 327=**1941 A.L.W.** 18= **1941 O.A.** (Supp.) 34=**1941 A.W.R.** (H.C.) 34= **1940 A.L.J.** 906=**1941 A.W.R.** (Rev.) 45= **1941 O.W.N.** 12=**A.I.R.** 1941 **All.** 61 (**F.B.**).

——**S.** 86—Application under—If can be converted into suit under S. 207. *See* AGRA TENANCY ACT, SS. 207 AND 86 AND C P. CODE, S. 99. **1941 A.W.R.** (Rev.) 5.

——**S.** 86—*Suit under—Plea in defence of permanent lease—Lease found to be by one only of the plaintiffs—Order of ejectment conditional on return of* nazarana—*Propriety.*

Where in a suit under S. 86 of the Agra Tenancy Act, the defendant pleads a permanent lease in defence and it is found that the lease was by one only of the plaintiffs, an order making whole decree of ejectment conditional on the return of the *nazarana* paid is not proper, inasmuch as it will be unfair to the plaintiff who had neither granted the lease nor received the *nazarana*. (*Shirreff, S.M. and Sathe, J.M.*) KHURSHED HUSAIN *v.* MOHAN KEWAT. **1941 A.W.R.** (Rev.) 800= **1941 O.A.** (Supp.) 711=**1941 R.D.** 729.

——**Ss. 95 and 264**—*Scope and applicability.*

S. 95 of the Agra Tenancy Act does not refer to a decree given under the provisions of that Act. It refers to a decree or order executed under the provisions of that Act. Whether an ejectment decree is given in a Revenue Court or in a Civil Court it is executed under the same legal procedure. If given in a Revenue Court S. 264 of the Agra Tenancy Act provides that the provisions of Civil Procedure Code apply. (*Harper, S.M.*) TONDI *v.* DHAPPUA. **1941 O.A.** (Supp.) 784= **1941 A.W.R.** (Rev.) 910=**1941 R.D.** 894.

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——**S. 99**—Applicability. *See* AGRA TENANCY ACT, SS. 44 AND 49—RELATIVE APPLICABILITY.

1941 A.W.R. (Rev.) 104.

——**S. 99**—*Dispossession — Removal of crops—If amounts to.*

A removal of crops by itself does not constitute dispossession. (*Sathe, J.M.*) JAMILUDDIN *v* CHHOTTO.

1941 R.D. 317 = 1941 O.A. (Supp.) 272 = 1940 A.W.R (Rev.) 358 = 1941 A.L.J. (Supp.) 72.

——**S. 99**—Remedy of dispossessed tenant. *See* AGRA TENANCY ACT, SS. 44 AND 99.

1941 A.W.R. (Rev.) 513 (1).

——**S. 99**—*Suit under—Maintainability— Lease and subsequent sale of* sir *plots to lessee—Vendor if can sue under S. 99.*

Where there has been a lease of *sir* plots and the lessee had been put in possession and there is a subsequent sale of the same *sir* plots to the same lessee and the vendor specifically agrees to the vendees remaining in possession, there is no illegal dispossession of the vendor and hence a suit under S. 99 of the Agra Tenancy Act by the vendor against the vendee must fail. (*Harper, S.M.*) BALWANT *v.* GULZAR.

1941 O.A. (Supp.) 607 = 1941 R.D. 661 = 1941 A.W.R. (Rev,) 667.

——**S. 99**—*Suit under—Proof of contract of tenancy—Sufficiency.*

The production of receipts for payments in respect of life tenancy and the entry in the patwari papers that the plaintiffs are tenants with six years' period, is not sufficient to prove a contract of tenancy between the plaintiffs and the zamindar. (*Sathe, J. M.*) SURENDRA MAN MISIR *v.* INDRAJIT PRATAP BAHADUR SAHI. **1941 A.W.R. (Rev.) 792 = 1941 O.A. (Supp.) 703 = 1941 R.D. 725.**

——**Ss. 99 and 37**—*Suit under S. 99—Maintainability—All co-tenants not joining—Holding though divided not consented to by landholder.*

A suit by some only of the co-tenants of a holding under S. 99 of the Agra Tenancy Act to recover possession is not maintainable even though there might have been a division of the holding in a case under S. 37 of the Act, when such division has not been consented to in writing by the landholder. (*Harper, S.M. and Shirreff, J.M.*) SURAJ BALI SINGH *v.* KAMLA LAL. **1941 R.D. 588 = 1941 A.W.R. (Rev.) 572 = 1941 O.A. (Supp.) 540.**

——**S. 99 and U. P. Tenancy Act (1939), S. 183**—*Suit nnder S. 99 of the Agra Tenancy Act filed on 30th June, 1939—Limitation—Law governing.*

Where a suit is filed under S. 99 of the Agra Tenancy Act on the 30th June, 1939, the period of limitation governing it would be six months under the Agra Tenancy Act and not three years under U. P. Tenancy Act. Hence if the plaintiff is not proved to have been in possession within six months prior to the filing of the suit, his claim would be barred. (*Harper, S.M. and Shirreff, J.M.*) RAM KISHORE SINGH *v.* MEVA LAL.

1941 O.A. (Supp.) 824 = 1941 A.W.R. (Rev.) 980.

——**S. 99 and United Provinces Tenancy Act, S. 183**—*Suit under S. 99 of the Agra Tenancy Act—Maintainability in Revenue Court—Land occupied by buildings at the time of suit.*

Where the land is agricultural land at the time when the dispossession is alleged to have taken place which is the ground of action for a suit under S. 99 of the Agra Tenancy Act, even if it is occupied by buildings at the time of the institution of the suit, the suit would nevertheless be maintainable in the Revenue Courts.

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(*Shirreff, S.M.*) AFTAHUDDIN KHAN *v.* SARDAR.

1941 A.W.R. (Rev.) 589 (1) = 1941 R.D. 498 (1) = 1941 O.A. (Supp.) 558 (1).

——**S. 99 (1), Proviso**—*Applicability—Person not liable to ejectment by virtue of other Acts.*

Per *Harper, S. M.* (*Sathe, J. M.*, dissenting).—The proviso to S. 99 (1) of the Agra Tenancy Act refers to a person who is liable to an ejectment order during the year under the wording of S. 86 of the Act and is not affected by any subsequent or other Act independent of '*this*' Act such as the Stay Act or the U. P. Encumbered Estates Act. (*Harper, S. M. and Sathe, J.M.*) NIADER *v.* KANHAIYA. **1941 R.D. 257 = 1941 O.A. (Supp.) 199 = 1941 A.W.R. (Rev.) 250 = 1941 A.L.J (Supp.) 53.**

——**S. 99 (1), Proviso and U. P. Tenancy Act (1939), S. 296**—*Suit for restoration of possession by non-occupancy tenant of* sir *land—Decree in November 1939—Effect of U.P. Stay of Proceedings Act, S. 1 (2) —U. P. Tenancy Act coming into force after decree and before appeal—Effect of.*

Where a suit by a non-occupancy tenant of *sir* land for restoration of possession under S. 99 of the Agra Tenancy Act was decreed on 21st November, 1939 and it was upheld in appeal, it was *held*, on a second appeal —that with reference to the particular case the current agricultural year ended on 30th June, 1940 and that as the Stay of Proceedings Act came into force on 21st September, 1937 and its application could not extend beyond 21st March, 1940, the tenant was liable to ejectment between 1st April, 1940 and 30th June, 1940. It was held further that the fact that the Agra Tenancy Act was not in force after 21st March, 1940 and also when the first appeal came on for hearing was of no consequence and the proviso to S. 99 (1) of the Agra Tenancy Act applied and that the plaintiff was not entitled to a decree for possession. (*Harper, S.M. and Sathe, J.M.*) BABU RAM *v.* BIDHI.

1941 R.D. 261 = 1941 A.W.R. (Rev.) 275 = 1941 O.A. (Supp.) 224 = 1941 A.L.J. (Supp.) 62.

——**Ss. 103 and 107**—Surrender in favour of one of the co-sharers—Legality—Responsibility for rent—When would cease. *See* 1940 Dig., Col. 26. MANGAL CHAND *v.* RASOOL BUX. **1941 A.L.J. (Supp.) 3.**

——**S. 107** — *Abandonment — Presumption — Criteria.*

In certain circumstances the tenant is liable to be presumed to have abandoned his holding on the expiry of that period for which he could sub-let. The criteria in such cases are that the tenant in chief must have ceased to cultivate the holding, executed no written sublease, left in charge some one who could not have inherited the holding and there is no agreement in writing by the landlord to the arrangement. (*Harper, S.M.*) GIRDHARI *v.* GANGA PRASAD. **1941 R.D. 449 = 1941 O.A. (Supp.) 445 = 1941 A.W.R. (Rev.) 486 (2).**

——**S. 107**—Abandonment — Presumption—Subsequent possession—Nature of. *See* U.P. TENANCY ACT, S. 87 AND AGRA TENANCY ACT, S. 107.

1941 R.D. 285.

——**S. 107**—*Abandonment—Sub-tenant, if can sue for declaration based on.*

Though a trespasser cannot in a suit for ejectment plead abandonment, but it is only open to the zamindar to plead it, yet where a lambardar supports a sub-tenant in the plea, he can sue for a declaration of title based on abandonment (*Harper, S.M.*) GIRDHARI *v.* GANGA PRASAD. **1941 R.D. 449 = 1941 O.A. (Supp.) 445 = 1941 A.W.R. (Rev.) 486 (2).**

AGRA TENANCY ACT (1926), S. 107.

——**S. 107 and United Provinces Tenancy Act, S. 87**—*Abandonment—Unnecessary finding as to abandonment of cultivation—If operates as* res judicata—*Making arrangement for cultivation during absence—If negatives abandonment.*

Where in a prior case decided on the ground that there was no relationship of landlord and tenant between the plaintiff and the defendant there was an unnecessary finding that the plaintiff had 'abandoned the cultivation', it was held that it did not operate as *res judicata* in a subsequent suit on a question of abandonment. Where a tenant makes arrangements for cultivation during his absence there is no abandonment in the legal sense of the word. (*Shirreff, J.M.*) MOHIB ALI *v.* BUCHUNU.
1941 A.W.R. (Rev.) 566 = 1941 R.D. 501 (1) = 1941 O.A. (Supp.) 497.

——**Ss. 107, 44 and 99**—Non-payment of rent—One of the co-sharers if can take possession on the plea of abandonment—Correct procedure—Effect of not following it. *See* 1940 Dig., Col. 26. SAHDEI KUNWAR *v.* USMAN.
1941 A.L.J. (Supp.) 16.

——**S. 107**—*Plea of abandonment—Who can invoke.*

A plea of abandonment can be invoked only by the zamindar and not by the recorded sub-tenants. (*Harper, S.M.*) GAJADHAR SINGH *v.* VIDYA RAM.
1941 O.A. (Supp.) 445 (1) = 1941 A.W.R. (Rev.) 486 (1) = 1941 R.D. 517.

——**S. 107**—*Plea of abandonment—Who can invoke.*

The provisions of S. 107, Agra Tenancy Act regarding abandonment can only be invoked by the zamindar and not by the recorded sub-tenants. If the zamindar does not choose to resume a holding, the sub-tenant cannot urge that he has become the tenant in chief on the ground that the holding has been abandoned by the recorded chief tenant. (*Harper, S.M. and Sathe, J.M.*) TULSI CHAMAR *v.* CHHEDI AHIR.
1941 A.W.R. (Rev) 99 = 1941 O.A. (Supp.) 87 = 1941 R.D. 40 = 1941 A.L.J. (Supp.) 32.

——**S. 107 (2)**—*Applicability.*

Where it has not been shown that a person left the village after leaving the holding in the charge of a person on whom the holding would have devolved in the case of the death of the former, it cannot be said that the latter has inherited the holding from the former under S. 107 (2) of the Agra Tenancy Act. (*Sathe, J.M.*) BANSU *v.* RAMADHANI.
1941 O.A. (Supp.) 443 = 1941 A.W.R. (Rev.) 484 = 1941 R.D. 582.

——**S. 107 (3) and (4)**—*Abandonment—Presumption—When arises—Disappearance from village—Property left with one on whom it would not devolve—Payment of rent direct by sub-tenant.*

Where an occupancy tenant disappears from the village, and there is no proof of a written sub-lease, and the property is left in charge of one on whom it would not devolve and the sub-tenant has been paying rent direct to the landlord, a presumption of abandonment of the holding arises and the occupancy rights are extinguished. (*Harper, S.M. and Shirreff, J.M.*) SETALU AHIR *v.* PARSAD AHIR.
1941 R.D. 862 = 1941 A.W.R. (Rev.) 1071 = 1941 O.A. (Supp.) 869 (2).

——**Ss. 120 (1) (b) and 230**—*Suit for mandatory and prohibitory injunction—Nature of—If similar to that of an application under S. 120 (1) (b)—Work, if an improvement—Civil Court, if precluded from determining.*

A suit for a mandatory and a prohibitory injunction is not of the same nature as an application under S. 120 (1) (*b*) of the Agra Tenancy Act for a decision as to whether a work is or is not an improvement as defined in the Act. There is nothing in the language of Ss. 120 (1) (b) and 230 of the Act which can be construed as precluding the Civil Court from determining a plea advanced before it as to whether a work is or is not an 'improvement.' What S. 230 provides is that if an application is preferred under S. 120 (1) (*b*) it shall be heard by the Assistant Collector in charge of the subdivision, but it does nowhere say that it is incompetent for a Civil Court to decide a plea as to a work being an improvement or not. (*Collister, Bajpai and Braund, JJ.*) SHANTI SARUP DAS *v.* ASHARFI SINGH.
I.L.R. (1941) All. 250 = 192 I C. 496 = 13 R.A. 327 = 1941 O.A. (Supp.) 34 = 1941 A.L.W. 18 = 1941 A.W.R (H.C.) 34 = 1940 A.L.J. 906 = 1941 A.W R. (Rev.) 45 = 1941 O.W.N. 12 = A.I.R. 1941 All. 61 (F.B.).

AGRA TENANCY ACT (1926), S. 121.

——**Ss. 121, 122 and 123**—*Applicabiliy—Suit by landholder to declare certain persons as statutory tenants—Improper frame of suit—Power to give appropriate relief.*

Where a landholder files a suit purporting to be under Ss. 121 and 123 of the Agra Tenancy Act, for a declaration that certain persons are statutory tenants of the holding and that others had fraudulently got their names entered in the patwari papers, it does not really lie either under S. 121 or S. 123. But it lies under S. 122 for it is obviously a suit for a declaration as to which of the two parties is the tenant. In such a suit though not properly framed, if it is found that there was really a fraud in the entry in the papers a declaration that such persons are not tenants could be given though there was no prayer for it and though the persons asked to be declared statutory tenants were also found to be not tenants and no declaration could be given in their favour. (*Shirreff, S.M. and Sathe, J.M.*) SUKHIA *v.* BHAGWATI.
1941 A.W.R. (Rev.) 796 = 1941 O.A. (Supp.) 707 = 1941 R.D. 736.

——**S. 121**—*Declaration under—Possession—Necessity—Declaration when to be refused.*

It cannot be generalised that a plaintiff is not entitled to a declaration under S. 121 of the Agra Tenancy Act unless he is in possession. It is for the Court in each case to see whether a plaintiff is able to seek further relief and has omitted to do so. If it is satisfied that the plaintiff ought to seek further relief it can either allow an amendment of the plaint or dismiss the suit. (*Harper, S.M. and Shirreff, J.M.*) TUFANI *v.* DEOKALI.
1941 O.A. (Supp.) 808 (2) = 1941 A.W.R. 934 (2) = 1941 R.D. 916 = 1941 A.L.J. (Supp.) 124.

——**S. 121**—Declaratory suit by plaintiff not in possession—Maintainability. *See* U. P. ENCUMBERED ESTATES ACT, S. 59 AND AGRA TENANCY ACT, S. 121.
1941 R.D. 532 (2).

——**S. 121**—*Decree in suit under—Clear finding as to possession before suit—Necessity.*

Where the trial Court has found in a suit under S. 121 of the Agra Tenancy Act that the plaintiffs were not in possession and had lost possession long before the period of limitation, before the appellate Court can reverse it, it must come to a clear finding as to plaintiffs' possession before the date of suit. In the absence of such a finding the suit is not maintainable. (*Harper, S.M. and Shirreff, J.M.*) INDAR KUNWAR *v.* SAGAR CHAUBE.
1941 R.D. 832 = 1941 O.A. Supp. 763 = 1941 A.W.R. (Rev.) 870.

——**S. 121**—*Relief under—Plaintiff not even in constructive possession.*

Where the plaintiff in a suit for declaration under S. 121, Agra Tenancy Act, is not only vague in his allegations but makes a specific statement which shows that

AGRA TENANCY ACT (1926). S. 121.

he was not even in constructive possession, he cannot obtain the relief under the section. (*Harper, S.M.*) MULLU *v.* CHHANGA. **1941 O.A. (Supp.) 826 = 1941 A.W.R. (Rev.) 982.**

——**S. 121**—Right to sue under—Invasion of rights of co-tenant. *See* AGRA TENANCY ACT, SS. 37 AND 121. **1941 R.D. 66.**

——**S. 121**—*Suit for declaration after ejectment of recorded tenants—Failure of plaintiff to get name recorded or to pay rent—Effect.*

Where after the recorded tenants have been ejected for arrears of rent, the widow of their uncle claiming a share in the holding sues for a declaration, she cannot succeed when she had not taken any steps to get her name recorded or to pay rent and more so when she has been living with the recorded tenants and knew about the ejectment. (*Shirreff, J.M.*) SHYAM SUNDER KUER *v.* MAHESHAR PRASAD.

1941 A W.R. (Rev.) 802 (2) = 1941 O.A. (Supp.) 713 (2) = 1941 R.D. 718 (1).

——**S. 121**—*Right of suit under—Co-tenant out of possession—Parties.*

A person who claims as a co-tenant but is out of possession can certainly bring a suit under S. 121, Agra Tenancy Act against both the landholder and sitting tenants. (*Harper, S.M and Shirreff, J.M.*) DUDHAI *v.* BINDESHARI. **1941 A.W.R. (Rev.) 1093 = 1941 O.A. (Supp.) 886.**

——**S. 121**—*Suit for mere declaration, when not justified—Removal of tenant's name under misapprehension—Declaration, sufficiency.*

When a party really desires to secure possession he could not multiply proceedings by first suing for a declaration. But where a person's name is removed from the papers under a misapprehension all that he requires is a declaration which would entitle him to have his name restored, and a suit by such a person for a declaration is maintainable. (*Harper, S.M.*) LAL MOHAN *v.* SITA RAM. **1941 A.W.R. (Rev.) 767 (1) = 1941 O.A. (Supp.) 676 = 1941 R.D. 789.**

——**S. 121**—Suit to declare plaintiff co-occupancy tenant—Facts disentitling plaintiff to the relief. *See* U. P. TENANCY ACT, S. 59 AND AGRA TENANCY ACT, S. 121. **1941 R.D. 514.**

——**S. 121**—*Suit to declare tenancy rights—Admission, not proved—Finding of lease in favour of opposite party to be fraudulent—If can affect right to declaration.*

Where sub-tenants claiming to be tenants in chief sue for a declaration of their rights but fail to prove their admission as tenants in chief at any time they cannot hope to obtain the declaration claimed by them as a result of the finding that the lease in favour of the tenant in chief is fraudulent. The fraud is against Government and so it does not help the plaintiffs. (*Shirreff, S.M.*) KAREEM ULLAH *v.* BHIKKU MAL.

1941 A.W.R. (Rev.) 793 = 1941 O.A. (Supp.) 704 = 1941 R.D. 715.

——**Ss. 121, 122 and 123**—*Suit under Ss.* 121 *and* 123—*Relief properly framed as for one under S.* 122—*Procedure to be adopted.*

Where though the relief sought is correctly described in the plaint as for one under S. 122 but the suit for declaration was stated to be under Ss. 121 and 123, the proper procedure is to treat it as one under S. 122 and not to dismiss it altogether. (*Shirreff, J.M.*) ALIVARI *v.* KOMDA PRASAD. **1941 A.W.R. (Rev.) 790 = 1941 O.A. (Supp.) 701 = 1941 R.D. 867 (2).**

——**S. 122**—*Suit under—Effect of prior suit against defendants for arrears of rent.*

AGRA TENANCY ACT (1926), S. 133.

In the absence of admission to tenancy, certain collaterals of an occupancy tenant who had been entered as joint occupancy tenants can be declared to have no rights, in a suit under S. 122 of the Agra Tenancy Act. The fact that they were sued along with the occupancy tenant for arrears of rent on a former occasion does not necessarily lead to an inference of admission to tenancy. The suit is merely an admission that they were so recorded and nothing more. (*Harper, S.M.*) MAHA RAM *v* JUGAL KISHORE. **1941 R D 881 = 1941 O.A. (Supp.) 841 (2) = 1941 A.W.R. (Rev.) 997 (2).**

——**S. 127 and United Provinces Land Records Manual, Para. 444**—*Agreements as to rate of rent—Procedure—Attestation by Qanungo—Propriety.*

Where the landholders in order to get the correct rates of rent entered in the papers enter into separate agreements with each tenant and signed by the landholders on the one side and by each tenant on the other and the S. D. O. verifies them and they are attested, the procedure followed is quite regular and is warranted both by S. 127 of the Agra Tenancy Act and para. 444 of the Land Records Manual. (*Harper, S.M. and Shirreff, J.M.*) NAWAL KISHORE SINGH *v.* KAMTA BARAI. **1941 A.W.R. (Rev.) 546 = 1941 R.D. 608 = 1941 O.A (Supp.) 477 = 1941 A L J. (Supp.) 101.**

——**Ss. 132, 133 (2)**—Decree for arrears of rent—Form—Different holdings—Separate specification of amount—Necessity. *See* 1940 Dig, Col. 28. BUDHA *v.* JWALA DEVI. **1941 A.W.R. (Rev.) 63 (1) = 1941 O.A. (Supp.) 50 (1).**

——**S. 132**—*Suit for arrears of rent—Conversion into declaratory suit for title—Propriety—Proper decree in such cases—Remedy of defendants claiming to be co-tenants with the recorded tenant.*

Any attempt to convert a suit for arrears of rent into a declaratory suit for title, must be discouraged. In a suit for arrears of rent, the decree should be against the recorded tenant only and the other defendants who claim to be his co-tenants should be left to seek their remedy by a separate suit under the proper section. (*Harper, S.M. and Sathe, J.M.*) HARDEI KUNWAR *v.* ANGAN LAL. **1941 R D. 21 = 1941 A W.R. (Rev.) 172 = 1941 O A. (Supp.) 117.**

——**S. 132**—*Suit under—Denial of sub-tenancy—Onus—No evidence of realisation of rent—Entry of 4 years standing—Value.*

When in a suit under S. 132, Agra Tenancy Act, the defendant denies the relationship of sub-tenant the onus lies on the plaintiff to prove the relationship. Where there is no evidence of any realisation of rent by the plaintiff, the mere entry in the papers of 4 years standing as to sub-tenancy, is not enough to enable a Court to decree the suit. (*Harper, S.M. and Sathe, J.M.*) CHANDRAKALI *v.* BHAIRON SINGH.

1941 A.W.R. (Rev.) 381 = 1941 R D. 327 = 1941 O A. (Supp.) 341.

——**S. 133 (2)**—*Requirements as to separate specification of dues, not complied with—Ejectment proceedings, if possible.*

Where the requirements of S. 133 (2) of the Agra Tenancy Act as to separate specification of dues in respect of each separate holding has not been complied with, no ejectment proceedings can be taken in execution of such decree against any of the holdings. (*Harper, S.M. and Sathe, J.M.*) KISHORE SINGH *v.* GANGA BISHUN. **1941 O A. (Supp.) 387 = 1941 R.D. 419 = 1941 A.W.R. (Rev.) 455 = 1941 A.L.J. (Supp.) 94**

AGRA TENANCY ACT (1926), S. 134.

——**S. 134 (1), Proviso**—*When applies.*

The proviso under S. 134 (1) of Agra Tenancy Act will come into play only when the arrears due from each holding are separately specified in the decree, and where the decree has not done this, the relief contemplated by the proviso will not be available. (*Harper, S.M. and Sathe, J.M.*) KISORE SINGH *v.* GANGA BISHUN.

1941 O A. (Supp.) 387 = 1941 R D. 419 = 1941 A.W.R. (Rev.) 455 = 1941 A L.J. (Supp.) 94.

——**S. 141 (2)**—Rent receipt—Failure to specify holding—Zamindar, if can take advantage of omission. *See* U. P. TENANCY ACT, S. 134 AND AGRA TENANCY ACT, S. 141 (2). **1941 R.D. 251.**

——**S. 185 (c)**—*Meaning and effect of.*

The plain and obvious meaning of Cl. (*c*) of S. 185, Agra Tenancy Act, is that it applies to a holder, of land whose title is based on a transfer, whether the transfer is made by the landlord or by a rent-free holder. The word 'or' occurring in line 4 of the clause connects only the words 'by the landlord' and 'by a rent-free holder thereof'. Hence a transfer must be shown to have taken place before 22nd December, 1873, before a transferee can claim the benefits of this clause. (*Harper, S.M. and Sathe, J.M.*) RASIK BEHARI LAL JI *v.* JWALA PRASAD.

1941 R. D 344 = 1941 A.W R (Rev) 424 = 1941 O.A. (Supp.) 361 = 1941 A.L.J. (Supp.) 83.

——**Ss. 186**—*Applicability—Plot no longer 'land' under Tenancy Act.*

The specific reference in S. 186 of the Agra Tenancy Act is to 'land' and where a plot ceases to be 'land' within the meaning of the Act, S. 186 can have no application to it. (*Harper, S.M. and Sathe, J.M.*) BRIJ MOHAN LAL *v.* RAM SWARUP. **1941 R.D 245 = 1941 A.W.R. (Rev.) 355 = 1941 O.A. (Supp) 269.**

——**S. 186**—*Suit under—Scope of—Maintainability, after settlement.*

The plaintiff in a suit under S. 186 of the Tenancy Act does not desire a new assessment of the land revenue. He only wants to make the defendant liable for paying land revenue due on the area in his possession for which he is not paying any rent. Hence such a suit is maintainable at any time and not necessarily, only at the time of settlement. (*Harper, S.M. and Sathe, J. M.*) RASIK BEHARI LAL JI *v.* JWALA PRASAD.

1941 R.D. 344 = 1941 A.W.R. (Rev) 424 = 1941 O.A. (Supp) 361 = 1941 A.L J (Supp.) 83.

——**Ss. 192, 44 and 99**—*Suit under S. 44—Power of Court to decree under S. 99.*

Under S. 192 of the Agra Tenancy Act, even if a suit is brought under S. 44 of the Act the Court is empowered to grant relief under any other section, (*e.g.*), S. 99 to which it may find plaintiff entitled notwithstanding that such relief may not have been asked for in the plaint. (*Sathe, J.M.*) JAMILUDDIN *v.* CHHOTTO.

1941 R D. 317 = 1941 O.A. (Supp.) 272 = 1941 A.W.R. (Rev.) 358 = 1941 A.L.J. (Supp.) 72

——**S. 200**—*Theka—Written instrument—Necessity—Absence—Effect on liability for rent.*

Under S. 200 of the Agra Tenancy Act a theka may be made only by a written instrument executed by the landlord. In the absence of such an instrument, the lessee though not legally a thekadar, is certainly liable as tenant. (*Harper, S.M. and Shirreff, J.M.*) NARSING PADMA SARAN SINGH *v.* MOTILAL.

1941 O.A. (Supp) 761 = 1941 A W.R (Rev). 860.

——**Ss. 207 and 86 and C P. Code, S. 99**—*Thekadar—Ejectment—Proper procedure—Application under S. 86, Tenancy Act—If can be converted into suit under S. 207—Defect, if any, condoned under S. 99, C. P. Code.*

AGRA TENANCY ACT (1926), S. 226.

For the ejectment of a thekadar the correct procedure to be followed is to file a suit under S. 207 of the Agra Tenancy Act. But where an application has been filed under S. 86 wrongly, there is no reason why it cannot be converted later on into a suit under S. 207 and there is no bar against such a conversion provided the proper court-fees are paid and the application when converted into a suit is within limitation. Even if there is any defect in the institution of the suit that defect should be condoned under S. 99, C. P. Code. (*Harper, S.M. and Sathe, J.M*) NABI HUSAIN *v.* GIRJA SHANKER. **1941 R.D. 1 = 1941 A.W.R. (Rev.) 5 = 1941 O.A. (Supp.) 12.**

——**S. 221**—*Applicability—Conditions—Suit against thekadar under—Maintainability.*

In order that a *thekadar* can be sued under S. 221 of the Agra Tenancy Act it must be shown that he comes within one of the categories mentioned in S. 229. A *thekadar* is not a co-sharer's legal representative or assignee and therefore no suit for arrears of land revenue or profits can lie against him. (*Shirreff, S.M. and Sathe, J.M.*) RAO HUSAIN BUX *v.* LACHMICHAND. **1941 R.D. 589 = 1941 O A. (Supp) 578 = 1941 A.W.R. (Rev.) 621 = 1941 A.L J. (Supp.) 114.**

——**S. 222, Sch. II, List 2, Serial No. 10**—*Land revenue and collection expenses—Claim in profits suit—If in the nature of a set-off—If can be disallowed.*

Expenses of collection and land revenue payments made to Government are not independent claims but part of the deductions which have to be made in working out the profits of the estate and therefore cannot be called a set-off within the meaning of Sch. II, List 2, Serial No. 10, Agra Tenancy Act. Such deductions have to be made from the gross collections before profits can at all be worked out and it is wrong to disallow such a deduction. (*Shirreff, J.M. and Sathe, A.M.*) SHAUKAT HUSAIN *v.* ZAKIR HUSAIN.

1941 R.D. 877 = 1941 O.A. (Supp.) 764 = 1941 A.W.R. (Rev.) 871.

——**S. 224** — *Applicability—Suit by lambardar against full proprietor—Maintainability.*

A lambardar or co-sharer who pays the land revenue due from another co-sharer may sue the latter under S. 221 or S. 222 of the Agra Tenancy Act. But he cannot sue a full proprietor under S. 224 of the Agra Tenancy Act which is meant for suits by a superior proprietor against a sub or under-proprietor. (*Harper, S. M. and Sathe, J. M.*) RADEY SHYAM *v.* SHEO SAMPAT SINGH. **1941 R.D. 380 (1) = 1941 A W.R. (Rev.) 469 (1) = 1941 O.A. (Supp.) 428 (1).**

——**S. 226**—*Suit for profits—Costs.*

The award of costs is a matter within the jurisdiction of the trial Court and when the filing of a suit for profits was not prohibited by any order of any Court and a plaintiff files a suit which he is justified in doing, there is no reason to withhold costs when the suit is decreed and hence an order for costs in such a case cannot be interfered with in revision. (*Shirreff, J.M. and Sathe, A.M.*) MURLI DHAR *v.* PITAMBAR LAL.

1941 O.A. (Supp.) 820 = 1941 A.W.R. (Rev.) 976 = 1941 R.D. 945.

——**S. 226**—Suit under—Income derived by holding land for purpose of brick kiln—If can be taken into account. *See* AGRA TENANCY ACT, SS. 3 (4) AND 226. **1941 A.L.J. 558 = 1941 A.W R. Rev. 840.**

——**Ss. 226 and 227**—*Suits under—Difference between—Suit under S. 226—Dismissal on ground that it should be under S. 227—Propriety.*

A suit should be filed under S. 226, if the defendant happens to be the lambardar and under S. 227, if he

AGRA TENANCY ACT (1926), S. 227.

happens to be a co sharer only. The relief sought under both Ss. 226 and 227 is the same, namely, a settlement of accounts and a decree for share of profits found due. Hence the mention of a particular section is of no significance or importance and a case filed under S. 226 should not be thrown out merely on the ground that it should have been instituted under S. 227. (*Shirreff, J.M. and Sathe, A.M.*) LACHMI NARAIN *v.* HIRA LAL.
1941 A.W.R. (Rev.) 930=1941 O.A. (Supp.) 804=1941 R.D. 915.

——**S. 227**—Suit for profits by mortgagee of half of a patti with *sir* and *khudkasht*—Proceedings under S.36, Land Revenue Act, not taken—Entire *sir* and *khudkasht* continuing in mortgagor's possession—Share of the mortgagee. *See* 1940 Dig., Col. 29. MOLAI MISIR *v.* GOPAL LAL. **192 I.C. 255=13 R A. 305.**

——**S. 232 and Sch. IV, Group F, Item 5**—*Decrees in suits under Tenancy Act—Execution—Limitation—Law applicable—Step-in-aid of execution, if can extend limitation—Composite application for execution and transfer of decree for execution—Later application, after limitation, before transferee Court for execution—Execution, if barred.*

Suits under Agra Tenancy Act are governed by the limitation prescribed for them in Sch. IV of the Act. Limitation in Tenancy Act must be counted from the date of the decree and no application which can be considered as a step in aid of execution can have the effect of extending it. Where an application which is both an execution application and an application to transfer the decree to another Court for execution is filed before the Court which passed the decree within the period of limitation and a subsequent application for execution is filed before the transferee Court, after the period of limitation, it cannot be said that the execution application is barred by limitation. The first application filed within limitation is a proper execution application and the second is only a repetition of the first and the latter being filed after limitation cannot affect the question. (*Shirreff, J. M. and Sathe, A. M.*) MATHURA PRASAD *v.* JAI LAL.
1941 O.A. (Supp.) 789=1941 A.W.R. (Rev.) 915=1941 R.D. 946=1941 A.L.J. (Supp.) 136.

——**S. 234 and U.P. Tenancy Act (1939), S. 257**—*Jurisdiction—Claim exceeding Rs. 200—Suit filed in Sub-Divisional Officer's Court—Suspension—Prayer for separation and adjudication of part of the claim—Transfer of suit to Assistant Collector, second class, for such adjudication—Decree by that Court, if without jurisdiction.*

Where a suit for arrears of rent for a sum exceeding Rs. 200 was instituted in the Court of the Sub-Divisional Officer and he ordered it to be suspended and the plaintiff applied to have the claim for 1344 F. separated and adjudicated upon and the suit was then transferred to the Assistant Collector, second class, for such adjudication and the claim in that behalf was only Rs. 60, it was *held*, that the claim was within the jurisdiction of that Court and that Assistant Collector second class was competent to decree it, and that the decree was not one passed without jurisdiction. (*Harper, S.M. and Sathe, J.M.*) FARZAND ALI *v.* JANGI SINGH.
1941 A.W.R. (Rev.) 265 (2)=1941 O.A. (Supp.) 214 (2)=1941 R.D. 88.

——**Ss. 248 (3) and 253**—*Appeal to District Judge against ejectment—Revision—Court competent.*

Where an ejectment order is appealable to the District Judge under S. 248 (3) of the Agra Tenancy Act, a revisionary order in respect of it can only be passed by the High Court under S. 253 of the Agra Tenancy Act and the Board cannot give any relief. (*Harper, S.M. and Sathe, J.M.*) KISHORE SINGH *v.* GANGA BISHUN.
1941 O.A. (Supp.) 387=1941 R.D. 419=1941 A.W.R. (Rev.) 455=1941 A.L.J. (Supp.) 94.

AGRA TENANCY ACT (1926), S. 253.

——**S. 248 (4) and U. P. Tenancy Act (1939), S. 271**—*Right of appeal—Forum—Determination—New Act coming into force before filing of appeal.*

The right of appeal is governed by the date of the institution of suit and not by the date of the filing of the appeal. Everything that follows on the institution of a suit, is governed by the date of the institution, unless there is any contrary provision in any new enactment coming into force thereafter. Hence when an application under S. 40, Agra Tenancy Act, is dismissed after U. P. Tenancy Act came into force, the appeal against the order of dismissal lies to the Board under S. 248 (4) of the Agra Tenancy Act and not to the commissioner under S. 271 of the U. P. Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) KANAK SINGH *v.* MAHBUB ALI KHAN. **1941 O.W.N. 254=1941 A.W.R. (Rev.) 184=1941 O.A. (Supp.) 128=1941 R.D. 81=1941 A.L.J. (Supp.) 51.**

——**S. 250 and C P. Code, O. 47**—*Review application to the Board—Compliance with O. 47, if necessary.*

Compliance with O. 47, C. P. Code, though necessary for S. 251 of the Agra Tenancy Act, has no bearing in the case of a review application under S. 250 of the Act. (*Harper, S.M. and Saihe, J.M.*) CHUNNI *v.* JAMNA.
1940 R.D. 624=1941 A W.R. (Rev.) 429=1941 R.D. 663 (2).

——**S. 252**—Revision—Competency—Case not 'decided'. *See* U. P. TENANCY ACT, S. 275 AND AGRA TENANCY ACT, S. 252. **1941 A.W.R. (Rev.) 183.**

——**S. 252**—*Revision—Competency—Order sanctioning restoration.*

Though an order rejecting a restoration application is appealable under O. 43, R. 1, C. P. Code, an order sanctioning restoration is not appealable and can only be revised by the Board under its revisionary powers. (*Shirreff, J. M. and Sathe, A. M.*) DEEP CHAND *v.* RAM NARAIN. **1941 O.A. (Supp.) 816=1941 A.W.R. 972=1941 R.D. 943.**

——**S. 252**—*Revision—Consideration of questions of fact.*

Objections relating to questions of fact are not considered in revisions which are confined only to legal defects or defects relating to jurisdiction by S. 252 of the Agra Tenancy Act. (*Shirreff, J.M. and Sathe, A. M.*) MURLI DHAR *v.* PITAMBAR LAL.
1941 O.A. (Supp.) 820=1941 A.W.R. (Rev.) 976=1941 R.D. 945.

——**S. 252**—*Revision—Obvious mistake.*

An obvious mistake will be corrected in revision. (*Harper, S.M. and Sathe, J.M.*) KIRPA RAM *v.* DOST MAHOMED. **1940 R.D. 604 (1)=1941 A.W.R. (Rev.) 94=1941 O.A. (Supp.) 82.**

——**S. 252**—*Revision—Order as to costs—Interference.*

Where a Court in setting aside an *ex parte* decree directs the payment of a certain sum as costs to the opposite party, it cannot be said that it has acted in the exercise of its jurisdiction illegally or with material irregularity inasmuch as it presumably was aware of the actual costs involved by the postponement and knew the circumstances of the parties. Such an order cannot be interfered with in revision. (*Harper, S.M. and Sathe, J.M.*) TIKAM SINGH *v.* SAHIB SINGH.
1940 R.D. 586=1941 A.W.R. (Rev.) 60=1941 O.A. (Supp). 47.

——**S. 253**—High Court—Powers of, in revision. *See* C. P. CODE, S. 115 AND AGRA TENANCY ACT, S. 253. **1941 A.W.R. (H.C.) 130.**

AGRA TENANCY ACT (1926), S. 265.

——**S. 265**—*Lease by lambardar—Pendency of partition proceedings—Validity.*

Where only partition proceedings have been confirmed and the subsequent proceedings for the carrying out of the partition still remain to be done, a *lambardar* grants a lease on economic rent, it is not invalid as the *lambardar* was still responsible for the administration of the estate and it cannot be said that he has acted contrary to his duties as *lambardar*. (*Harper, S.M. and Sathe, J.M.*) ASEY *v.* SHIB LAL. **1940 R.D. 587 = 1941 A.W.R. (Rev.) 89 = 1941 O.A. (Supp.) 77.**

——**S. 266**—*Applicability—Co-tenants.*

S. 266 of the Agra Tenancy Act applies to the case of co-tenants also and not merely to co-sharers in proprietary rights. (*Harper, S.M. and Shirreff, J.M.*) SURAJ BALI SINGH *v.* KAMLA LAL. **1941 R.D. 588 = 1941 A.W.R. (Rev.) 572 = 1941 O.A. (Supp.) 540.**

——**S. 266**—Applicability—Suit by one co-sharer alone—Proof of separate collection—Effect. *See* U. P. TENANCY ACT, SS. 245, 246 AND AGRA TENANCY ACT, SS. 265 AND 266. **1941 R.D. 326.**

——**S. 266**—*Right of collecting co-sharer to sue alone, for ejectment of trespasser.*

Where a person is shown to be the sole collecting co-sharer he is the agent acting on behalf of the co-sharers and hence he is entitled to sue alone for the ejectment of a trespasser. (*Harper, S.M.*) BHAGWAN SINGH *v.* BAJRANG BALI. **1941 R.D. 27 = 1941 A.W.R. (Rev.) 176 = 1941 O.A. (Supp.) 120.**

——**S. 266**—Suit by some co-sharers only—Plaintiffs alone interested in the *khudkasht* rights sought to be protected—Absence of other co-sharers, if fatal to suit. *See* 1940 Dig., Col. 31. RAMPAT SINGH *v* NAGESHAR SINGH. **I.L.R. (1940) All. 678.**

——**S. 270**—Plea of payment in 'good faith'—Sustainability—Circumstances. *See* U. P. TENANCY ACT, S. 247 AND AGRA TENANCY ACT, S. 270. **1941 R.D. 296 (2).**

——**S. 270**—*Scope of Assistant Collector's powers—Question of proprietary right—It can be decided by him.*

S. 270, Agra Tenancy Act deals with the procedure to be adopted and the proof to be submttted when a landholder sues a tenant for arrears of rent or a tenant contests a distraint against a landholder. If the status of the parties is admitted an Assistant Collector is not due to go beyond the question of payment in good faith etc. But it is also open to the defendant to plead that the plaintiff is not entitled to sue. In such a case the question of proprietary right has to be decided in the Court of the Assistant Collector (*Harper, S. M. and Sathe, J. M.*) ROSHAN LAL *v.* RAM CHARAN LAL. **1941 O.A. (Supp.) 888 = 1941 A.W.R. (Rev.) 1095.**

——**S. 271 (1)**—*Question of proprietary title—Submission to Civil Court—Power of Civil Court to refer that issue to arbitration.*

A Civil Court to which an 'issue, on the question of proprietary right' has been submitted under S. 271 (1) of the Agra Tenancy Act, has jurisdiction to refer that issue to arbitration under S. 1 of Second Schedule to the C. P. Code and the finding based upon that award in the arbitration proceedings is a valid finding. (*Thom, C.J., Ganga Nath and Braund, JJ.*) MAHA RAM *v.* HARBANS. **I.L.R. (1941) All. 193 = 193 I.C. 17 = 13 R.A. 380 = 1941 A.L.J. 63 = 1941 R.D. 185 = 1941 O.W.N. 393 = 1941 A.L.W. 282 = 1941 A.W.R. (H.C.) 25 = 1941 O.A. (Supp.) 25 = 1941 A.W.R. (Rev.) 36 = A.I.R. 1941 All. 101 (F.B.).**

AJMER LAWS REGULATION (1877), S. 8.

——**S. 271 (4) and U. P. Tenancy Act, S. 286 (4)**—Difference between. *See* U. P. TENANCY ACT, S. 286 (4) AND AGRA TENANCY ACT, S. 271 (4). **1941 R.D. 693 (2).**

——**Ch. 13**—*Applicability—Theka by a licensee.*

Ch. 13 of the Agra Tenancy Act does not at all apply to a theka given by one not a proprietor but a iicensee. (*Harper, S. M. and Sathe, A. M.*) ROSHAN LAL *v.* RAM CHARAN LAL. **1941 O.A. (Supp.) 888 = 1941 A.W.R. (Rev.) 1095.**

——**Sch. II, List II, Serial 10**—Claim for land revenue as a deduction in profits suit—If a claim by way of set-off. *See* AGRA TENANCY ACT, S. 222 AND SCH. II, LIST II, SERIAL 10. **1941 R.D. 877 = 1941 A.W.R. (Rev.) 871.**

——**Sch. II, List II, Item 10**—*Set-off in respect of excess payment in prior years—Availability.*

In view of item 10 in list II in Sch. II to Agra Tenancy Act no set-off can be allowed in respect of excess payment made by the tenant in previous years. (*Harper, S.M. and Sathe, J.M.*) PUTTOO LAL *v.* BANSIDHAR. **1941 O.A. (Supp.) 384 (1) = 1941 A.W.R. (Rev.) 452 (1) = 1941 R.D. 418 (1).**

——**Sch. IV, Group F, Serial Nos. 3 and 5**—Decree declaring proper rent and the costs to be paid—Nature of decree—Limitation. *See* 1940 Dig., Col. 32. MOHABBE ALI KHAN *v.* CHHOTEY. **1941 A.L.J. (Supp.) 5.**

——**Sch. IV, Group F, Serial Nos. 3 and 5**—*Execution for costs in decree for division—Limitation—Nature of decree.*

Where after a division was carried out in pursuance of a decree for it, the costs portion of it is executed, the limitation is 3 years under Serial No. 3 of Group F of the IV Schedule to the Agra Tenancy Act and not one year under Serial No. 5. The decree is a money decree at that stage for there was nothing left to execute but the money part of the decree. (*Shirreff, J.M.*) NARAIN LAL *v.* SHIVCHARAN SINGH. **1941 A.W.R. (Rev.) 766 = 1941 O.A. (Supp.) 675 (2) = 1941 R.D. 758.**

AJMER LAND REVENUE REGULATION (II OF 1877), Ss. 25 and 119—*Decision under S. 25—If can be challenged by civil suit.*

Under S. 25 of the Ajmer Land Revenue Regulation the Chief Commissioner is empowered to decide who is to hold land in lieu of maintenance against any Istimrardar where the applicant is a member of his family. Not only under this section is the decision conclusive, but S. 119 of same Regulation is an express bar to the institution of a suit on the subject in any Civil Court. (*Davies.*) BAKHTAWAR SINGH *v.* CHANDER SINGH. **1941 A.M.L.J. 1.**

——**Ss. 31 to 36**—*Effect of—Occupancy tenancy prior to Act, if affected—Occupancy tenancy, if an alienation.*

The Bhum Regulations have no retrospective effect and hence any alienation made or occupancy tenancy granted prior to the Regulations will continue to be valid. The grant of a permanent occupancy tenancy amounts to an alienation. (*Davies.*) GANGA NATH SINGH *v.* SHEO NARAIN. **1940 A.M.L.J. 88.**

AJMER LAWS REGULATION (III OF 1877), S. 8—*Benami transaction—If can affect pre-emption.*

Right of pre-emption is a personal matter which cannot possibly be the subject of an assignment and hence it would be entirely against the spirit of the law of pre-emption to allow a benami transaction to have any lega force in this connection. (*Davies.*) AFSAR-UN-NISSA *v.* ABDUL HALIM. **1941 A.M.L.J. 65.**

ALLAHABAD HIGH COURT RULES, General (Civil), Ch XXI, Rr. 22 and 23—*Contentious litigation—Test.*

Rules 22 and 23 of Ch. XXI of the General Rules (Civil of the Allahabad High Court draw a distinction between contested and uncontested litigation and make it depend upon whether there has been a decision 'on the merits after contest'. A decision as to the amount of Court-fee payable, is not a decision 'on the merits' although it may give rise to some measure of contest. (*Braund, J.*) SHIVA SHANKAR LAL SHARMA *v.* RAMJI LAL. **195 I C. 781 = 14 R A. 81 = 1941 A.L J. 290 = 1941 A.W R. (Rev.) 405 = 1941 O A. (Supp.) 331 = 1941 R.D. 312 = 1941 A.W.R. (H C.) 166 = 1941 A L W. 428 = A.I R. 1941 All. 285.**

ALLAHABAD HIGH COURT RULES GENERAL (CRIMINAL), Chap. II R. 1—*Fresh* vakalatnama, *in appeal—If necessary.*

Once a *vakalatnama* has been filed in the trial Court, it holds good for such Courts as the pleader has a certificate for, provided that the *vakalatnama* authorises him to appear there on behalf of his client. (*Hamilton, J.*) EMPEROR *v.* CHHAJJU. **1941 A.L.J. 344 = 1941 A.Cr.C. 145 = 1941 A L W. 653 = 1941 A.W R. (H.C.) 246 = 1941 O.A. (Supp.) 599 = A.I.R. 1941 All. 336.**

ALLUVION AND DILUVION. *See* BENGAL ALLUVION AND DILUVION ACT.

AMENDMENT.

——Of pleadings. *See* C. P. Code, S. 152. C. P CODE, O. 6, R. 17.

APPEAL. *See* PRACTICE—APPEAL.

APPROPRIATION. *See* CONTRACT ACT, SS. 59-61.

ARBITRATION. *See also* C. P. CODE. SCH. II (REPEALED) AND ARBITRATION ACT (1940).

——*Arbitrators—Jurisdiction to rewrite award after issue.*

Once arbitrators have issued an award, they become *functus officio*, and they have no jurisdiction subsequently to re-write the original award. (*Wort and Meredith, JJ.*) CHHATI LAL *v.* RAM CHARITER SAHU. **195 I.C. 87 = 14 R.P. 83 = 7 B.R. 864 = A.I.R. 1941 Pat. 215.**

——*Arbitrator—"Misconduct"—Architect arbitrator—Latter expressing opinion or having money claim against one party—If ground of disqualification.*

Where an agreement is made between the owner of certain premises and a building contractor, and an architect is appointed, and it is agreed that that architect should act as arbitrator in the event of disputes between the parties to the agreement, the parties know that in certain matters and to certain extent the arbitrator agreed upon may, previous to his entering upon the arbitration, deal with the merits of the matter and possibly express opinions. And such an architect is not disqualified from acting as arbitrator merely by the fact that there is money due to him as architect from one of the parties or by the fact that he has expressed his opinions when he has made it clear that he is ready to adjudicate on the contentions of the parties with an open mind after hearing them. (*Lobo, J.*) SAKHI MAHOMED HYDER *v.* THAROOMAL. **A.I.R. 1941 Sind 202.**

——*Award—Suit to set aside on ground of patent error—Maintainability.*

A suit to set aside an award made by an arbitrator on a reference by the Registrar of Co-operative Societies on the ground of a patent error of law on a question of limitation, is maintainable. (*Roberts, C.J. and Blagden J.*) CO-OPERATIVE TOWN BANK OF

ARBITRATION ACT (1899), S. 11.

HENZADA *v.* U KYAN THA. **1940 Rang.L.R. 739 = 194 I C. 220 = 13 R R. 286 = A.I.R. 1941 Rang. 104.**

——*Award—Validity—Reference to number of arbitrators—Evidence recorded by some—Others signing award after reading recorded evidence.*

It is true that when arbitrators are appointed they are supposed to act together, but it is not absolutely essential that all the arbitrators should be present when all the evidence is recorded provided all the arbitrators are made acquainted with the evidence that has been recorded before they come to their decision. There is nothing illegal or contrary to the principles of natural justice in this. Hence where reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence the award is not invalidated. (*Baguley, J.*) U PO HLAING *v.* DAW NGWE. **192 I.C. 801 = 13 R.R. 197 = A.I R. 1941 Rang. 22.**

——*Award—When takes effect—Award declared on certain date but signed later.*

Where an award was declared by the arbitrators in the presence of both parties on a certain date but signed by them on a later date, the effectiveness of the award is not postponed to the date on which it was signed. The award becomes effective on the date on which the parties are made aware of it. (*Sen, J.*) SUDHIR KUMAR CHAKRAVARTY *v.* BILASBATI DEBI. **45 C.W.N. 223.**

——Permission of Court — Award—Supersession—Appeal—Revision—If lies. *See* C. P. CODE, O. 23, R. 3 AND S. 115. **1941 N.L.J. 333.**

——*Reference by some heirs only—Award, binding nature.*

The mere fact that all the heirs did not join in the reference to arbitration of a dispute about inheritance is no ground for upsetting the award so far as those people who made the reference are concerned. (*Baguley, J.*) U PO HLAING *v.* DAW NGWE. **192 I C. 801 = 13 R.R. 197 = A.I.R. 1941 Rang. 22.**

——Reference to—Authority—Mother acting on behalf of minor daughter—Binding character. *See* 1940 Dig., Col. 36. HAR NARAINI KUNWAR *v.* SAJJAN PAL SINGH. **67 I A. 386 = I.L.R. (1940) All. 719 = I.L.R. (1940) Kar. 366 = 43 Bom.L.R. 141 (P C.).**

ARBITRATION ACT (IX OF 1899), S. 2—*Agreement executed at Amritsar—Applicability of Act—Punjab Amendment Act I of* 1911, *S.* 2—*Punjab Government Notification*, 1915.

The combined effect of S. 2 of the Punjab Amendment Act I of 1911 and the notification issued by the Punjab Government in 1915 is that the provisions of the Indian Arbitration Act apply only to those agreements executed at Amritsar which are (1) in writing and (2) in which it is *expressly* declared that the Indian Arbitration Act shall apply. (*Tek Chand and Din Mahomed, JJ.*) BOMBAY CO. LTD. *v.* RADHA KISHAN. **43 P.L.R. 344 = A.I.R 1941 Lah. 279.**

——**S. 11**—*Award—Validity of—Original appointment of arbitrators bad—Effect of.*

If the original appointment of arbitrators is bad the tribunal constituted is without jurisdiction and no subsequent realization of a mistake or an attempt to rectify matters by one party can clothe with jurisdiction a tribunal which is in its inception illegal and without jurisdiction, and the award by such tribunal is invalid, and if filed in Court should be removed from the file. (*Lobo, J.*) GOSHO KABUSHIKI KAISHA, LTD. *v.* MULCHAND HARICHAND. **196 I.C 15 = 14 R.S. 58 = A.I.R. 1941 Sind 111.**

ARBITRATION ACT (1899), S. 15.

——**S. 15**—*Construction—"As if it were a decree of the Court"—Award filed in High Court—Execution—Limitation—Limitation Act, Art.* 183—*Applicability.*

When S. 15 of the Arbitration Act speaks of the award being "enforceable as if it were a decree of the Court", the expression has to be read as including both the manner of execution and the time within which execution must take place. An award under the Act which is filed in the High Court, is executable as a decree of the High Court in virtue of S. 15 of the Act, and therefore Art. 183 of the Limitation Act will apply to such a case. (*Beaumont, C. J. and Kania, J.*) NADIRSHAW H. CONTRACTOR *v.* GAJRAJ SHEOKARANDAS.
43 Bom.L.R. 1006.

——**S. 19**—*Applicability—Contract of sale—Arbitration clause—Question of law—Power to stay suit.*

The plaintiff sued the defendant for his failure to deliver the goods agreed to be supplied by him under a contract. The arbitration clause in the contract provided that any dispute including short and/or non-payment by the purchaser, or any dispute arising out of the contract should be referred to arbitration. The main disputes in the case between the parties were whether the plaintiff agreed specifically for goods of the manufacture of Dobbertin & Co., of Hamburg, and whether by reason of the war which broke out in September 1939 the contract became impossible of performance.

Held, that the points in dispute fell within the arbitration clause in the contract.

Held, further, that the main dispute between the parties whether in the circumstances of the case the contract became impossible of performance involved an important and intricate question of law and therefore the Court was entitled to exercise its discretion conferred by S. 19 and was justified in refusing stay of suit. (*Lobo, J.*) SUKHDEV & CO. *v.* AYARAM ATAMPRAKASH.
196 I.C. 188=14 R.S. 57=A.I.R. 1941 Sind 99.

——**S. 19**—Application for stay—Discretion of Court—Circumstances justifying refusal—Party cancelling contract—Right to invoke arbitration clause. *See* 1940 Dig., Col. 38. TOLARAM CHAMPALAL *v.* JEWANRAM GANGARAM.
193 I.C. 126=13 R.C. 370=A.I.R. 1941 Cal. 39.

——**S. 19**—*Application made under Act of* 1899—*At time of hearing new Act of* 1940 *in operation—Application, if governed by Act of* 1899.

The Arbitration Act of 1899 must govern an application made thereunder even though the new Act of 1940 comes into operation at the time when the application is heard. (*McNair, J.*) RUPCHAND *v.* PANNALAL.
A.I.R. 1941 Cal. 415.

——**S. 19**—*Contract—Arbitration clause—Question as to interpolation in terms of contract—If falls within.*

Where an arbitration clause in a contract provides for a reference to arbitration of any dispute whatsoever arising in or out of the contract the question whether there has been an interpolation in the terms of the contract falls within the arbitration clause and must be decided by arbitrators. Consequently a suit is not maintainable on that ground. (*McNair, J.*) RUPCHAND *v.* PANNALAL. **A.I.R. 1941 Cal. 415.**

——**S. 19**—*Contract containing arbitration clause—One party alleging breach by other and claiming rescission of contract—Suit by other against him—Latter, if entitled to order staying suit.*

Where a contract contains an arbitration clause and one party to it alleges breach by the other of its provisions and claims to have rescinded the contract on that ground, the dispute is one arising out of the agreement.

ARBITRATION ACT (1940), S. 34.

If, therefore, the other party brings a suit against him in respect of the contract, he is entitled to an order under S. 19 of the Arbitration Act staying that suit. (*Lort Williams, J.*) KRISHNA *v.* HARIPADA.
45 C.W.N. 984.

——**S. 19**—*Step in the proceedings—Defendant supplied with copy of plaint—Grant of time by Court for filing written statement.*

Having regard to the provisions of O. 5, R. 2, C. P. Code, a proceeding must be taken to have commenced within the meaning of S. 19, Arbitration Act, only when the defendant is supplied with a copy of the plaint and the fixing of time by the Court for filing a written statement when the defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings inasmuch as time for filing the written statement is necessarily given by the Court. (*Beckett, J.*) PREM NATH PRAN NATH *v.* AMBA PARSHAD.
193 I.C. 167=13 R.L. 435=A.I.R. 1941 Lah. 64.

——**(X of 1940)**—*Applicability—Application under Act of* 1899—*Act of* 1940 *coming into force at time of hearing—Whether new or old Act applicable.*

An application made under the Arbitration Act of 1899 must be governed by that Act only even though the new Act of 1940 had come into operation at the time when the application was heard. (*McNair, J.*) RUPCHAND *v.* PANNALAL. **A.I.R. 1941 Cal. 415.**

—— **Ss. 32 and 33**—*Suit challenging validity of contract containing arbitration clause—Maintainability—Proper procedure.*

Having regard to S. 32 of the Arbitration Act, 1940, a suit for a declaration that a certain contract containing an arbitration clause is by way of gaming and wagering and as such void and for an injunction to restrain the Tribunal of Arbitration from proceeding with the arbitration is not maintainable. The proper procedure is to make an application to the Court under S. 33 of the Act to be decided on affidavits, or on other evidence if deemed expedient by the Court. (*Lort Williams, J.*) DEOKINANDAN DALMIA *v.* BASANTLAL.
I.L.R. (1941) 2 Cal. 123=196 I.C. 851=45 C.W.N. 881=A.I.R. 1941 Cal 527.

——**S. 34**—*A appointed medical referee of insurance company under written agreement—Agreement containing arbitration clause—Company terminating A's services on ground of gross negligence—Suit by A for damages—Company, if entitled to have suit stayed.*

One *A* was appointed the medical referee of an insurance company under a written agreement which provided that *A* should diligently and faithfully examine medical reports submitted to him by the company. It was also provided that the company would be entitled to terminate the agreement in case of gross negligence of work on the part of *A*. Lastly, there was an arbitration clause which provided that any dispute arising between parties concerning their rights, liabilities or duties under the agreement would be referred to arbitration. Subsequently the company charged *A* with gross negligence in respect of a medical report and terminated his services. *A* thereupon brought a suit for remuneration and damages for the wrongful conduct of the company.

Held, that as *A* was suing for his rights under the agreement and for the damage he had suffered owing to the wrongful termination of it before its expiry, the company had the right to have the suit stayed under S. 34 (*Panckridge, J.*) HAPPY INDIA INSURANCE CO., LTD, *v.* KUMUD BANDHU CHAKRAVARTY.
A.I.R. 1941 Cal 503.

ARMS ACT (XI OF 1878), Ss. 4 and 19 (f)—*'Arms'—Spears electroplated and used for religious purpose.*

It is always a question of fact whether the article for the possession of which a charge under the Act is made comes within the definition of 'arms" or not. A spear which has the appearance of a spear, and which can be used as a spear, does not cease to be so merely because it is electroplated or is called something else such as Nishan Sahib or is used for a religious purpose. The fact that an article which comes within the definition of "arms" in the Arms Act is used for religious purposes does not relieve the person in possession of such an arm from tho operation of the Act. (*Young, C.J. and Ram Lall, J.*) EMPEROR *v.* SOBHA SINGH.

196 I.C. 766 = A.I.R. 1941 Lah. 340.

——**Ss. 4 and 19 (f)**— 'Arms"—Takwas. *See* 1940 Dig., Col. 40. UDHAM SINGH *v.* EMPEROR.

191 I.C. 323 = 42 Cr.L.J. 144 = 13 R.L. 311.

——**S. 19 (e)**—*Going armed—Accused carrying gun tied to bi-cycle as luggage—Offence.*

If a person carries a gun not in his hand but tied to his bi-cycle in the manner of a piece of luggage, he must be said to be "going armed" within the meaning of S. 19 (*e*) of the Arms Act and is liable to conviction. (*Rowland, J.*) IMAMUDDIN MIAN *v.* EMPEROR.

192 I.C. 766 = 13 R.P. 570 = 42 Cr.L.J. 341 = 22 P.L.T. 570 = 1941 P.W.N. 423 = 7 B.R. 411 = A.I.R. 1941 Pat. 284.

——**S. 19 (f)**—*Conviction under—Absence of sanction under S. 29—Effect.*

Sanction under S. 29 of the Arms Act is necessary in order to commence a prosecution, for an offence under S. 19 (*f*) of the Act. Where there is no such sanction, there can be no conviction under S. 19 (*f*). (*Rowland, J.*) IMAMUDDIN MIAN *v.* EMPEROR.

192 I.C. 766 = 13 R.P. 570 = 42 Cr.L.J. 341 = 22 P.L.T. 570 = 1941 P.W.N. 423 = 7 B.R. 411 = A.I.R. 1941 Pat. 284.

——**S. 19 (f)**—*Discovery of arms in house occupied by joint family—Presumption—Nature of—Weight to be attached to.*

There is an initial presumption in case of a discovery of arms in a house occupied by a joint family that the article found therein is in the possession of the head of the family. The same principle applies to all families living jointly in the same house. The weight to be attached to the presumption must vary according to circumstances. It could easily be rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of a particular member of the family. The strength of the presumption would also vary according to the improbability that the article owing to its size, etc., could have escaped the notice of the head of the family. (*Gruer, J.*) HARBANS SINGH *v.* EMPEROR.

196 I.C. 727 = 1941 N.L.J. 405 = A.I.R. 1941 Nag. 296.

——**S. 19 (f)**—Offence under—What constitutes. *See* 1940 Dig., Col. 40. EMPEROR *v.* ABDUL RAHMAN.

I.L.R. (1940) All. 657 = 42 Cr. L.J. 59.

——**S. 19 (f)**—*"Possession"—Meaning of.*

"Possession" for the purposes of the Arms Act is possession for use. The mere holding of a weapon by one person on behalf of the person entitled to it is not "possession" within the meaning of S. 19 (*f*). When a person holding a licence for a gun stays in the house of a friend and leaves the house leaving the gun in that house intending to return for it shortly afterwards, it cannot be held that the licensee is not in possession or that the friend in whose house it has been left, is in possession of it especialiy when the friend has not made any use of the gun. (*Meredith, J.*) KEDAR NATH *v.*

ASSAM MUNICIPAL ACT (1923), S. 254.

EMPEROR. 191 I.C. 187 = 13 R.P. 316 = 42 Cr.L.J. 97 = 7 B.R. 164 = A.I.R. 1941 Pat. 209.

——**S. 29**—Scope — Non-compliance—Effect—Absence of sanction—Conviction under S. 19 (f)—Legality. *See* ARMS ACT, S. 19 (*f*). 7 B.R. 411.

ASSAM DEBT CONCILIATION ACT (X OF 1936), Ss. 7, 8 and 16—Decision by Board that debt is time barred—Effect of—Power of Civil Court to deal with such debt. *See* 1940 Dig., Col. 41. PULIN BEHARI DAS *v.* SYED REASAT ALI. 194 I.C. 265 = 13 R.C. 493 = A.I.R. 1941 Cal. 156.

——**S. 8 (3)**—Decision of Board—Finality—Extent. *See* 1940 Dig., Col. 41. PULIN BEHARI DAS *v.* SYED REASAT ALI. 194 I.C. 265 = 13 R C. 493 = A.I.R. 1941 Cal. 156.

ASSAM MONEY-LENDERS ACT (IV OF 1934), S. 9—*"Principal of the loan"—Meaning of—Bond in respect of past liabilities including principal and interest.*

Where a bond is executed in respect of past liabilities which include principal as well as interest, the creditor cannot under S. 9 of the Assam Money-lenders' Act claim arrears of interest greater than the principal of the loan, which means the money which the money-lender actually advanced to the borrower and not the amount for which the bond is executed. (*Nasim Ali and Pal, JJ.*) PRASANNA KUMAR DATTA *v.* KRISHNA KISHORE SWAMI. 45 C.W.N. 394.

ASSAM MUNICIPAL ACT (I OF 1923), Ss. 3(15) and 59 (1) (b)—*Carrying on business—If includes service.*

The expression "carrying on business" in S. 3 (15) of the Assam Municipal Act does not imply service. A Government servant employed in a Munsif's Court within a Municipality cannot be regarded as "carrying on business" there so as to bring him as such within the meaning of the word "inhabitant" defined in S. 3 (15) and make him liable to taxation under S. 59 (1) (*b*) of the Act. (*Akram, J.*) ABDUL MANAF *v.* SUNAMGANJ MUNICIPAL BOARD. I.L.R. (1941) 1 Cal. 127 = 196 I.C 137 = 14 R.C. 179 = A.I.R. 1941 Cal. 482.

——**S. 40**—Rent for land let out under S. 40—How to be recovered. *See* ASSAM MUNICIPAL ACT (I OF 1923), SS. 141 AND 144. 45 C.W.N. 215.

——**S 59 (1) (b)**—Government servant employed in Munsif's Court—If liable to tax as carrying on business. *See* ASSAM MUNICIPAL ACT (I OF 1923), SS. 3 (15) AND 59 (1) (*b*). I.L.R. (1941) 1 Cal. 127.

——**Ss. 141 and 144**—*Rent for land let out under S. 40—Remedy of Board for its recovery.*

S. 141 of the Assam Municipal Act relates to rents specified in S. 140 and to other monies due under the Act. The rent which may be recovered for land let out under S. 40 cannot come under the terms of the section. The remedy of the Board for the recovery of the rent of such land lies in a suit brought in accordance with the provisions of C. P. Code and the Board cannot recover this rent by having recourse either to the provisions of Ss. 99 to 108 or to the provisions of S. 144. (*Sen, J.*) GOLAGHAT MUNICIPAL BOARD *v.* SONARAM GOHAIN. 45 C.W.N. 215 = 73 C.L.J. 152 = A.I.R. 1941 Cal. 609.

——**S. 254**—*'Prostitute'—Proof.*

In a case under S. 254 of the Assam Municipal Act a heavy onus lies on the prosecution to prove that the accused person is actually a prostitute. No such inference can be drawn from the fact that she is residing in a quarter of the town ordinarily inhabited by prostitutes or that her name appears in the register of prostitutes maintained at the Thana or that she is in the keeping

ASSAM MUNICIPAL ACT (1923), S. 320.

of a man who is a resident of the town. (*Edgley, J.*) CHAIRMAN OF DHUBRI MUNICIPALITY *v.* KUMUDINI GANIKA. **195 I.C. 546=14 R.C. 134=73 C.L.J. 191=42 Cr. L.J. 756=45 C.W.N. 167=A.I.R. 1941 Cal. 445.**

——**S. 320**—*Act of Board irregular—Notice, if necessary.*

Under S. 320 of Assam Municipal Act, notice is necessary if the act complained against was one which was done by the Board purporting to act under the Act. It cannot be said that the Board was not acting under the Act although it has not followed the correct procedure. The act of the Board would be protected so long as it purported to act according to the provisions of the Act and so long as it acted *bona fide* and in the belief that what it was doing was lawful. Of course that belief must not be an absurd belief. (*Sen, J.*) GOLAGHAT MUNICIPAL BOARD *v.* SONARAM GOHAIN. **45 C.W.N. 215=73 C.L.J. 152=A.I.R. 1941 Cal. 609.**

——**S. 320**—*Validity of notice—Onus of proof.*

Under S. 320 of the Assam Municipal Act, the onus is upon the plaintiff to prove not only service of notice but also that the notice is of the kind of notice contemplated by the section. Where there is a specific denial of the validity of the notice by the Municipality, it is not sufficient for the plaintiff to merely prove the service of the notice. He must further prove that the notice was valid. It is not the duty of the Municipality to produce the notice to show that it was not in accordance with the provisions of S. 320. (*Sen, J.*) GOLAGHAT MUNICIPAL BOARD *v.* SONARAM GOHAIN. **45 C.W.N. 215=73 C.L.J. 152=A.I.R. 1941 Cal. 609.**

ATTACHMENT. *See* C. P. CODE, O. 38.

ATTESTATION—*Effect—Knowledge of contents.*

Attestation of a deed does not by itself prove that the person attesting it had knowledge of its contents or consented to the transaction. No doubt there may be cases in which the fact of attestation may be taken in conjunction with certain other circumstances such as the course of negotiations and other connected events, and inferences as to consent to the transaction may be drawn from those circumstances supported by the fact of attestation. (*Rowland, J.*) LACHHMI NARAIN *v.* RAM SARAN DUSADH. **196 I.C. 380=14 R.P. 195=8 B.R. 18.**

AUCTIONEER—*Position and liabilities of—Sale not completed after initial deposit—Demand for return of deposit—Applicability of S. 230, Contract Act—Auctioneer's right to commission, law as to.*

In England an auctioneer has always been regarded as a stake-holder and it has never been doubted that if he has received a notice from the purchaser to return the deposit in a case where the sale had gone off on account of the default of the seller, the auctioneer would be bound to return the deposit to the purchaser. There is nothing in the Indian Contract Act which is in any way inconsistent with the English Law on this subject. S. 230 of the Contract Act has got no application to the case where a demand for return of deposit is made. The primary liability to pay the commission to the auctioneer is on the seller and even if the former has a lien on the deposit with regard to his commission, the lien is ordinarily enforceable against a deposit when the deposit becomes the property of the seller. In certain circumstances on equitable considerations it may be possible to allow an auctioneer to recover his commission from the deposit even against the purchaser. In a case where the conduct of the auctioneer is found to be open to a certain amount of suspicion, he is not entitled to get his

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commission from the purchaser's deposit. (*Dar, J.*) KALKA PRASAD *v.* SARJU PRASAD. **1941 A.W.R. (H.C.) 365=1941 A.L.W. 1110.**

BANKER AND CUSTOMER—Banker failing to repay money paid into current account—If guilty of offence under S. 409, I. P. Code. *See* PENAL CODE, S. 409. **45 C.W.N. 1071.**

——*Liability of banker—Customer drawing hundis for amount to be applied to charity—Hundis handed over to* B *with authority to invest trust funds in his own business—Bank crediting amount to charity account—Subsequently bank closing that account and transferring trust funds to itself thereby cancelling overdraft account of* B *with it—*B *opening new account in his books in name of charity for amount of hundis—Liability of bank to restore monies to charity.*

A who had an account with a bank drew hundis for a certain amount which was to be applied to charity by him and *B*, and handed over the hundis to *B* authorising him to invest the trust funds in his own business. The hundis though payable to bearer were headed with the name of the charity concerned. The hundis were duly presented by *B* to the Bank, which acknowledging the receipt of money due thereunder credited the same to an account in the name of charity concerned though *B* had an account of his own with the Bank. Subsequently the Bank closed the account in the name of the charity and transferred the monies to the credit of *B's* account and then to itself thereby cancelling an overdraft of *B* who on the same date opened a new account in his business books in the name of the charity for the amount for which the hundis were given.

Held, that the bank in appropriating the charity monies to itself was taking a transfer of property which in equity it was bound to restore to the charity unless it could show that *B* had authority to use those funds to pay off his overdraft and that the appropriation by him was not a breach of trust.

Held, further, that the discharge of the overdraft on *B's* account did not come within the scope or intention of any authority given by *A* to *B* "to invest the trust funds in his own business" and therefore the Bank was liable to restore the monies to the charity in as much as it took the trust monies by a transaction with *B* which was a breach of trust on his part and with notice that it was a breach of trust. (*Sir George Rankin.*) O. RM. O.M. SP. FIRM *v.* P.L.N.K.M. NAGAPPA CHETTIAR. **67 I.A. 448=I.L.R. (1941) Mad. 175=I.L.R. (1941) Kar. (P.C.) 1=13 R.P.C 139=45 C.W.N. 385=7 B.R. 466=53 L.W. 522=73 C.L.J. 166=1941 A.L.W. 28=43 Bom.L.R. 440=1941 P.W.N. 299=192 I.C. 1=1941 O.L.R. 108=1941 M.W.N. 571=1941 Comp. C. 231=A.I.R. 1941 P.C. 1=(1941) 1 M.L.J. 393 (P.C.).**

——*Payee of cheque—If has cause of action against drawee banker.*

The payee of a cheque has as a rule no cause of action against the banker on which it is drawn. (*Panckridge, J.*) PUNJAB NATIONAL BANK, LTD. *v.* BANK OF BARODA, LTD. **1941 Comp. C. 242=A.I.R. 1941 Cal. 372.**

——*Post dated cheques—Certification — Power of manager of bank.*

A bank manager's authority to certify cheques generally includes as far as third parties are concerned, the power to certify imprudently or irregularly and hence as against an innocent third party the bank cannot plead their manager's failure to observe the instructions as to certification. (*Panckridge, J.*) PUNJAB NATIONAL BANK, LTD. *v.* BANK OF BARODA, LTD. **1941 Comp. C. 242=A.I.R. 1941 Cal. 372.**

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——Relationship—Fiduciary capacity—When arises—Moneys paid by party for the purpose of effecting specific transaction and credited in anamath account—If held in trust—Insolvency of Bank—Right to preferential payment. *See* 1940 Dig., Col. 43. OFFICIAL ASSIGNEE, MADRAS *v.* NATESAM PILLAI.

194 I.C 728 = 14 R.M. 41 = (1940) 1 M.L.J. 254.

BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 2 (8)—*Requirements not carried out—Effect.*

An extract was prepared from the ledger books of the bank. It was not a true copy and it was signed by the sub-accountant for the manager. The certificate read as follows: "We certify that this is a true extract from the books of the bank:"

Held, that it was not a certified copy as defined in S. 2 (8). (*Ba U and Shaw, JJ.*) FATIMA BEE BEE *v.* OFFICIAL TRUSTEE. **A I.R. 1941 Rang. 344.**

BAR COUNCILS ACT (XXXVIII OF 1926), S. 10—"Misconduct" — Meaning of—If reasonable cause within meaning of Cl. 10, Letters Patent (Bombay). *See* LETTERS PATENT (BOMBAY), CL. 10.

43 Bom. L.R. 250.

——**S. 10**—*Misconduct—Advocate writing letter to clerk of magistrate requesting him to expedite application filed by him—Propriety.*

It is manifest that it is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for an advocate, if there was any delay, is to bring the matter to the notice of the Magistrate himself. (*Leach, C.J., Krishnaswami Aiyongar and Happell, JJ.*) KALYANASUNDARAM AIYAR, *In re.* **I.L.R. (1941) Mad. 354 = 194 I.C. 587 = 14 R.M. 40 = 1941 A.W.R (Supp.) 7 (1) = 1941 A L.W. 106 = 42 Cr L.J. 602 = 1941 M.W.N. 56 = 53 L.W. 62 = 1941 O.W N 203 = 1941 O A. (Supp.) 100 = A.I.R. 1941 Mad. 230 = (1941) 1 M.L.J. 128 (F.B.).**

——**S. 10 (1) and (2)**—*Jurisdiction under—Scope and nature of—Principles governing the exercise of.*

The jurisdiction under the Bar Councils Act is one which ought to be circumspectly exercised. Though it is true that a deliberate fraud of a criminal character committed on a client must necessarily amount to professional misconduct in an advocate, it does not follow that the special tribunal created by the Bar Councils Act is one which ought necessarily to deal, at any rate in the first place, with every case in which an advocate is charged with committing a fraud or other crime in relation to his professional practice. A distinction should be drawn between misconduct which is of a purely professional character and misconduct which also lies within the ambit of the criminal law. In the former case the special tribunal contemplated by the Act is a proper one to deal exclusively with purely professional delinquencies. But in the latter class of misconduct the special tribunal under the Act will not in all cases usurp the functions of a Civil or Criminal Court and simple cases such as a charge of misappropriation should be dealt with under S. 10 only, after the complainant has taken such steps, if any, as he may be advised to take to establish either the guilt of the practitioner in question in a Criminal Court or his liability in a Civil Court. Should either of those proceedings be taken and terminate in the framing of the charges levelled by the complainant against the advocate in question, then it will be possible for him to approach the High Court again under the Bar Councils Act. (*Collister, Bajpai and Braund, JJ.*) *In the matter of* H, AN ADVOCATE, CAWNPUR.

I.L.R. (1941) All. 592 = 195 I.C. 116 =

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14 R.A. 19 = 1941 O.A. (Supp.) 512 = 1941 A.L.J. 390 = 1941 A.L.W. 684 = 42 Cr.L.J. 673 = 1941 A.Cr C. 165 = 1941 A.W.R. (H.C) 217 = 1941 O.W N. 841 = A.I.R. 1941 All. 280 (S.B.).

BENAMI—*Advancement—Presumption of—Applicability to India.*

There is no presumption of advancement in India. (*Yorke and Agarwal, JJ.*) SARDAR JAHAN *v* AFZAL BEGAM. **16 Luck. 341 = 192 I.C. 873 = 13 R.O. 415 = 1941 A.W.R. (C.C.) 93 = 1941 O.L R. 240 = 1941 A.L.W. 328 = 1941 O.W.N. 208 = 1941 O.A. 154 = A.I.R. 1941 Oudh 288.**

——*Burden of proof—Property in name of Mahomedan wife.*

Where property stands in the name of a Mahomedan wife, the burden lies on those who allege that it had been purchased *benami* for the benefit of her husband, to establish the correctness of their allegations. In such a case there is no presumption that the property belongs to her husband and is not the wife's property. (*Yorke and Agarwal, JJ.*) SARDAR JAHAN *v.* AFZAL BEGAM. **16 Luck. 341 = 192 I.C. 873 = 13 R.O. 415 = 1941 A W.R. (C.C.) 93 = 1941 O.L.R. 240 = 1941 A.L.W. 328 = 1941 O.W.N. 208 = 1941 O A. 154 = A.I.R. 1941 Oudh 288.**

——Burden of proof—Test to determine character of transaction—Circumstances to be considered—Doctrine of advancement—Applicability in India. *See* 1940 Dig., Col 45. SABHAGIBAI *v.* PERKASH CHAND.

191 I.C. 111 = 13 R.S. 125.

——*Presumption—Joint Hindu family—Bengal School—Conveyance in wife's name—Presumption.*

The law is well-settled that the apparent state of things must be presumed to be the real state of things, that is to say, if a conveyance stands in the name of one, he would be presumed to be the beneficial owner unless the contrary is shown by the other side. This presumption is modified by the further presumption which is peculiar to a Hindu joint family, namely, that if the person in whose name the conveyance stands is a coparcener of a Hindu joint family, the presumption would ordinarily be that the purchase was made in his name for the benefit of all the coparceners of the said Hindu joint family. But this further presumption does not apply where the conveyance stands in the name of a non-coparcener of a Hindu joint family, as for instance, wives, daughters-in-law, or sons in a Bengal family who are not coparceners in a family governed by the Bengal School. (*Mitter, J.*) SURENDRABALA DEBI *v.* BHUPENDRA KUMAR. **45 C.W.N. 177**

——*Presumption—Purchase in wife's name.*

The proposition that there is a presumption in India that a purchase made in the name of the wife is a purchase for her husband is somewhat wide. It ought to be stated in the form that as benami purchases in the name of wives are very frequent in India, slight evidence would be required to show that the purchase was made really for and on behalf of the husband, the wife being a mere *benamidar*. (*Mitter, J.*) SURENDRABALA DEBI *v.* BHUPENDRA KUMAR. **45 C.W.N. 177.**

BENGAL ACTS AND REGULATIONS.

Agricultural Debtors' Act (VII of 1936).
Alluvion and Diluvion Regulation (XI of 1825).
Cess Act (IX of 1880).
Court of Wards Act (IX of 1879).
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Food Adulteration Act (VI of 1919).
General Clauses Act (I of 1899).
Ghatwali Lands Regulation (XXIX of 1814).
Land Registration Act (VII of 1876).
Land Revenue Assessment (Resumed Lands) Regulation (II of 1819).
Land Revenue Sales Act (XI of 1859).
Licensed Warehouse and Fire Brigade Act (I of 1893).
Limitation Regulation II of 1805).
Local Self-Government Act (III of 1885).
Money-lenders Act (VII of 1933).
Moneyslenders Act (X of 1940).
Municipal Act (XV of 1932).
Non-agricultural Tenancy (Temporary Provisions) Act (IX of 1940).
Patni Regulation (VIII of 1819).
Permanent Settlement Regulation (I of 1793).
Public Demands Recovery Act (III of 1913).
Public Gambling Act (II of 1867).
Regulation XIX of 1793.
Regulation XXVII of 1793.
Regulation I of 1829.
Revenue Free Lands Regulation (VIII of 1800).
Rent Act (X of 1859).
Tenancy Act (VIII of 1885).
Village Local Self-Government Act (V of 1919).

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 2 (8)—*'Debt'—What constitutes.*

Per *Mukherjea, J.*—The definition or description of debt as given in S. 2 (8) of the Bengal Agricultural Debtors' Act has both a positive and negative aspect, and in order that a particular liability may rank as a debt, it is not enough that it is not included in any one of the exceptions mentioned in the section, it must fulfil the positive test of being essentially the liability of a debtor.

Per *Biswas, J.*—In order to constitute a debt under the Bengal Agricultural Debtors' Act, two conditions must be fulfilled, namely, (1) that there must be a present obligation to pay on the part of the debtor, and (2) that this obligation must be in respect of a liquidated claim or demand against him. Where there is uncertainty as to either of these points, uncertainty as to the obligation to pay, though not necessarily as to the date of payment, or uncertainty as to the quantum of the claim, there will be no debt at all. (*Mukherjea and Biswas, JJ.*) JABED SHEIKH *v.* TAHER MALLIK.
45 C.W.N. 519=73 C.L.J. 234=A.I.R. 1941 Cal. 639.

——**S. 2 (8)**—"Debt"—Liability of defendants under preliminary decree for mesne profits. *See* BENGAL AGRICULTURAL DEBTORS' ACT, S. 34. **45 C.W.N. 519.**

——**Ss. 2 (8) (iii) and 34**—Money decree for share of bhag produce—If debt—Execution of such decree—If can be stayed by notice. *See* 1940 Dig., Col. 46. HEMENDRA NATH RAY *v.* PURNA CHARAN.
I.L.R. (1941) 1 Cal. 132=13 R.C. 499=194 I.C. 367.

——**S. 2 (9)**—Adhiras bargadars and bhagdars—If debtors. *See* 1940 Dig., Col. 46 HEMENDRA NATH RAY *v.* PURNA CHARAN. **I.L.R. (1941) 1 Cal. 132=13 R.C. 499=194 I.C. 367.**

BENG. AGRIC. DEBTORS' ACT (1936), S. 33.

——**S. 8 (5)**—*Application dismissed by Board under S. 17 (1)—Second application to another Board—Maintainability.*

Where an application by a debtor to a Board is dismissed by it under S. 17 (1) of the Bengal Agricultural Debtors' Act, a second application by him to another Board relating to the same debt is not maintainable. (*Henderson, J.*) PURNA LALL NANDAN *v.* BHUPENDRA CHANDRA DUTT. **192 I.C. 544=13 R.C. 320=45 C.W.N. 82=A.I.R. 1941 Cal. 31.**

——**S. 8 (5)**—Second application relating to same debt after dismissal of first—Maintainability. *See* 1940 Dig., Col. 46. KALI SUNDAR ROY *v.* KHUM CHAND.
13 R.C. 244=191 I.C. 421.

——**S. 13 (2)**—*Order that debt is nil—Legality.*

It is impossible for a Board to pass an order under S. 13 (2) of the Bengal Agricultural Debtors' Act saying that the debt is nil. Such an order has no legal effect of any sort. (*Henderson, J.*) BIRAJA MOHAN BHATTACHARJEE *v.* ABANINATH. **45 C.W.N. 817.**

——**Ss. 13 (2) and 34**—*Order under S. 13 (2)—If terminates proceedings before Board—Effect of, on notice under S. 34.*

An order under S. 13 (2) of the Bengal Agricultural Debtors' Act does not terminate the proceedings before the Board. The position is that they continue to be pending before the Board and until they are disposed of in some way or other, notice issued to the Civil Court under S. 34 remains a good notice and the Civil Court cannot direct the execution proceedings to proceed. (*Henderson, J.*) BIRAJA MOHAN BHATTACHARJEE *v.* ABANINATH. **45 C.W.N. 817.**

——**S. 20 (as amended)**—*Retrospective effect.*

S. 20 of the Bengal Agricultural Debtors' Act as amended by the Amending Act VIII of 1940 is not attracted to a case where the application for settlement of debt was presented to a Board before the Amending Act came into force and the notice under S. 34 of the Act was also issued by the Board before that date. (*Mukherjea and Biswas, JJ.*) JABED SHEIKH *v.* TAHER MALLIK.
45 C.W.N. 519=73 C.L.J. 234=A.I.R. 1941 Cal. 639.

——**Ss. 27 (1) and 25 (1) (e)**—Award converting usufructuary into simple mortgage—Jurisdiction of Board. *See* 1940 Dig., Col. 47. FAZLUR RAHMAN SARKAR *v.* ATAL BEHARY GHOSE. **193 I.C. 254=13 R.C. 386=42 Cr.L.J. 359=A.I.R. 1941 Cal. 123.**

——**S. 33**—*Creditor failing to avail himself of certificate procedure to realise award amount—Suit to recover such amount—Maintainability.*

A creditor who fails to avail himself of the certificate procedure under S. 28 (1) of the Bengal Agricultural Debtors' Act within the prescribed period to recover the amount payable under an award, is entitled to sue for its recovery in a Civil Court subject only to the restrictions contained in S. 35 (3) of the Act. Such a suit is not barred by the provisions of S. 33 of the Act, as at the date of the suit there is no debt for which any amount is still "payable under the award" within the meaning of cl. (*b*) of that section. (*Mukherjea and Biswas, JJ.*) NALINI KANTA MAITY *v.* BROJOMOHAN PATRA.
45 C.W.N. 466=A.I.R. 1941 Cal. 361.

——**S. 33**—Suit for ejectment under S. 48 C of the Bengal Tenancy Act—If in respect of debt constituted by arrears of rent. *See* 1940 Dig., Col. 47. MYMENSINGH LOAN OFFICE, LTD. *v.* BASIR SHEIKH.
191 I.C. 225=13 R.C. 254.

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——S. 34—*"Barga" suit—Civil Court, if bound to stay.*

Obiter:—A Civil Court receiving a notice under S. 34 of the Bengal Agricultural Debtors' Act in a "barga" suit, is bound to stay the proceedings of that suit, and it is for the Board to decide whether a "barga" claim is or is not a debt within the meaning of the Act. (*Biswas and Roxburgh, JJ.*) SITARAM BHATTACHARJEE *v.* PANCHA MUCHI. **46 C.W.N. 14.**

——S. 34—*Decree for ejectment under S. 66 (2) of the Bengal Tenancy Act—Application by tenant to Board within time specified in decree for paying arrears of rent—Notice to executing Court—Court, if can stay execution in respect of rent and proceed with ejectment.*

Where a decree for ejectment is passed under S. 66 (2) of the Bengal Tenancy Act but the tenant instead of paying the arrears of rent applied to the Debt Settlement Board within the time specified in the decree for its payment, and the Board thereupon issued a notice under S. 34 of the Bengal Agricultural Debtors' Act to the executing Court, that Court is bound to stay the whole execution case. It cannot merely stay the execution of the actual decree for rent and proceed with the execution of the decree for ejectment. (*Henderson, J.*) KASHI NATH *v.* SONAULLA. **45 C.W.N. 908.**

——Ss. 34 and 20—*Ejectment suit—Real question involved one as to existence of mortgage debt—Suit, if must be stayed.*

In an ejectment suit the defendant denied that she was plaintiff's tenant and alleged the document on which the plaintiff relied to prove relationship of landlord and tenant as showing no more than that her husband had borrowed money from the plaintiff upon a mortgage of the house which he subsequently sold to her and from which the plaintiff sought to evict her,

Held, that the real question in the suit was as to the existence of the mortgage debt and, inasmuch as under S. 20 it could be decided by the Board alone, the suit ought to have been stayed under S. 34. (*Khundkar and Lodge, JJ.*) MST. MASIHA *v.* ULATANNESSA BIBI. **A I.R. 1941 Cal. 222.**

——Ss. 34 and 35—Failure of Board to issue notice—Execution sale—Validity of—Setting aside of sale—Revival of debt. *See* 1940 Dig., Col. 48. SHEIKH TAMIZALI *v.* MASARALI BHUIYA. **193 I.C. 451 = 13 R.C. 439 = A.I.R. 1941 Cal. 58.**

——S. 34—*Joint decree against several judgment-debtors—Some alone applying to the Board—Entire proceedings, if must be stayed.*

Where some of the parties to a proceeding who were jointly liable for a debt applied to a Debt Settlement Board for the settlement of their debt and the Board issued a notice under S. 34 to the Court to stay proceedings, the proceedings so far as they related to the applicants before the Board only must be stayed and they should continue so far as the other parties are concerned. 43 C.W.N. 318, Foll. (*Derbyshire, C.J. and Mukherjea, J.*) UPENDRA NARAYAN *v.* SHIB CHANDRA. **A.I.R. 1941 Cal. 116.**

——S. 34—*Joint mortgage decree against three judgment-debtors—Two of them applying to Board and obtaining stay—Decree-holder proceeding against non-applicant judgment-debtor—Liability of latter for whole debt.*

A joint mortgage deeree was passed against three judgment-debtors. Two of them applied to the Debt Settlement Board for settlement of debt and the Board issued a notice under S. 34. The decree-holder thereupon proceeded against the judgment-debtor who had not applied to the Board. The decree-holder neither released any one of the judgment-debtors nor had purchased himself any portion of the mortgaged property.

Held, that the judgment-debtor who had not applied was liable for the whole debt and not for a proportionate share only and no question of apportionment of the debt or piecemeal redemption could probably arise. (*Derbyshire, C.J. and Mukherjea, J.*) UPENDRA NARAYAN *v.* SHIB CHANDRA. **A.I.R. 1941 Cal. 116.**

——Ss. 34, 20 and 2 (8)—*Liability incurred before and after 1st January, 1940, included in application to Board—Suit in respect of same liability—Partial stay—Permissibility.*

Where the debtor has included a liability incurred partly before and partly after 1st of January, 1940, in his application to the Board under S. 8 of the Bengal Agricultural Debtors' Act, the Board itself is the only authority which has jurisdiction to decide whether any part of the liability is a debt or not. A Civil Court in which a suit in respect of the same liability is pending, is bound to stay the entire suit on receipt of a notice under S. 34 of the Act. A question of partial stay of the suit can arise only if the claim for the period subsequent to the 1st of January, 1940, is not included in the application before the Board, or if the Board itself decides under S. 20 that this portion of the claim is not a debt within the definition in S. 2 (8) of the Act and that the Board cannot, therefore, deal with it. (*Biswas and Roxburgh, JJ.*) SITARAM BHATTACHARJEE *v.* PANGHA MUCHI. **46 C.W.N. 14.**

——S. 34—*Notice for stay—Amount of debt—Power of Court to determine.*

Under S. 18 (1) of the Bengal Agricultural Debtors' Act, it is the function of the Board not of the Civil Court to determine the amount of debt. On receipt of a notice under S. 34 of the Act, the Court should stay the suit until the Board decides the amount of the debt and makes an award in respect of it. (*Derbyshire, C.J. and Mukherjea, J.*) SRIS CHANDRA SEN *v.* MAHIM CHANDRA. **45 C.W.N. 194 = A.I.R. 1941 Cal. 256.**

——S. 34—Notice for stay of execution—Validity—Notice omitting one decree-holder and adding stranger as judgment-debtor. *See* 1940 Dig., Col. 48. PYARI MOHAN MANJHI *v.* HASHEM ALI KHAN. **194 I.C. 317 = 13 R.C. 497 = A.I.R. 1941 Cal. 251.**

——S. 34—*Order staying execution—Appeal—Revision.*

An order staying execution proceedings in consequence of a notice under S. 34 is appealable to the District Court. But the failure on the part of a party to appeal to the District Court does not preclude the High Court from interfering in revision under S. 115, C. P. Code. (*Henderson, J.*) GEO MILLER & CO., LTD. *v.* PABNA MOTOR SERVICE. **45 C.W.N. 922 = A.I.R. 1941 Cal. 706.**

——S. 34—*Order staying proceedings—Appeal.*

It is doubtful whether an order staying proceedings would amount to a decree and would be appealable as such. It is difficult to say that an order adjourning a case conclusively determines anything. (*Henderson, J.*)

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PURNA LALL NANDAN *v.* BHUPENDRA CHANDRA DUTT. **192 I.C. 544=13 R.C. 320=45 C.W.N. 82=A.I.R. 1941 Cal. 31.**

——**S. 34**—Order under S. 13 (2)—Effect on notice under S. 34. *See* BENGAL AGRICULTURAL DEBTORS' ACT, SS. 13 (2) AND 34. **45 C.W.N. 817.**

——**S. 34**—*Proceeding for ascertainment of mesne profits under O. 20, R. 12, C. P. Code—If one in respect of 'debt'—Such proceeding, if must be stayed on receipt of notice.*

A Civil Court receiving a notice from a Board under S. 34 of the Bengal Agricultural Debtors' Act is not bound to stay a proceeding for ascertainment of mesne profits under O. 20, R. 12, C. P. Code, as such proceeding is not one in respect of a "debt." A preliminary decree for mesne profits in a title suit must be taken to have only determined that the defendants were trespassers and hence liable to pay mesne profits to the plaintiff. It is only when a final decree for a specified sum is passed against them as a result of an enquiry under O. 20, R. 12, C. P. Code, that they would become debtors in law, and their liability to pay the sum fixed by the judgment would rank as a debt. (*Mukherjea and Biswas, JJ.*) JABED SHEIKH *v.* TAHER MALLIK. **45 C.W.N. 519=73 C.L.J. 234=A.I.R. 1941 Cal. 639.**

——**S. 34**—*Power of Board to issue notice—Review application pending before it.*

S. 34 of the Bengal Agricultural Debtors' Act confers no power on a Debt Settlement Board to issue a notice for stay when an application for review is made to it. Accordingly if a Board issues a notice under this section in such a case, it will be acting without jurisdiction, and the Civil Court will be competent to ignore it. (*Biswas and Roxburgh, JJ.*) LAKSHMI PRIYA *v.* SOUDAMINI. **45 C.W.N. 345.**

——**(as amended by Act VIII of 1940), Ss. 34, 20, 8 and 2 (8)**—*Rent suit for arrears both anterior and subsequent to 1st January, 1940—Application by tenant to Board mentioning entire claim as one item of debt—Notice by Board—Partial stay of suit—Permissibility.*

During the pendency of a rent suit for arrears' both anterior and subsequent to 1st January, 1940, the tenant applied to the Debt Settlement Board under S. 8 including in the application claims for both the periods and mentioning the entire claim in rent suit as one item of debt. On receipt of notice from the Board under S. 34 the question was whether the suit could be partially stayed since arrears subsequent to 1st January, 1940, were not "debt" within the meaning of the amended Act,

Held, that under S. 20 the Debt Settlement Board had the exclusive jurisdiction to decide whether the liability was a debt or not and until the matter was decided by the Board, the Civil Court had nothing further to do except to stay all further proceedings in the suit under S. 34. The question of partial stay of suit could arise only, if the claim for the period subsequent to 1st January, 1940, was not before the Debt Settlement Board at all, or if the latter expressly decided not to deal with that portion of the claim as not being a debt within the meaning of the Act. (*Mukherjea and Biswas, JJ.*) MANAGER, NATOR RAJ WARD'S ESTATE *v.* GEDA BEWA. **46 C.W.N. 12=A.I.R. 1941 Cal. 658.**

——**S. 34**—*Suit by Bank stayed on notice from Board—Bank becoming scheduled bank before award—Application for trial of suit made after award—Jurisdiction of Court.*

A suit filed by a Bank for the recovery of a mortgage debt was stayed by the Court on receipt of a notice from the Board under S.34 of the Bengal Agricultural Debtors' Act. The Bank was included in the second schedule to the Reserve Bank of India Act before the Board made an award, with the result that the claim in the suit ceased to be a debt within the meaning of the Bengal Agricultural Debtors' Act. The Bank applied to the Court for the trial of the suit after the award was made. The Court held that it had no jurisdiction to question the action of the Board.

Held, (*i*) that as soon as the debt due to the Bank ceased to be a debt within the meaning of the Bengal Agricultural Debtors' Act, it was the duty of the Court to proceed with the suit without any application being made to that effect, and that the delay in making the application did not affect its jurisdiction; (*ii*) that the award of the Board was entirely without jurisdiction and the jurisdiction of the Court could not be taken away by a proceeding which had no legal effect; (*iii*) that the Court had jurisdiction to decide whether a certain claim was a debt within the meaning of the Bengal Agricultural Debtors' Act. (*Henderson, J.*) NEW STANDARD BANK, LTD. *v.* MUNSAR ALI. **I.L.R. (1941) 2 Cal. 68=196 I.C. 266=14 R.C. 203=45 C.W.N. 578=A.I.R. 1941 Cal. 442.**

BENGAL CESS ACT (1880),

——**(as amended by Act VIII of 1940), Ss. 34, 35**—*Applicability—Presidency Small Cause Court's decree—Notice from Board—If can operate to stay execution proceedings.*

A Presidency Small Cause Court's decree is not a decree of a Civil Court within the meaning of the Act. Consequently a notice under S. 34 cannot operate to stay proceedings in execution of that decree pending in the Munsif's Court to which the decree was transferred for execution. The amendment of S. 20 of the Act makes no difference. (*Henderson, J.*) GEO MILLER & CO., LTD. *v.* PABNA MOTOR SERVICE. **45 C.W.N. 922=A.I.R. 1941 Cal. 706.**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 4—Right under—Absence of offer by patnidar to pay additional rent for increment to tenure—Effect of. *See* 1940 Dig., Col 50. MIDNAPORE ZEMINDARY CO., LTD. *v.* BIJOY SINGH DUDHURIA. **193 I.C. 578=13 R.C. 420=A.I.R. 1941 Cal. 1.**

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847), S. 6—Churs *formed out of river bed since decennial settlement—Liability to assessment.*

Churs formed out of the bed of navigable or non-navigable rivers since the decennial settlement are *prima facie* liable to be assessed to revenue. To negative the claim of the Crown the zamindar must prove that (1) the lands were actually in existence at the time of the decennial settlement and (2) specifically included in the estate as settled. For the purpose of the first element the bed of a flowing river, navigable or non-navigable, passing through a permanently settled estate cannot be regarded as waste land covered with water and placed in the same category as waste lands covered with jungly weeds. For the purpose of second element the fact that the river bed from which the *chur* had been thrown up was at the date of the decennial settlement the property of the zamindar or that that settlement was imposed upon the zamindari as a whole is not sufficient. (*Mitter and Khundkar, JJ.*) SECRETARY OF STATE *v.* MIDNAPORE ZAMINDARY CO., LTD. **197 I.C. 5=A.I.R. 1941 Cal. 520.**

BENGAL CESS ACT (IX OF 1880), S. 20—*Construction and scope—Bar under—If applies to period before filing of cess return.*

On a consideration of the provisions of the Bengal Cess Act, it is clear that the statute aims at the obtaining by the Board of Revenue of correct particulars of the

BENGAL CESS ACT (1880), S. 99.

income from the lands for the cess year, and has nothing to do with the income which was being received for such lands before the valuation or re-valuation as the case may be. The statute has not taken away the right to recover rent or arrears of rent for the period before the return was filed. The landlord cannot be prevented from recovering the rent for the period covered by the old cess return at a rate higher than that mentioned in the new cess return. The penalty for not making a return or not giving a correct return can only apply to the recovery of rent for the period after the return is filed. The bar imposed by S. 20 of the Bengal Cess Act will not therefore prevent a landlord from realising rent at a higher rate than that mentioned in the cess return for the period before the cess return was filed. (*Harries, C.J. and Manohar Lall, J.*) SAMANTA RADHA PRASANNA DAS *v.* BARENDRA KRISHNA DAS.
20 Pat 527 = A.I.R. 1941 Pat. 617.

——S. 99—*Attachment under—Suit by proprietor for rent—If barred—Procedure.*

An attachment of the estate by the Collector under S. 99 of the Cess Act does not bar the filing of a suit for rent by the proprietor against the tenant. But the Court is not competent to proceed with the suit and pass a decree so long as the attachment is not removed. The necessary consequence is that the hearing of the suit must have to remain stayed during this period. This procedure would, on the one hand, enable the Court to pass a proper decree after giving due credit to the tenant for any amount that he might have had to pay to the Collector during this period and on the other hand it will avoid the consequence which must necessarily arise if a simultaneous legal proceeding can be instituted by the Collector against the same tenant for recovery of the same arrears of rent. (*Nasim Ali and Mukherjea, JJ.*) MANINDRA CHANDRA ROY *v.* GOPI BALLAV SEN. 195 I.C. 691 = 14 R C. 123 = 45 C.W.N. 44 = A.I.R. 1941 Cal. 353

——Ss. 100 and 108 (b)—"*Officers of Crown*"—*Meaning of—Collector acting under S.* 100.

Under the present administration at least all the senior 'officers of Government' are 'officers of the Crown' as that expression is understood in this country. The Collector or person invested with the powers of a Collector under S. 100 performs the duties cast upon him by the Cess Act as Collector, that is, as an officer of the Crown and not as an agent of the local authorities (the District Boards). (*Harries, C J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. 20 Pat. 573 = 194 I C. 663 = 14 R.P. 17 = 7 B.R. 818 = 1941 I T R 386 = 4 F.L.J. (H.C.) 178 = 22 Pat.L.T. 863 = A.I R. 1941 Pat. 306 (S.B.).

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 10 C—"*Civil Court*"—*Meaning of—If includes High Court.*

The words "Civil Court" in S. 10-C of the Bengal Court of Wards Act mean the Court of the District Judge, the Court of the Additional Judge, the Court of the Subordinate Judge and the Court of the Munsif. They do not include the High Court. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) RAI ANATH NATH BOSE *v.* SRIS CHANDRA NANDY. 196 I.C. 322 = 14 R.C. 221 = 73 C.L J. 277 = 45 C.W N. 617 = A.I R. 1941 Cal. 529 (S B.).

——S. 59-A—Manager of Estate under Court of Wards — Public servant. *See* 1940 Dig., Col. 52. ANGELO *v.* KANDAN MANJHI. 21 Pat L.T. 1085.

——S. 60-A—Applicability after relinquishment of estate by Court of Wards. *See* 1940 Dig., Col. 52.

BENG. EST. PARTITION ACT (1897), S. 119.

LACHMI NARAYAN *v.* MAHOMED MEHDI.
20 Pat. 223 = 192 I.C. 387 = 13 R P. 455 = 7 B.R. 385 = A.I R. 1941 Pat. 70.

——S. 60-A—"At any time"—Meaning of—If confined to period of ward's lifetime. *See* 1940 Dig., Col. 52. LACHMI NARAYAN *v.* MAHOMED MEHDI.
20 Pat. 223 = 192 I.C. 387 = 13 R.P. 455 = 7 B.R. 385 = A.I.R. 1941 Pat. 70.

——Ss. 69 and 70—Rule 115—If *ultra vires*. *See* 1940 Dig., Col. 52. ANGELO *v.* KANDAN MANJHI.
21 Pat.L.T. 1085.

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 99—Applicability — Co-sharers — Bakasht lands—Some co sharers placed in possession for convenience of management—Settlement of raiyats by latter in course of management—Acquisition of occupancy rights—Subsequent partition—Lands allotted by partition to co-sharer subject to tenancy—Right to eject tenants. *See* 1940 Dig., Col. 53. RAJENDRA NARAYAN *v.* HARGOBIND CHOUDHURY. 192 I.C. 508 = 13 R P. 494 = 7 B.R. 480 = A.I.R. 1941 Pat. 19.

——S. 99—*Mortgage of share by co-sharers—Subsequent partition—Mortgagor allotted other properties in lieu of mortgaged property—Suit on mortgage ignoring partition—Sale—Obstruction to delivery—Remedy of mortgagee—Application for amendment of all proceedings and documents—Competency—Dispute as to identity of property.*

Where a partition follows a mortgage and other properties are allotted to the mortgagor in lieu of the mortgaged property, there can be no doubt that the mortgagee can proceed against the substituted security and can bring to sale the property which represents the property originally mortgaged. When the mortgagee does not proceed against the substituted security but ignoring the partition proceeds against the property originally mortgaged and bring the same to sale and difficulties arise after the whole proceedings are over in obtaining delivery of possession, he may be permitted to amend the plaint, preliminary decree and final decree, but no further amendment can justifiably be made, *i.e.*, no amendment can be made in any of the relevant documents and proceedings following the final decree, such as the execution petition, sale proclamation and the sale certificate. If an amendment were allowed in the latter, the result would be that property will have been bought and sold which has never been even put up for sale. After such amendment fresh steps will have to be taken to bring the substituted property to sale. But when there is a serious dispute as to what was the subject matter of the mortgage, proceedings for amendment of the relevant documents in the case are not appropriate. A question involving the identity of the property mortgaged cannot be dealt with on an application to amend. A case of misdescription can be dealt with by amending the plaint, and decree, but not a dispute as to the identity of the properties which are the subject-matter of the mortgage. (*Harries, C.J. and Fazl Ali, J.*) SHYAMAKANT LAL *v* RAM LAL.
193 I.C. 748 = 13 R P. 617 = 7 B.R. 636 = 22 Pat L.T. 267 = A.I.R. 1941 Pat 399.

——S. 99—Scope—If affects accrual of occupancy rights under Bihar Tenancy Act—Settlement of raiyat by co-sharer in possession on behalf of all co-sharers—Effect of—Occupancy rights—Accrual of—If effective after partition. *See* 1940 Dig., Col. 54. RAJENDRA NARAYAN *v.* HARGOBIND CHOUDHURY. 192 I.C. 508 = 13 R.P. 494 = 7 B.R. 480 = A.I.R. 1941 Pat. 19.

——S. 119—Orders not liable to be contested. *See* 1940 Dig., Col. 54. KUNJBEHARI RAI *v.* BUNI SINHA.
A.I.R. 1941 Pat. 50.

BENGAL EXCISE ACT (V OF 1919), S. 83 (b)—*Cognisance of offence taken on challan submitted by Inspector of Police—Latter acting on letter from Collector of Excise—Validity of proceedings.*

Where a Magistrate took cognisance of an offence under the Excise Act on a challan submitted by an Inspector of Police acting on a letter written by the Collector of Excise sanctioning the prosecution,

Held, that even assuming that the letter amounted in itself to a complaint or report as described in S. 83 (*b*) of the Excise Act, the Magistrate did not take cognisance on such complaint or report, that the police officer who filed the challan of which cognisance was taken did not answer to the description required by S. 83, namely, "an Excise Officer authorised by the Collector in this behalf" and that in the circumstances the entire proceedings were void. (*Roxburgh, J.*) FAKIR MAHOMED *v.* EMPEROR. **194 I.C. 777=14 R.C. 18=72 C.L.J. 611=42 Cr.L.J. 619=45 C.W.N. 112=A.I.R. 1941 Cal. 246.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 6—*Ghee consigned to firm seized at railway station and found adulterated—Conviction of consignee—Sustainability.*

Two tins of ghee consigned to a firm were seized at the railway station and found adulterated. The accused was found to be a partner in the firm and convicted under S. 6.

Held, that the conviction could not be sustained inasmuch as the accused could not be said to be storing ghee for sale at the railway station. (*Henderson, J.*) CHAIRMAN, DISTRICT BOARD *v.* SREENIBASH. **A.I.R. 1941 Cal. 491.**

——**S. 6 (1) and (4)**—Consignee taking delivery of consignment of oil at railway station—Oil found to be adulterated from sample taken at railway premises—Presumption, if arises. *See* 1940 Dig., Col. 55. HARI RAKSHAK DUTT *v.* CHAIRMAN, DISTRICT BOARD, BIRBHUM. **194 I.C. 136=13 R.C. 492=42 Cr.L.J. 522=72 C.L.J. 531=A.I.R. 1941 Cal. 150.**

——**S. 6 (3)**—Want of opportunity to examine nature of goods—If valid defence. *See* 1940 Dig., Col. 55. HARI RAKSHAK DUTT *v.* CHAIRMAN, DISTRICT BOARD, BIRBHUM. **194 I.C. 136=13 R.C. 492=42 Cr.L.J. 522=72 C.L.J. 531=A.I.R. 1941 Cal. 150.**

BENGAL GENERAL CLAUSES ACT (I OF 1899, S. 8—Scope and applicability. *See* 1940 Dig., Col. 56. DHIRENDRA NATH ROY *v.* IJJETALI MIAH. **13 R.C. 514=194 I.C. 511.**

BENGAL GHATWALI LANDS REGULATION (XXIX OF 1814)—*Execution of decree of Civil Court against* ghatwal—*Attachment of "surplus profits"—Allowance to* ghatwal—*Power to fix—Allowance fixed by executive authority—If binding on executing Court.*

It is well-settled that the surplus profits of a *ghatwali* tenure in the Santhal Parganas, governed by the Bengal Regulation XXIX of 1814, which may be left after the payment of Government revenue, the wages of the chowkidars employed by the *ghatwal* and "other like charges", are available for the satisfaction of decrees obtained against the *ghatwal*. Whatever is left over to the *ghatwal* out of the income of his tenure after the payment of the Government revenue, etc., is his personal property and as such liable to be seized in execution by holders of decree against the *ghatwal*. The question of what would be the surplus profits available to the decree-holders must be determined by the executing Court. The *ghatwal's* maintenance allowance and the personal expenses cannot be regarded as coming within the term "*other like charges*," though the Court executing the decree must make provision for the maintenance and other necessary expenses of the *ghatwal* judgment-debtor. His maintenance allowance cannot be regarded as salary to be fixed by the executive authorities. When the surplus profits are under attachment by the Civil Court, it is that Court which has to determine the amount of the surplus profits available to the decree-holder and for that purpose to fix the allowance to be paid to the *ghatwal* judgment-debtor. Any allowance which may have been fixed by the executive authorities previously cannot be binding on the Civil Court executing a decree against the *ghatwal*. (*Chatterji, J.*) HAR KISHORE PRASAD SINHA *v.* LOKNATH PRASAD DHANDHANIA. **194 I.C. 234=13 R.P. 686=7 B.R. 734=A.I.R. 1941 Pat. 502.**

BENGAL LAND REGISTRATION ACT (VII OF 1876)—*Jurisdiction—Question of priority as between two Court sales—Jurisdiction of Land Registration Court to decide—Possession based on Court sale—Finding of—If conclusive in revision.*

It is not the province of the Land Registration Court to decide finally a question of priority as between two Court sales in a case where each of the rival claimants relies on a Court sale and delivery. A finding of possession on a Court sale has to be recognised, and a finding of fact regarding possession cannot be lightly interfered with in revision. (*Middleton.*) JADUNANDAN SINGH *v.* HARKISHUN SAHAI. **7 B.R. 889=1941 P.W.N. 475.**

——*Mortgage—Refusal to register deed on the ground of minority of executant—Subsequent agreement by guardian of executant declaring that he executed as guardian—If validates deed in respect of minor's interest—Mortgagee's right to be recorded.*

Where a mortgage deed has been refused registration under the Registration Act on the ground that the executant was a minor, there is no valid registered deed operating as a transfer. A subsequent agreement by the guardian of the minor executant declaring that he executed the deed not only on his own behalf but also as guardian of the minor executant cannot validate the mortgage so as to entitle the mortgagee to have his name recorded as a mortgagee under the Land Registration Act in respect of the minor's share. The order refusing registration, if not appealed from, becomes final and cannot be evaded by the subsequent agreement by the guardian of the minor executant. Where there is no effective change of title, there is no use of relying on possession, because possession must be in accordance with some title. Nor can the principles of equity be invoked to evade statutory requirements; equity cannot go contrary to statutory law. (*Middleton.*) RAMESHWAR NATH CHAUBEY *v.* RAM CHETAN RAI. **1941 P.W.N 472.**

——*Possession not based on title—If sufficient to support—Application for registration.*

Mere possession not based on any title will not justify registration under the Land Registration Act of the name of a person alleged to be in possession in a possibly unlawful way. Possession must be shown to be in accordance with a *prima facie* title. (*Middleton.*) JAGDISHWARI PRASAD *v.* SHAM PRAKASH NARAIN. **7 B.R. 894.**

——*Proceedings under—Scope—Application for registration—What has to be proved—Order of Civil Court for registration of person not proving possession—If binding on Revenue Court.*

An application for registration under the Land Registration Act must prove some title or at least *bona fide* claim, and also that he is in possession in accordance with such a title or claim. Even if the Civil Court has directed the Revenue Court to register the name of a person who has not proved his possession, the Revenue

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Court must respectfully decline to do so. The fact that the objector has no *locus standi* to object and has not himself applied for registration is irrelevant when the applicant not being in possession is not entitled to registration whether there is any objection or not. (*Middleton.*) RADHA KRISHNA *v.* HARI DAS.

8 B. R. 37.

——*Revision—Concurrent finding as to possession—Interference by Board of Revenue.*

Under the Land Registration Act, when there are concurrent findings by the lower Courts that the objector's evidence of possession is better than that of the applicant, the Board will not interfere with the findings of fact about possession in the absence of sufficient reasons. (*Middleton.*) JAGDISHWARI PRASAD *v.* SHAM PRAKASH NARAIN. **7 B.R. 894.**

——**Ss. 7 and 8** *-Scope—Possession of woman claiming as heir to last recorded proprietor—If can be recorded.*

Ss. 7 and 8 of the Bengal Land Registration Act provide for the recording of the names of proprietors, managers, and mortgagees in respect of revenue paying land, but it does not follow that every person in possession has the right to be recorded. There are forms of possession for the record of which the Act makes no provision. The possession of a woman who claims as heir to the last recorded proprietor is not of a kind which can be recorded under the Act and she does not come under any of the categories mentioned in the Act. (*Middleton.*) BALLA SINGH *v.* JHALKO KUER.

7 B.R. 513= 1941 P.W.N. 458.

——**S. 55**—*Scope—Duty of Land Registration Officer—Possession of Gotra of deceased—If to be disregarded.*

The best evidence of possession in favour of a Malik's right is the collection of rent and the payment of revenue. What the Land Registration Officer has to do under the Land Registration Act is to find and decide the *factum* of possession The possession of Gotra of the deceased proprietor, if proved, is not the possession of a trespasser, but is attributable to a *bona fide* claim. Such possession cannot therefore be disregarded. (*Middleton.*) BIRANJ KUER *v.* DWARIKA SINGH. **1941 P.W.N. 426.**

——**S. 78**—Suit for rent by assignee of rent—Assignee not a registered proprietor—Suit, if barred. *See* BIHAR TENANCY ACT, S. 60. **196 I.C. 552.**

——**S. 85**—*Mistake in Register D—Commissioner directing steps to be taken under S. 85—Land Registration Deputy Collector ordering correction—If* ultra vires.

Where there is a mistake of long standing in Register D, and the Commissioner directs that if a mistake needing correction exists in the Register, he should be moved for its correction under S. 85 of the Land Registration Act, the Land Registration Deputy Collector cannot disregard it and pass an order of correction. Such an order is *ultra vires.* (*Middleton.*) KESHWAR SAHU *v.* MST. GAMBHIRAN.

7 B.R. 996 (1).

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819), S 31—"*Lands*"—*Meaning of.*

The word "lands" in S. 31 is used in its ordinary meaning and has no reference to what is treated as land on the basis of a fiction of law. The word "land" consequently does not cover the bed of a flowing river navigable or non-navigable. (*Mitter and Khundkar, JJ.*) SECRETARY OF STATE *v.* MIDNAPORE ZAMINDARY CO., LTD. **197 I.C. 5 = A.I.R. 1941 Cal. 520.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 3—*Notification fixing three* kists *for estates whose annual revenue is less than Rs.* 100—*If applies to separate accounts.*

The general notification of the Board of Revenue under S. 3 of Act XI of 1859 that in respect of estates the annual revenue of which was less than Rs. 100 the arrears are to be cleared up by three instead of four *kists*, does not apply to separate accounts but to entire estates. (*Mitter and Khundkar, JJ.*) MANMATHA NATH MUKHERJEE *v.* ANANGA KUMAR.

I.L.R. (1941) 2 Cal. 353 = 74 C.L.J. 131 = 45 C.W.N. 890 = A.I.R. 1941 Cal. 702.

——**S. 6**—*Notice of sale—Rules and forms prescribed by Board of Revenue—Nature of—Non-compliance with them—Effect of.*

The special rules issued and the special forms prescribed by the Board of Revenue for drawing up the notice of sale under S. 6 of Act XI of 1859 have no statutory force, not being framed under any authority conferred by the Act. They are in the nature of administrative directions to Government's own officers. The omission of the particulars therein specified will not vitiate the notice, if the particulars given are sufficient to identify the estate or share of an estate to be sold and give prospective buyers full information as to what they are invited to bid for. (*Edgley and Biswas, JJ.*) SAKINA KHATOON *v.* KHIROD CHANDRA MANNA.

74 C.L.J. 346 = 46 C.W.N. 73.

——**S. 6**—*Sufficiency of notice—Test—Non-mention of* mouza *or* Sadar Jama—*If fatal—One of two defaulting shares in arrear for two kists and the other for only one—One latest date of payment given in both cases—Notice, if sufficient.*

The test of a valid notice under S. 6 of the Bengal Land Revenue Sales Act is whether the specification of the estate or share of an estate therein is sufficiently definite to enable likely purchasers to know exactly what is going to be sold and to ensure thereby reasonable competition. No hard and fast rule can be laid down as to what will constitute such sufficiency. It must depend upon the particular facts of each case. The non-mention of the *mouza* in the notice of sale is not a fatal omission. If the property advertised for sale is not the whole estate but only certain shares which are correctly specified, the omission of the *Sadar Jama* of the whole estate is also not fatal. Where one of the two defaulting shares is in arrear for two kists and the other share for only one, and only one latest date of payment is given in both cases but the unpaid amounts would become "arrears of revenue" within the meaning of S. 2 of the Act before that date, the information given is enough to satisfy intending purchasers that the sale is going to be held on a proper date. (*Edgley and Biswas, JJ.*) SAKINA KHATOON *v.* KHIROD CHANDRA MANNA.

74 C.L.J. 346 = 46 C.W.N. 73.

——**S. 10**—*Opening of separate account—Effect of—Liability to pay* kist *for period prior to separation—If remains joint with larger account.*

The concluding sentence of S. 10 of Act XI of 1859 does not directly contemplate the separation of liability to pay according to the *dowl kistibandi* but the separation of liability for sale in default of payment according to the *kists* notified under S. 3. The liability for sale of the separate account is separated from the liability for sale of other separate accounts or of the residuary that is left after the opening of the separate accounts. It is wrong to state that if a separate account is carved out of a larger account, the liability of both the accounts to pay the kists for the period prior to the date on which the Collector records his sanction to the opening of the separate account remains joint. After the separate account is opened out of the larger account, the larger

BENG. LAND REV. SALES ACT (1859), S. 13.

account has no existence for revenue administration and cannot, obviously, be put up to sale. (*Mitter and Khundkar, JJ.*) MANMATHA NATH *v.* ANANGA KUMAR. **I.L.R. (1941) 2 Cal. 353 = 74 C.L.J. 131 = 45 C.W.N. 890 = A.I.R. 1941 Cal. 702.**

——**Ss. 13 and 14**—*Joint sale of separate accounts—Legality.*

A joint sale of two or more defaulting separate accounts of an estate is not warranted by the provisions of Act XI of 1859 and is illegal. S. 14 of the Act points to a separate sale as the proper procedure. The rule laid down by the Board of Revenue in Note 8 to S. 13 of the Act in the Government Mannal directing a joint sale is not a statutory rule, and can have no legal effect. (*Edgley and Biswas, JJ.*) SAKINA KHATOON *v.* KHIROD CHANDRA MANNA. **74 C.L.J. 346 = 46 C.W.N. 73.**

——**S. 14**—*Declaration for sale of entire estate—When may or may not be made.*

Under S. 14 of Act XI of 1859 the Collector is not bound to make a declaration for the sale of the entire estate in every case where the bid for one defaulting separate account fails to realise the full amount of arrear due thereupon, without previously putting up the other separate accounts which are also in arrears and have been advertised for sale. He can do so only if he finds that even if the other sales are held and the proceeds are sufficient in each case to cover the amount due upon the account sold, the estate as a whole will still be left in arrear. If on the other hand the arrears due upon one or more of the separate accounts advertised for sale, if realised, will be sufficient to wipe off the demand against the estate as a whole, the collector is bound to proceed with the sales, of the separate accounts *seriatim*, stopping only when he finds that by appropriating the purchase money of each account sold to the liquidation of its own arrears, the estate as a whole is freed from its liability for arrears of revenue in the general account. (*Edgley and Biswas, JJ.*) SAKINA KHATOON *v.* KHIROD CHANDRA MANNA. **74 C.L.J. 346 = 46 C.W.N. 73.**

——**S. 14**—*Sale of entire estate—Closing of separate accounts—Blending of arrears for periods prior and subsequent to abortive sale—Legality.*

The Collector holding the sale of an entire estate under S. 14 of Act XI of 1859 can close the separate accounts. The blending by him of the two amounts of arrears—one for the period anterior and the other subsequent to the abortive sale of the separate account—is not illegal. (*Mitter and Khundkar, JJ.*) MANMATHA NATH *v.* ANANGA KUMAR.
I.L.R. (1941) 2 Cal. 353 = 74 C.L.J. 131 = 45 C.W.N. 890 = A.I.R. 1941 Cal. 702.

——**S. 14**—*Sale proclamation—Entry of arrears in wrong column—Validity of sale.*

The entry in the sale proclamation of the amount of arrears in a wrong column, column No. 7, instead of column No. 8, does not affect the validity of the sale, especially when the said amount has been entered in the right column in the copy published in the collectorate and in the Court of the District Judge. (*Mitter and Khundkar, JJ.*) MANMATHA NATH *v.* ANANGA KUMAR. **I.L.R. (1941) 2 Cal. 353 = 74 C.L.J. 131 = 45 C.W.N. 890 = A.I.R. 1941 Cal. 702.**

——**Ss. 14 and 18**—*Scope—Sale—Absence of bidders—Notice of sale of whole estate after 10 days in default of payment of arrears by other co-sharers—Payment of arrears by one co-sharer next day—Effect of—Subsequent payment by defaulting sharer—If effective.*

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On 8 1-1940, a share in a Tauzi was put up for sale. As there was no bid, it was announced, in accordance with S. 14 of Act XI of 1859, that unless within 10 days one or more of the recorded co-sharers in the estate paid up the whole arrears due from the share in question, the entire estate would be put up for sale. On the next day the recorded proprietor of a separate account in the Tauzi deposited the arrears and on the same day the defaulting proprietor of the share deposited the arrears and the collector thereupon passed an order of exemption from sale.

Held, that the arrears having been deposited by the co-sharer the purchase was complete, and the collector had therefore no jurisdiction to exempt the defaulting share. (*Middleton.*) RAM KISHORE PANDEY *v.* SHEODUTT PRASAD. **7 B.R. 422 = 1941 P.W.N. 489.**

——**S. 25**—*Revision — Jurisdiction of Board of Revenue.*

Though an order of the Commissioner under S. 25 of Bengal Act XI of 1859 is not generally open to revision by the Board of Revenue, the Board can revise what may be called a miscellaneous order under the Act when such an order appears to the Board to be illegal. (*Middleton.*) RAM KISHORE PANDEY *v.* SHEODUTT PRASAD. **7 B.R. 422 = 1941 P.W.N. 489.**

——**S. 31**—*Purchase money of one defaulting share—Appropriation towards discharge of arrears due from another—Permissibility.*

The appropriation of the purchase money of one defaulting share towards the discharge of the arrears due from another would be contrary to the provisions of S. 31 of the Bengal Land Revenue Sales Act. (*Edgley and Biswas, JJ.*) SAKINA KHATOON *v.* KHIROD CHANDRA MANNA. **74 C.L.J. 346 = 46 C.W.N. 73.**

——**S. 37**—*Rights of auction-purchaser.*

Per *Mukherjea, J.*—The statutory title which the law gives to the auction-purchaser at a revenue sale is for protection of revenue and in order to ensure due payment of revenue by such purchaser and to avoid the necessity of repeated sales of the property, he is entitled to all the rights which the original settlor had at the time of the settlement. (*Mukherjea and Roxburgh, JJ.*) APTABUDDIN HOWLADHAR *v.* ABUAL KASEM.
I.L.R. (1941) 2 Cal. 199 = 45 C.W.N. 851 = 73 C.L.J. 405 = A.I.R. 1941 Cal. 604.

——**S. 37**—*Valid sub-division of tenure—If operates as breach of continuity of tenure—Gati tenure existing since before permanent settlement sold at revenue sale—Sub-division of tenure with consent of defaulting proprietor—Effect of—Position of purchaser—B. T. Act, Ss. 50 and 88.*

Though a valid sub-division of a tenure does not operate as a breach of the continuity of the tenure for the purposes of S. 50, Bengal Tenancy Act, it does so operate for the purposes of S. 37, Land Revenue Sales Act, if it were valid and binding against a purchaser of the superior interest in a sale for arrears of Government revenue. The consent of a defaulting proprietor of a gati tenure which is sold for arrears of revenue to a valid sub-division of the tenure does not bind the purchaser at the revenue sale. The sub division not being valid against the purchaser amounts merely to an amicable arrangement among the tenure-holders for the more convenient enjoyment of the property and therefore cannot affect the continuity of the tenure and where it has been in existence since before the permanent settlement, it is a protected interest and cannot be annulled. Consequently the purchaser at the revenue sale is not entitled to khas possession. (*Khundkar and Lodge, JJ.*) AMULYADHAN SINHA *v.* KANAK CHANDRA. **45 C.W.N. 896 = A.I.R. 1941 Cal. 368.**

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——**S. 37 proviso**—'Raiyat'—Meaning of. *See* 1940 Dig., Col. 59. KHODADAT BIBI *v.* KAMALA RANJAN ROY. **192 I.C. 77 = 13 R.C. 301.**

——**S. 37, Secondly**—*Settlement—Meaning of.*

Per *Mukherjea, J.*—The word "settlement" as used in S. 37, secondly, of the Bengal Land Revenue Sales Act, refers not to the permanent settlement of the year 1793, but it means the particular settlement or contract with the Government, whenever that might have been made, by which revenue was assessed upon certain lands. It means only the original settlement and not any subsequent re-settlement. (*Mukherjea and Roxburgh, JJ.*) APTABUDDIN HOWLADHAR *v.* ABUAL KASEM.

I.L.R (1941) 2 Cal. 199 = 45 C.W.N. 851 = 73 C.L.J. 405 = A.I.R. 1941 Cal. 604.

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (I OF 1893), Ss. 4, 6, 8, 10, 12, 13 and 14—*Applicability—Railways—Railways Act, Ss. 7, 47 and 135.*

The provisions of Ss. 4, 6, 8 10, 12, 13 and 14 of Bengal Act I of 1893 are inconsistent with Ss. 7 and 47 of the Railways Act and have no application to railways. It is, therefore, not incumbent on the railways to take out a license for their warehouses under the provisions of the Bengal Act and no tax is payable by the railway on that account. These provisions, if applied to railways, would result in a division of control between the Central Government and the local authorities, which would be entirely inconsistent with the main scheme of the Railways Act. Further, the railway is protected under the provisions of S. 135 of the Railways Act. The license fee prescribed by the Bengal Act is a tax in aid of the funds of a local authority within the meaning of this section, the local authority being the Commissioner of Police who is entrusted under the Act with the control of the Fire Brigade Fund under the general superintendence of the Local Government. (*Edgley, J.*) MARRIOTT *v.* MUNICIPALITY OF HOWRAH.

I.L.R. (1941) 1 Cal. 345 = 196 I.C. 394 = 45 C.W.N 347 = A.I.R. 1941 Cal. 319.

BENGAL LIMITATION REGULATION (II OF 1805), S 11, Second—If impliedly repealed by Act XIV of 1859. *See* 1940 Dig., Col. 60. PROVINCE OF BENGAL *v.* MRITUNJOY ROY. **191 I C. 499 = 13 R.C. 246.**

——**S. 11, Second**—Assessment of invalid lakhiraj with revenue—Cause of action—When arises. *See* 1940 Dig., Col. 60. PROVINCE OF BENGAL *v.* MRITUNJOY ROY. **191 I.C. 499 = 13 R.C. 246.**

——**S. 11, Second**—Claim barred under—If revived by subsequent repeal of Regulation. *See* 1940 Dig., Col. 60. PROVINCE OF BENGAL *v.* MRITUNJOY ROY. **191 I C. 499 = 13 R C. 246.**

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 86 A—*Bridge constructed by District Board dismantled and reconstructed by Road Board—Sanction for levy of toll obtained only for old bridge—Unrealised balance of sanctioned amount—If can be realised by levying toll on new bridge—Such balance and price of old materials used—If District Board's contribution to new bridge.*

Under S. 86 A of the Bengal Local Self-Government Act, the toll can be recovered only from persons using a bridge in respect of which the sanction of the Local Government is given. If that bridge is dismantled and a new bridge is erected on the same site, the unrealised balance of the amount sanctioned for the old bridge cannot be realised by levying a toll on the new bridge, when neither the estimated cost of renewal was included in the amount originally sanctioned nor a fresh sanction for a toll has been obtained in respect of the new bridge.

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Where the old bridge which was dismantled was constructed by the District Board out of its own funds and the new bridge was reconstructed by the Road Board with grants from the Central Road Fund and there was no sort of connection whatever between the one and the other except that materials of the value of about Rs. 250 only were used from the old bridge, the new bridge cannot be taken to be the old one in another garb; nor can the outstanding balance which was due on account of tolls in respect of the old bridge be regarded as a contribution by the District Board towards the cost of the new bridge. The question whether the price of the materials of the old bridge which had been used for the construction of the new bridge can be regarded as a contribution out of the District Board Fund is not wholly free from difficulty having regard to the provisions of Ss. 52 and 53 of the Act. (*Edgley and Biswas, JJ.*) PABNA DISTRICT BOARD *v.* RANJIT CHANDRA LAHIRI.

45 C.W.N. 1035.

——**S. 86-A**—*Sanction of Local Government—Omission to specify amounts to be recovered—Validity.*

Under S. 86-A of the Bengal Local Self-Government Act, the sanction of the Local Government will not be valid or complete unless it expressly mentions the amounts the recovery of which is sought to be authorised thereby. (*Edgley and Biswas, JJ.*) PABNA DISTRICT BOARD *v.* RANJIT CHANDRA LAHIRI.

45 C.W.N. 1035.

BENGAL MONEY-LENDERS ACT (VII OF 1933), S. 2 (2)—*"Successor-in-interest" of borrower—Meaning of—If includes purchaser of equity of redemption.*

The expression "successor-in-interest" in S. 2 (2) of the Bengal Money-Lenders Act may be taken to include an executor or persons who have succeeded to the original borrower's property by inheritance who will be liable to the extent of the borrower's assets which have come into their hands. But it is not the intention of the Legislature that it should include a purchaser of the equity of redemption. (*Edgley, J.*) HRISHIKESH BANERJEE *v.* JITENDRA NATH ROY.

45 C.W.N. 850.

——**S. 2 (12)**—*Bond executed by vendee for unpaid purchase money—Transaction, if a loan.*

Every loan is a debt but every debt is not a loan. Unpaid purchase money due to a vendor is a debt due to him, and a bond executed by the vendee in respect thereof is not a transaction which is in substance a loan. Therefore, the vendee is not entitled to get any relief under the Bengal Money Lenders Act in a suit upon such a bond. (*Nasim Ali and Pal, JJ.*) SARADINDU SEKHAR *v.* LALIT MOHAN. **196 I C. 287 = 14 R.C. 206 = 73 C.L.J. 530 = 45 C.W N. 734 = A.I.R 1941 Cal. 538.**

——**Ss. 2 (12) and 36**—*Security bond given by vendee for price of goods already supplied and to be supplied in future—Interest made payable only if vendee failed to pay money within certain time—Transaction, if a loan.*

There may exist circumstances under which the transaction by which a bond or security is taken in respect of unpaid purchase money may come within the definition of a loan as laid down in S. 2 (12) of the Bengal Money-Lenders Act. But where security was taken as a sort of floating security not only for the sum which was actually due at the time as the price of goods supplied to the vendee but for other goods that the vendee might purchase from the vendor in future, and interest was made payable on the amount only if the vendee failed to pay the same within a certain time, there is no question of advance, either express or implied and conse-

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quently the transaction cannot be treated in substance as a loan within the meaning of S. 2 (12) of the Bengal Money Lenders Act. A decree passed on the security bond cannot, therefore, be reopened under S. 36 of that Act. (*Mukherjea and Roxburgh, JJ.*) KUNJA BEHARI PAL *v.* SATYENDRA NATH DAS. **45 C.W.N. 1122 = 74 C.L.J. 379 = A.I.R. 1941 Cal. 689.**

——**S. 2 (22)**—*Purchaser of equity of redemption—If borrower.*

A purchaser from a mortgagor of the equity of redemption in the mortgaged property is a 'borrower' within the meaning of the Bengal Money-Lenders Act as defined in S. 2 (22). (*Biswas and Roxburgh, JJ.*) BUDHAN MIA *v.* JOTINDRA MOHAN DUTT.
74 C.L.J. 200.

——**Ss. 2 (22) and 36**—*Suit to which Act applies—Decree passed in suit before 1st January, 1939—No proceeding in execution pending—Procedure for obtaining relief.*

A suit for the recovery of money in which a decree has been passed before 1st day of January, 1939, and no proceeding in execution of the decree is pending on that date, is not a suit to which the Bengal Money-Lenders Act applies, even though the decree has not been satisfied. Therefore an application by the judgment-debtor for relief or for review under the Act is not maintainable. He can get relief only by way of a suit under S. 36 of the Act. 45 C.W.N. 859, dissented from. (*Sen, J.*) NABAKUMAR SINGH *v.* MAHARAJA JOGINDRA NATH ROY.
46 C.W.N. 84.

——**Ss. 2 (22) and 36**—*Suit to which Act applies—Final decree in mortgage suit passed before 1st January, 1939—Such decree not satisfied on that date—Procedure for obtaining relief.*

Where a final decree in a mortgage suit was passed before the 1st January, 1939, but such decree remains unsatisfied on that date, the suit must be regarded as "pending" on that date within the meaning of S. 2 (22) of the Bengal Money-Lenders Act Such a suit is, therefore, one to which the Act applies. As regards the procedure which should be adopted in applying for relief under the Act in cases such as the above, the provisions of S. 36 allow the borrower to obtain relief either by filing a suit or by making an application. In the case of applications, it is the intention of the legislature that they should be made either in the proceedings in execution of a decree or, if no such proceedings have been taken or are pending, the debtor should be at liberty to file what is described in the Act as an application for review. To such an application, the rules contained in Chapter XXXI of the Original Side Rules of the Calcutta High Court are not applicable. (*Edgley, J.*) SURESH CHANDRA *v.* LAL MOHAN.
I.L.R. (1941) 2 Cal. 184 = 45 C.W.N. 859.

——**S. 4**—"*Amount of such interest recoverable in the suit*"—*Interpretation—Simple mortgage suit.*

The expression "the amount of such interest recoverable in the suit" in S. 4 of the Bengal Money-Lenders' Act means the arrears of interest recoverable *in the suit* and not *up to the date of the suit*. The expression, therefore, means with reference to a simple mortgage suit, the arrears of interest up to the date fixed for redemption. (*Rau and Mukherjea, JJ.*) KHIRODE CHANDRA GHOSH *v.* NARENDRA NATH SANYAL.
45 C.W.N. 15.

——**S. 4**—"Principal of the loan"—Meaning of—Renewed bond. *See* 1940 Dig., Col. 61. SUDHANYA MOHAN BASAK *v.* MANORAMA GUPTA.
I.L.R. (1941) 1 Cal. 83 = 192 I.C. 321 = 13 R.C. 307 = 72 C.L.J. 391.

BENG. MONEY-LENDERS ACT (1933), S. 30.

——**Ss. 29 (2) and 36**—*Assignee of loan before commencement of Act—If protected.*

S. 29 (2) of the Bengal Money-Lenders Act makes it clear that a person who has obtained an assignment of a loan before the commencement of the Act is subject to the same statutory liabilities and disabilities as the original lender "except where the context otherwise requires." If the borrower seeks remedy under S. 36 of the Act, the only exception provided by the context in that section in favour of such an assignee is contained in the proviso to S. 36 (*d*). Apart from this provision, the remedies provided by S. 36 are equally efficacious as against the lender or an assignee from such lender, provided the assignment took place before the commencement of the Act. Sub-S. (5) of S. 36 cannot be taken to protect a person in the position of such an assignee. (*Edgley, J.*) MANMATHA NATH BOSE *v.* RENULA BIBI.
45 C.W.N. 863 = A.I.R. 1941 Cal. 681.

——**S. 30 (1) (a)**—*Applicability—Interest on decretal amount.*

The interest payable on the decretal amount must be regarded as a liability included in the decree to which the terms of S. 30 (1) (*a*) of the Bengal Money-Lenders Act have no application and in respect of which this sub-section can not operate to afford a judgment-debtor any relief. (*Edgley, J.*) MANMATHA NATH BOSE *v.* RENULA BIBI.
45 C.W N 863 = A.I.R. 1941 Cal. 681.

——**S. 30 (1) (a)**—*Decretal amount together with past payments exceeding twice the loan—Liability of borrower.*

If the amount due to the lender in respect of principal and interest has been declared by a decree of a competent Court, S. 30 (1) (*a*) of the Bengal Money Lenders Act does not operate to release the borrower from his liability under the decree although the payments made before the decree together with the amount of the decree exceed twice the amount of the principal of the original loan, provided the interest payable in respect of the loan does not exceed the limits specified in S. 30 (1) (*c*) of the Act. (*Edgley, J.*) MANMATHA NATH BOSE *v.* RENULA BIBI.
45 C W N. 863 = A.I.R. 1941 Cal. 681.

——**Ss. 30 (1) (a) and 36**—*Payment of twice the principal of loan—If releases borrower from further liability under any circumstances—Borrower seeking release from further liability under decree—If can be granted declaration.*

The meaning of S. 30 (1) (*a*) of the Bengal Money-Lenders Act is that after the commencement of that Act no borrower is liable to pay in respect of principal and interest in respect of any loan more than twice the principal of the original loan. Payments in respect of the loan may be voluntary payments or payments made under a decree in respect of the loan or payments treated in a decree as being made in respect of the loan as for instance, by way of set-off; but in whatever manner they are made, the sum total of them is not to exceed twice the principal of the original loan under any circumstances. If the borrower pays that amount, he is absolved from liability to pay anything more in respect of the loan, even though the loan is crystallised into a decree. If a borrower who has already paid twice the principal of the loan seeks relief under the Act in respect of a decree passed on the loan, it is not necessary in order to give him relief that the powers under S. 36 of the Act should be exercised at all. He can be granted a declaration that he is not liable to pay any more money under the decree. 44 C.W.N. 863, reversed. (*Derbyshire, C.J. and Nasim Ali, J.*) MANMATHA NATH BOSE *v.* RENULA BOSE.
45 C.W.N. 1091.

BENG. MONEY-LENDERS ACT (1933), S, 30.

——**S. 30 (2)**—*Mortgage decree*—Pendente lite *interest calculated at 12 per cent—Total interest awarded not exceeding statutory limit—Decree, if offends section.*

For the purpose of applying the test as to whether the limits prescribed by S. 30 of the Bengal Money-Lenders Act have been exceeded in awarding interest to a lender, the total interest awarded is to be taken for the whole period up to the date of payment, and this is to be compared with the amount arrived at for the same period calculated at the statutory rates. It is not correct to split this period into two parts, *viz.*, the period up to date of suit and the period from date of suit up to the date of payment, and to apply the test to the parts separately. It is, therefore, immaterial that in the process of calculation a rate of 12 per cent. is taken for part of the period, namely, the period *pendente lite* provided that the total interest on the principal amount included in the decree including the interest for the period *pendente lite* does not exceed the amount calculated for the same period at the limit of 8 per cent. laid down in S. 30 (1) (*c*) (*ii*). (*Mukherjea and Roxburgh, JJ.*) RAMESH CHANDRA BHADURI *v.* JNANADA PROSANNA BHADURI. **I.L.R. (1941) 2 Cal. 342 = 74 C.L.J. 405 = 45 C.W.N. 772.**

——**S. 31**—*Applicability—Decree passed before Act.*

S. 31 of the Bengal Money-Lenders Act merely prohibits the Court from granting interest on the decretal amount at the time it passes the decree. It has, therefore, no application to a case where the decree has already been passed before the Act came into force. If such a decree allows interest on the decretal amount, it cannot be re-opened on that ground. (*Panckridge, J.*) ANNAPURNA RAY *v.* SRISH CHANDRA DUTT. **45 C.W.N. 877 = A.I.R. 1941 Cal. 539.**

——**S. 31**—*Applicability—Decrees passed before Act.*

S. 31 of the Bengal Money-Lenders Act is intended to operate only on decrees to be passed after the Act came into operation and not on decrees passed before the Act. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) ACCOWRIE MUKHERJEE *v.* SAILENDRA MOHAN. **I L.R. (1941) 2 Cal. 169 = 195 I.C. 779 = I4 R C. 135 = 45 C W N. 548 = 73 C.L J. 287 = A.I.R 1941 Cal 495.**

——**S. 31**—*Decree allowing interest on decretal amount passed before Act—If can be modified by appellate Court.*

If a decree allowing interest on the decretal amount is passed before the Bengal Money-Lenders Act came into force, the appellate Court in an appeal from that decree can under S. 31 (*a*) of the Act modify the decree by disallowing the interest allowed on the decretal amount. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH. **I.L,R. (1941) 1 Cal. 514 = 73 C.L,J. 435 = 45 C.W.N. 530 = A.I.R. 1941 Cal. 484.**

——**S. 31**—*Decree allowing interest on decretal amount passed before Act—Whether can be modified.*

Under S. 31 of the Bengal Money-Lenders Act what he Courts are prohibited from doing since the commencement of the Act is passing decrees allowing interest on the decretal amount, in cases where the loan was advanced before the commencement of the Act. But the section does not enable a Court to revise or modify a decree allowing interest on the decretal amount passed prior to the commencement of the Act. (*Derbyshire, C.J. and Panckridge, J.*) MAHALAKSHMI RAKHIT *v.* SHAMRANGINI. **I.L.R. (1941) 1 Cal. 499 = 73 C.L.J. 344 = 45 C.W.N. 526 = A.I R. 1941 Cal. 673.**

——**S. 31 (a)**—*Decree allowing interest passed before Act—If can be modified.*

BENG MONEY-LENDERS ACT (1933), S. 36.

S. 31 (*a*) of the Bengal Money-Lenders' Act merely prohibits the Court from passing any decree in which interest on the decretal amount is allowed. There is no provision in the Act which says that if a decree is passed whereby interest on the decretal amount is granted before the Act came into force, the judgment-debtor would be entitled to have that decree set aside, or modified, by a disallowance of that portion of the decree by which interest is granted on the decretal amount. (*Sen, J.*) RATAN CHUNDER *v.* NIRMAL CHUNDER. **45 C.W.N. 13.**

——**S. 31 (a)**—*Decree allowing interest passed before Act—If can be modified.*

S. 31 of the Bengal Money Lenders' Act prohibits the Court in certain circumstances from granting interest on the decretal amount at the time it passes the decree. It has no application to a case where the decree has already been passed before the Act came into force. There is no section in the Act which says that in such a case, the Court may upon an application brought subsequent to the decree vary its order granting interest on the decretal amount. (*Sen, J.*) SAILENDRA M. DEY *v.* ACCOWRIE MUKHERJEE. **45 C.W.N. 11.**

——**S. 33**—*If retrospective.*

S. 33 of the Bengal Money-Lenders Act has no retrospective effect and does not affect agreements which had been performed prior to its enactment. Consequently a borrower is not entitled to claim the return of the amount paid by him to the lender by way of capitalist commission before the Act came into force. (*Sen, J.*) JUGGANNATH ROY *v.* MADAN MOHAN. **45 C.W.N. 1042.**

——**S. 34**—*If* ultra vires, *so far as it deals with decrees on promissory notes.*

The Bengal Money-Lenders Act, in so far as it deals with decrees passed on promissory notes, is not *ultra vires*. 45 C.W.N. 609, foll. (*Mukherjea and Biswas, JJ.*) MOHINI RANJAN *v.* SURENDRA CHANDRA GHOSAL. **45 C.W.N. 973 = 74 C.L.J. 88 = 4 F.L.J. (H.C.) 319.**

——**Ss. 36 and 30**—*Grant of relief in respect of liability under decree—Decree, if must be reopened.*

In order to grant relief to a borrower in respect of his liability under a decree in excess of the limits set out in S. 30 of the Bengal Money-Lenders Act, the decree must be reopened. (*Sen, J.*) JUGGANNATH ROY *v.* MADAN MOHAN. **45 C.W.N. 1042.**

——**S. 36**—*Grant of relief—Person other than borrower.*

Under the provisions of the Bengal Money-Lenders Act, it is open even to a person who is not a "borrower" to show to what extent a "borrower" is liable, if thereby he can obtain any relief. There is nothing in the Act preventing the granting of relief, if otherwise obtainable, at the instance of such a person. (*Edgley and Biswas, JJ.*) SARADINDU MUKHERJEE *v.* JAHARLAL AGARWALLA. **74 C.L.J. 61 = 46 C.W.N. 33.**

——**Ss. 36, 34 and 30**—*If* ultra vires—*Government of India Act, Ss. 292 and 299.*

The provisions of Ss. 30, 34 and 36 of the Beagal Money-Lenders Act, 1940, so far as they authorise Courts to reopen decrees passed before the Act came into operation and to pass new decrees in accordance with the Act, are not *ultra vires* of the Bengal Legislature. They do not offend either S. 292 or S. 299 of the Government of India Act. The subject-matter of the Act comes within Item 27 of List II in the Sch. VII of the Government of India Act. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) PROMODE KUMAR *v.* BENOY KRISHNA. **I.L.R. (1941) 2 Cal. 85 = 196 I.C. 80 = 14 R.C. 161 = 73 C.L.J. 316 =**

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4 F L.J. (H C.) 288=45 C.W.N. 581= A.I R. 1941 Cal. 425 (S.B.).

——**S. 36**—*Powers of Court—Power to release borrower from liability without re-oponing decree.*

Under S. 36 of the Bengal Money-Lenders Act the Court may re-open a decree if it contravenes the provisions of S. 30 and further in suitable cases may, even without re-opening the decree, release a borrower of all liability in excess of the limits specified in S. 30 (1) and (2) of the Act. (*Edgley, J.*) MANMATHA NATH BOSE *v.* RENULA BIBI. **45 C.W.N. 863= A.I.R. 1941 Cal. 681.**

——**S. 36**—Procedure for obtaining relief—Decrce passed in suit before 1st January, 1939—No proceeding in execution pending. *See* BENGAL MONEY-LENDERS ACT, SS. 2 (22) AND 36. **46 C.W.N. 84.**

——**S. 36**—Procedure for obtaining relief—Final decree in mortgage suit passed before 1st January. 1939—Such decree not satisfied on that date. *See* BENGAL MONEY-LENDERS ACT, SS. 2 (22) AND 36. **45 C.W.N. 859.**

——**S. 36**—*Re opening of decree—Ground for—Claim for instalments.*

The Court can re-open a decree under S. 36 of the Bengal Money Lenders Act only if it is necessary to do so for the purpose of exercising any of the powers which are conferred by sub S. (1) of that section. A claim for instalments is not one of the reliefs which comes under the purview of that sub-section and cannot by itself afford a ground for re-opening a decree. (*Mukherjea and Sen, JJ.*) ANATH NATH *v.* RAJENDRA NATH. **45 C W.N. 975..**

——**S. 36**—*Reopening of decree—Proper test—Interest decreed exceeding statutory limit—Decree-holder claiming less in execution—Relief if may be refused.*

If an application is made by a judgment-debtor under S. 36 of the Bengal Money-Lenders Act for reopening a decree passed against him, the proper test is to weigh the actual amount of the liability in respect of total interest under the decree as against what the amount would be if calculated at the appropriate rate specified in S. 30. It is wrong in applying as a test of the relief to be obtained by the debtor what the decree-holder may choose to claim in execution of his decree. If, therefore, the amount decreed in respect of interest exceeds the amount that could be decreed if the limits applicable under S. 36 (2) read with S. 30 (1) (*c*) are applied in calculating the liability of the judgment-debtor, the decree is to be reopened under S. 36 (1) (*a*) and S. 36 (6) at the instance of the judgment-debtor, although the amount claimed by the decree-holder in execution is less than the amount due to him applying the statutory limit. (*Mukherjea and Roxburgh, JJ*) PROBODH KUMAR GOSWAMI *v* LALIT MOHAN DEY. **45 C.W.N. 1120.**

——**S. 36 (1)**—*Right of suit—Decree passed on loan at creditor's suit—Subsequent suit by borrower—If maintainable—Forum of suit.*

A suit by a borrower under S. 36 (1) of the Bengal Money-Lenders Act is maintainable even after a decree has been passed against him on the loan at the instance of the creditor. Such a suit must be instituted by the borrower in the Court which has passed the decree and in no other Court. (*Miitter and Khundkar, JJ.*) SATYANARAYAN BANERJEE *v.* RADHANATH DAS. **45 C.W.N. 1085.**

——**S. 36 (1), proviso (ii)**—*Mortgage executed before* 1939 *to satisfy decree passed on earlier mortgage—Earlier mortgage carrying interest in excess of maximum allowed under Act—Decree passed in* 1940 *on later mortgage—If can be reopened so as to affect earlier mortgage decree.*

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A mortgage was executed before the 1st day of January, 1939, in satisfaction of a decree passed on an earlier mortgage which carried interest at a rate higher than the maximum rate of interest allowed under the Bengal Money-Lenders Act. A decree was passed in 1940 on the later mortgage which fixed interest within the limits specified in the Act. On an application made for reopening this decree,

Held, that having regard to S. 36 (1), proviso (ii) of the Bengal Money-Lenders Act, the Court in granting relief was not permitted to do anything which affected the earlier mortgage decree, as it was not a decree passed in a suit to which the Act applied, and that consequently the Court could not reopen the earlier mortgage and grant relief by a refund of the interest paid in excess of the maximum allowed under the Act. (*Sen, J.*) PROMODE KUMAR ROY *v* TINCOWRIE DEY. **45 C.W.N. 1006.**

——**S. 36 (1), Proviso (ii)**—*Scope—Mortgage decree passed in* 1939*—Consideration for mortgage being sums due under prior decrees—Mortgage, if may be re-opened—Such prior decrees, if may be "affected".*

Where a decree was passed on a mortgage in a suit which was pending on the 1st day of January, 1939, and the consideration for the mortgage was the total of two sums which were due under two prior decrees, an application for re opening the mortgage transaction under S. 36 of the Bengal Money-Lenders Act is hit by the second proviso to sub-S. (1) of that section, which lays down that in re-opening transactions, the Court is not to do anything which "affects" any decree of a Court. The re-opening of the mortgage transaction must necessarily involve a re-opening of the two prior decrees. It is no answer to say that the decrees had ceased to exist by reason of the execution of the mortgage bond in lieu thereof, and that, therefore, there were no decrees to be affected. Proviso (ii) does not mean that a decree may not be affected within the meaning thereof, if it is no longer subsisting. On the other hand, it seems clearly to contemplate the affecting of decrees which were already satisfied. The exception within the Proviso (ii) is of no avail to the applicant. The two prior decrees cannot obviously be said to be decrees in suits to which the Act applies, as neither the suits nor any execution proceedings in connection therewith were pending on the 1st January, 1939. Nor can it be said that the decrees were decrees which were not fully satisfied by that date. The decree had ceased to exist on execution of the mortgage bond in lieu thereof, and that would doubtless be satisfaction of the decrees. In any case, the decrees must be deemed to have been satisfied, if their execution had become barred by limitation. (*Mukherjea and Biswas, JJ.*) TARAPADA BANERJEE *v.* AJIMADDIN MALLICK. **45 C.W.N. 969=74 C.L.J. 7= A.I.R. 1941 Cal. 699.**

——**S. 36 (1) (c) and (2)**—*Court reducing decretal amount in excess of limits prescribed by S. 30—If re-opens decree—Duty to make new decree.*

If the Court reduces the amount due under a decree by a sum which, according to it, is the excess amount allowed in contravention of S. 30 of the Bengal Money-Lenders Act, and makes proportionate alteration in the order for costs also, it in reality re-opens the decree and it is bound to make a new decree as contemplated by S. 36 (2) of the Act. If it is a mortgage decree, the new decree has got to be made in accordance with S. 34 of the Act. (*Mukherjea and Sen, JJ.*) ANATH NATH *v.* RAJENDRA NATH. **45 C.W N. 975.**

——**S. 36 (1) (c) and (2)**—*Mortgage decree—Court relieving judgment-debtor from liability to pay interest*

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in excess of limits specified in S. 30—If bound to re-open decree.

Where after a decree has been passed on a mortgage the judgment-debtor seeks relief from liability to pay interest on the mortgage in excess of the limits specified in S. 30 of the Bengal Money-Lenders Act, the Court cannot grant him relief without re-opening the decree. Once the decree is re-opened, the Court must under S. 36 (2) pass a new decree in accordance with the terms of S. 34 (1) (*a*) of the Act. 45 C.W.N. 859 and 863, dissented from. (*Sen, J.*) MRITUNJOY ROY *v.* NETAI CHAND DUTT. **45 C.W.N. 976.**

——**S. 36 (1) (c)**—*Powers under—Order directing decree as satisfied without re-opening it.*

Under S. 36 (1) (*c*) of the Bengal Money-Lenders Act, the Court may in a proper case, without re-opening a decree, treat it as fully satisfied by writing off the amount by which the decree holder's dues under the decree exceed the amount calculated at the rate of interest prescribed in S 30. (*Edgley, J.*) SURESH CHANDRA *v.* LAL MOHAN.

I.L.R. (1941) 2 Cal 184=45 C.W.N. 859.

——**S. 36 (5)**—*Pre-Act Assignee—If protected.*

Per *Derbyshire, C.J.*—S. 36 (5) of the Bengal Money-Lenders Act includes a pre-Act *bona fide* transferee within its protective provisions, since a pre-Act transferee cannot have had the notice prescribed by S. 28 (2) of the Act. The case in S. 36 (1) (*d*) is, however, a special one, and a transferee coming under this provision is not protected by S. 36 (5).

Per *Nasim Ali, J.*—S. 36 (5) of the Act protects only *bona fide* assignees for value after the Act who did not receive the notice referred to in S. 28 (1) (*a*) of the Act, but not the assignees before the Act. (*Derbyshire, C.J. and Nasim Ali, J.*) MANMATHA NATH BOSE *v.* RENULA BOSE. **45 C.W.N. 1091.**

——**S. 36 (6) (a)**—*Decree passed before 1st January, 1939—Execution pending on that date—Application concerning that decree—If competent.*

Where a decree has been passed before the 1st January, 1939, but an execution case in connection therewith is still pending on that date, the decree is one passed in a suit to which the Bengal Money-Lenders Act applies within the meaning of S. 36 (6) (*a*) of that Act. An application under this provision concerning such a decree is, therefore, competent. (*Mukherjea and Biswas, JJ.*) MOHINI RANJAN *v.* SURENDRA CHANDRA. **45 C.W.N. 973=74 C.L.J. 88=4 F.L.J. (H.C.) 319.**

——**S. 36 (6) (i) and (ii)**—*Order refusing to reopen decree—Appeal.*

Where on an application under S. 36 (6) of the Bengal Money Lenders Act the Court refuses to reopen a decree, the order is non-appealable, whether it is made under sub-Cl. (1) or sub-Cl. (2). The Act certainly confers no right of appeal against such an order, and in so far as the order is made under sub-Cl. (*ii*), an appeal will be expressly barred by O. 47, R. 7 (1), C. P. Code, treating the application as one for review. (*Biswas and Roxburgh, JJ.*) BUDHAN MIA *v.* JOTINDRA MOHAN DUTT. **74 C.L.J. 200.**

——**S. 36 (6) (a) (i) and (ii)**—*Orders under—Appeal—C. P. Code, Ss. 47 and 96.*

An order made under S. 36 (6) (*a*) (*i*) of the Bengal Money Lenders Act, either granting or refusing a prayer for re-opening a decree does not come under S. 47, C. P. Code, and is not appealable as such. If the decree is re-opened and a new decree made, an appeal would undoubtedly lie against the new decree which supersedes the old, under S. 96, C. P. Code. Such an appeal could be taken not only by the decree-holder who is *prima facie* aggrieved by the amendment but by the judgment debtor also on the ground that it did not go far enough in his favour. But if the application of the judgment-debtor under S. 36 (6) (*a*) (*i*) of the Act is refused, there is no provision of law under which an appeal would lie against the order of refusal and the only remedy of the aggrieved party would be to apply for revision under S. 115, C. P. Code. The remedy of the aggrieved party is practically the same whether the order is made under sub-Cl. (*i*) or sub-Cl. (*ii*) of S. 36 (6) (*a*). (*Mukherjea and Roxburgh, JJ.*) PROMODE NATH SINHA ROY *v.* RASESHWARI DASSI.

196 I.C. 683=45 C.W.N. 776=A.I.R. 1941 Cal. 530.

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——**S. 36 (6) (a) (ii)**—*Decree on hand note passed by Small Cause Court—Hand-note executed for balance due on mortgages—Power of Small Cause Court to reopen settled account on mortgages.*

A Small Cause Court which has passed a decree on a hand-note which was executed on account of the balance due on two mortgages, has juridiction on an application made to it under S. 36 (6) (*a*) (*ii*) of the Bengal Money-Lenders Act to reopen the account which closed the previous dealings on the mortgages. (*Henderson, J.*) BHUTNATH ADDY *v.* KHAGENDRA NATH BANERJEE. **45 C.W.N. 1069.**

——**S. 36 (6) (a) (ii)**—*Proceeding under—Interrogatories—Power of Court to administer—Civil Procedure Code, O. 11.*

The Court has power in a proper case to administer interrogatories under O. 11, Civil Procedure Code, in a miscellaneous proceeding under S 36 (6) (*a*) (*ii*) of the Bengal Money-Lenders Act. (*Mukherjea and Sen, JJ.*) SUKDEVJEE *v.* RAMKRISHNA LAHA.

196 I.C. 758=45 C.W.N. 924=A.I.R. 1941 Cal 537.

——**S. 36 (6) (ii)**—*Relief given by way of review—Court, if bound to pass new decree.*

Where an application is made for review of a decree under S. 36 (6) (*ii*) (*a*) of the Bengal Money-Lenders Act and relief is given by way of review, then that procedure itself must *ipso facto* involve a "reopening" of the decree. That being so, the Court is bound to pass a "new decree" in accordance with the provisions of the Act under the terms of Cl. (*a*) of sub-S. (2). (*Biswas and Roxburgh, JJ.*) BUDHAN MIA *v.* JOTINDRA MOHAN DUTT. **74 C.L.J. 200.**

——**S. 36 (6) (b)**—*Applicability—Decree passed in suit filed before* 1939.

S. 36 (6) (*b*) of the Bengal Money-Lenders Act applies to a case where a decree was passed in a suit instituted before the 1st January, 1939, provided that such decree was not fully satisfied by that date. (*Edgley and Biswas, JJ.*) SARADINDU MUKHERJEE *v.* JAHARLAL AGARWALLA. **74 C.L.J. 61=46 C.W.N. 33.**

——**S. 36 (6) (b)**—*Application for review of decree—Court to which appeal is filed from order passed in execution proceedings—If can hear.*

Under S. 36 (6) (*b*) of the Bengal Money-Lenders Act, the appellate Court which is empowered to hear an application for review to have a decree re-opened under S 36 (1) (*a*) or to be released from all liability in excess of the limits specified in S 30 (1) and (2) of the Act, is the Court before which a decree of the nature referred to in Cl. (*a*) of Sub-S. (6) is being questioned or challenged by way of a direct appeal, and not the Court in which an appeal is pending in connection with some order made in the proceedings taken for the execution of such a decree. (*Edgley and Biswas, JJ.*) JOGENDRA NARAIN SING *v.* SOURENDRA

BENG. MONEY-LENDERS ACT (1940), S. 2.

NARAIN. I.L.R. (1941) 2 Cal. 232 = 195 I.C. 554 = 14 R.C. 116 = 45 C.W.N. 774 = A.I R. 1941 Cal. 431.

——(X OF 1940), S. 2 (2)—*'Borrower'—Lessee from mortgagor.*

A lessee from the mortgagor who took the lease after the mortgage and any person who derives an interest in the mortgaged property which is affected by the mortgage, will come within the definition of borrower in S. 2 (2) of the Bengal Money-Lenders Act. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH. I.L.R. (1941) 1 Cal. 514 = 73 C.L.J. 435 = 45 C.W N. 530 = A.I.R. 1941 Cal 484.

——Ss. 2 (2) and 30—*"Borrower"—Puisne mortgagee* vis-a-vis *prior mortgagee—Purchaser of mortgagor's right* vis-a vis *mortgagee—If borrowers—Right to benefit of S.* 30.

A puisne mortgagee *vis a-vis* the prior mortgagee, and a purchaser of the mortgagor's interest *vis a-vis* the mortgagee or mortgagees are borrowers within the meaning of S. 2 (2) of the Bengal Money-Lenders Act. Therefore, in a suit on a mortgage filed by a non-impleaded puisne mortgagee against a purchaser at a sale in execution of a prior mortgage decree who had also paid off a decree obtained by another prior mortgagee, the plaintiff as the puisne mortgagee is entitled to the benefit of S. 30 of the Act in respect of the claims on the two prior mortgages, if the suit is one to which the Act applies. The defendant as purchaser of the interest of the mortgagor is also entitled to the benefit of that section in respect of the claim of the plaintiff as mortgagee. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH.

I.L R. (1941) 1 Cal. 514 = 73 C.L.J. 435 = 45 C.W.N. 530 = A.I.R. 1941 Cal. 484.

——S. 30—*Compound interest—If prohibited.*

The Bengal Money-Lenders' Act (X of 1940) nowhere prohibits compound interest. All that S. 30 says is that the borrower shall not be liable to pay interest at a higher rate per annum than 8 per cent. simple in the case of secured loans. What has, therefore, to be ascertained in each case is whether the interest which the borrower has been made liable to pay exceeds the interest which would have been payable, had the rate of interest been 8 per cent. simple. (*Sen, J.*) RATAN CHUNDER *v.* NIRMAL CHUNDER. 45 C.W.N. 13.

——S. 30—*Interest at date of suit equalling principal*—Pendente lite *interest—If can be awarded.*

S. 30 (1) (*a*) of the Bengal Money-Lenders Act is mandatory. The borrower is not liable to pay in any circumstances more than twice the amount of the original loan. If, therefore, the amount of interest at the date of the institution of the mortgage suit is equal to or exceeds the principal, *pendente lite* interest cannot be awarded. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH. I.L.R. (1941) 1 Cal 514 = 73 C.L J. 435 = 45 C W.N. 530 = A.I R. 1941 Cal. 484.

——S. 30—*Provision in agreement for compound interest—Legality—Proper decree.*

The Bengal Money-Lenders Act does not make a provision in an agreement between the parties for compound interest as such illegal. The Court should calculate interest according to the agreement but should not pass a decree exceeding the sum which would be due had the agreement provided for the maximum rate of simple interest allowed by S. 30 of the Act. (*Derbyshire, C.J. and Panckridge, J.*) MAHALAKSHMI RAKHIT *v.* SHAMRANGINI.

I.L R. (1941) 1 Cal. 499 = 73 C.L.J. 344 = 45 C.W.N. 526 = A.I.R. 1941 Cal. 673.

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——S. 34—*Mortgage decree passed before Act—Order for instalments—If can be made.*

Under S. 34 of the Bengal Money-Lenders' Act, 1940, an order for instalments regarding a mortgage debt must be made at the time that the preliminary decree is passed. The section makes no provision for instalments being ordered at any other time. Where, therefore, the preliminary and the final decrees have already been passed before the Act coming into force, no order for instalments can be made under the section. (*Sen, J.*) SAILENDRA M. DEY *v.* ACCOWRIE MUKHERJEE.

45 C W.N. 11.

——S. 34 (1) (a)—*Applicability—Mortgage decree passed before Act.*

By S. 34 (1) (*a*) of the Bengal Money-Lenders Act the Court has been empowered to grant instalments in suits in respect of mortgage loans at the time of the passing of the preliminary decree after the commencement of the Act. The provisions of this section are, therefore not attracted to a case where the decree is passed before the Act and cannot be reopened under the Act. Affirming the Judgment of Sen, J. in 45 C.WN. 11. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) ACCOWRIE MUKHERJEE *v.* SAILENDRA MOHAN.

I.L.R (1941) 2 Cal 169 = 195 I C. 779 = 14 R.C. 135 = 45 C.W.N. 548 = 73 C L J 287 = A.I.R. 1941 Cal. 495.

——S. 34 (1) (b)—*If* ultra vires, *so far as it operates on decrees on promissory notes passed before Act—Provision, if in conflict with Negotiable Instruments Act or C. P. Code—Government of India Act, Sch. VII, Items* 28 *and* 53 *of List I and Items* 4 *and* 15 *of List III.*

S. 34 (1) (*b*) of the Bengal Money-Lenders Act, so far as it operates on decrees in suits on loans evidenced by promissory notes passed before the commencement of the Act, would not come under Item No. 28 or 53 of List I of the seventh schedule of the Government of India Act, and is not *ultra vires* of the Bengal Legislature. Legislation with respect to decrees on promissory notes before the commencement of the Act is not legislation "with respect to promissory notes" (Item No. 28 of List I). The provisions of S. 34 (1) (*b*) (*ii*) are not in conflict with the Negotiable Instruments Act. These provisions are in conflict with Rr. 3 and 11, O. 21, Rr. 2 (26), 3, O 37 of the Code of Civil Procedure (an existing Indian law). They come under Items 4 and 15 of the Concurrent List, List III, and the repugnancy has been cured by the assent of the Governor General. (*Derbyshire, C.J, Panckridge and Nasim Ali, JJ.*) HARSUKHDAS *v.* DHIRENDRA NATH.

I.L.R. (1941) 2 Cal 107 = 196 I.C. 161 = 14 R C. 182 = 73 C L.J. 333 = 1941 F.L.J. (H.C.) 308 = 45 C.W.N. 609 = A.I R. 1941 Cal. 498 (F.B).

——S. 36—*Powers under—When may be exercised.*

Before the powers under S. 36 of the Bengal Money-Lenders Act can be exercised, the applicant must show that their exercise will bring relief against the specific evils, such as unduly high rates of interest at which the Act is aimed. The powers under the section cannot be exercised merely on the ground that the borrower is able to show that the exercise of them will ease his burden generally without regard to the Act. (*Panckridge, J.*) KAMALA RANJAN *v.* BEPIN BEHARI.

I.L.R. (1941) 2 Cal. 73 = 196 I.C. 290 = 14 R.C. 205 = 45 C.W.N. 619 = A.I.R. 1941 Cal. 540.

——S. 36—*Reopening of account.*

Under S. 36 of the Bengal Money-Lenders' Act, the Court will not reopen the account unless it has reason to believe that the reopening of the account would entitle

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the borrower to get some relief under the Act. (*Sen, J.*) SAILENDRA M. DEY *v.* ACCOWRIE MUKHERJEE. **45 C.W.N. 11.**

——**S. 36 (1)**—*Power of Court to reopen decree—'Transaction'—If includes decree.*

Under S. 36 (1) of the Bengal Money-Lenders Act, the power of reopening the decree flows from and is dependent on powers which the Court has been authorised to exercise under Cls. (*a*) to (*e*) of that sub-section. It is, therefore, restricted to cases where the question of the exercise of all or any of these powers arises. Even if the word "transaction" in S. 36 (1) (*a*) is interpreted to include a decree, that power can be exercised only when the decree is to be reopened *and* accounts between the parties are to be taken. If there is no question of taking accounts, the Court has no power to reopen the decree under S. 36 (1) (*a*). The power of the Court to order payment by instalments and thereby to give relief to the debtor under S. 36 (2) (*d*) cannot be invoked for reopening the decree under S. 36 (1) (*a*) as that power can be exercised only after the decree has been reopened and not before. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) ACCOWRIE MUKHERJEE *v.* SAILENDRA MOHAN. **I.L.R. (1941) 2 Cal 169 = 195 I.C. 779 = 14 R C. 135 = 45 C.W N. 548 = 73 C.L.J. 287 = A.I.R. 1941 Cal. 495.**

——**S. 36 (2) (a)**—*Form of new decree.*

The new decree under S. 36 (2) (*a*) of the Bengal Money-Lenders Act, 1940, should be in terms of S. 34 and not as directed by S. 36 (2) (*d*) of the Act. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) PROMODE KUMAR *v.* BENOY KRISHNA. **I.L.R. (1941) 2 Cal. 85 = 196 I.C 80 = 14 R.C. 161 = 73 C.L.J. 316 = 4 F.L.J. (H.C.) 288 = 45 C.W.N. 581 = A.I.R. 1941 Cal. 425 (S.B.).**

——**S. 36 (2) (b)**—*Right of purchaser at Court sale to complete sale—If protected.*

The right to which reference is made in S. 36 (2) (*b*) of the Bengal Money-Lenders Act is not necessarily a right in respect of the property which was sold at the Court sale. The language used is sufficiently wide to include the right which a purchaser, who has as required by the conditions of sale deposited 25 per cent. of the purchase money, has to apply to have the sale completed. The position of such a purchaser, if he is not the decree-holder, is safeguarded by S 36 (2) (*b*) of the Act. (*Edgley, J.*) KIRONBALA *v.* HIRALAL. **196 I.C. 413 = 14 R.C. 230 = 45 C.W.N. 621 = A.I.R. 1941 Cal. 492**

BENGAL MUNICIPAL ACT (XV OF 1932), Ss. 52 and 149—*Delegation of authority—Scope of—Chairmanship of Review Committee—If can be delegated.*

It is wrong to limit the operation of S. 52 of the Bengal Municipal Act only to the powers referred to in S. 51. The functions of a chairman under S. 149 are not excluded from the scope of the delegation contemplated by S. 52. A vice-Chairman is, therefore, competent to act for the chairman in the Review Committee by virtue of a delegation of authority under S. 52. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 145 (3)**—*Appointment of person outside panel as assessor—Approval of Government—If can be obtained subsequently.*

S. 145 (3) of the Bengal Municipal Act expressly authorises the Commissioners to appoint any person approved by the Local Government as assessor, though he may not be included in the panel referred to in sub-S. (1). The fact that the approval of the Local Government was obtained after the appointment, and not before it, makes no difference. (*Biswas, J.*) HARI

BENG. MUNICIPAL ACT (1932), S. 215.

BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 148 (3)**—*Failure of committee to give notice to assessor—Irregularity.*

The failure of the Review Committee to give notice to the assessor as required by sub-S. (3) of S. 148 of the Bengal Municipal Act, which sub-section has since been repealed, is nothing more than a mere irregularity, when the Assessor had ceased to be in the service of the Municipality. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 149 (before amendment)**—*Constitution of Review Committee—Resolution appointing three, instead of two, Commissioners—Sittings attended only by two of them—Constitution of Committee—If vitiated.*

The fact that the resolution passed by the Commissioners by which the Review Committee was constituted mentioned three instead of two Ward Commissioners besides the chairman, does not vitiate the constitution of the Committee, when in point of fact the sittings of the Committee were attended by only two of them besides the chairman. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 215**—*Rules framed under, R. 1—Appointment of assessor without allowing interval of three months to him to complete work—Irregularity.*

The fact that an assessor is appointed at a time which does not allow him the necessary interval of three months between the completion of his work and the date on which the assessment is to take effect as required by R. 1 of the Rules framed by the Local Government under S. 215 of the Bengal Municipal Act, is no more than a mere irregularity. An objection to the appointment on this ground will fail when there is no evidence that the shortness of time in any way affected the work of the assessor, or that it resulted in any prejudice or injustice to any party concerned. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 215**—*Rules framed under, Rr. 4 and 9—Notice by assessor to owner or occupier—If obligatory—Failure to fill up last two columns of Form B—Validity of assessment list.*

Neither under S. 134 of the Bengal Municipal Act nor under R. 4 of the Rules framed under S. 215 of that Act, is it obligatory on the assessor to issue a notice to the owner or occupier; he may do so, whenever he thinks fit. If the assessor had otherwise all necessary information before him regarding the holding, and he also actually inspected it, the failure to issue notice under S. 134 cannot be regarded as an illegality. When there is no notice under S. 134 and, therefore, no return submitted by the owner or occupier in Form B, there can be no question of the assessor filling up the last two columns of this form. The failure to do so will not, therefore, render the assessment list invalid. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

——**S. 215**—*Rules framed under, R. 9—Absence of certificate by assessor—Validity of assessment list.*

The failure of the assessor to endorse a certificate on the assessment list under the latter part of R. 9 does not render the assessment list invalid in law. The object of the rule evidently is to ensure the authenticity of the assessment list as submitted by the assessor to the chairman. If the assessment list, as published under S. 147 of the Bengal Municipal Act, bears the signature of the chairman, it is a complete guarantee of its genuineness. (*Biswas, J.*) HARI BHUSAN DE *v.*

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45 C.W.N. 1113.

——**S. 215**—*Rules framed under, R. 10—Absence of note by assessor showing basis of assessment—Validity of assessment list.*

It does not appear that the note by the assessor under R. 10 showing the basis on which the annual valuation had been determined, is required to be incorporated in the assessment list itself as an integral part thereof. If, therefore, the Commissioner has not under S. 136 of the Bengal Municipal Act directed the inclusion of a statement on this point, the absence of it does not necessarily invalidate the assessment list. (*Biswas, J.*) HARI BHUSAN DE *v.* MUNICIPAL COMMISSIONERS OF KAMARHATI. **45 C.W.N. 1113.**

BENGAL NON AGRICULTURAL TENANCY (TEMPORARY PROVISIONS) ACT (IX OF 1940)—*Application for stay of proceedings—Application made by person who has filed suit under O. 21, R. 103, C. P. Code—Order of dismissal—Appeal—If competent.*

Where a person who has instituted a suit under O. 21, R. 103, C. P. Code, for a declaration that he is a tenant of the decree holder files an application to the executing Court under the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act for staying all further proceedings, and that application is dismissed, an appeal is not competent from the order of dismissal. (*Henderson, J.*) BALDEO SINGH *v.* UPENDRA CHANDRA. **45 C.W.N. 780.**

——*Suit to recover arrears of rent and for ejectment—Defendant denying that arrears were due—Stay of suit—When may be ordered.*

Where the plaintiff instituted a suit both to recover arrears of rent and for ejectment, and the defendant denied that anything was due on account of rent and filed a prayer for staying the suit under the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act,

Held, that on the plaint as filed the defendant was not entitled to the stay but that if the defence was well-founded and nothing was due on account of rent, the suit would have to be stayed. (*Henderson, J.*) NUT BEHARI DAS *v.* MAHOMED ALI. **196 I.C. 697 = 45 C.W.N. 791 = A.I.R. 1941 Cal. 528.**

——**Ss. 2, 3 and 6**—*Lessee of land with structures on it—If non-agricultural tenant—Right to relief.*

A lessee of land with structures on it erected by the landlord is not a non-agricultural tenant within the definition of S. 2 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, and he is not, therefore, entitled to relief under S. 3 or S. 6 of the Act. (*Mukherjea and Biswas, JJ.*) JAHUR MIA *v.* ABDUL GAFFUR. **196 I.C. 346 = 14 R.C. 223 = 45 C.W.N. 603 = A.I.R. 1941 Cal. 452.**

——**S. 2**—*"Non-agricultural tenant"—Person with right to sell fruits from trees and fish from tank.*

The fact that the only right that a person has is to sell fruits from the trees and fish from the tank on land is quite insufficient to make him a non-agricultural tenant within the meaning of S. 2 of Bengal Act IX of 1940. (*Henderson, J.*) BHAGABAT CHANDRA JANA *v.* NAGENDRA NATH BANERJEE. **45 C.W.N. 382 (2) = A.I.R. 1941 Cal. 265.**

——**S. 2**—*Tenant of land and buildings, who has erected* ekchalas—*If non-agricultural tenant.*

A tenant of both the land and buildings is not a non-agricultural tenant within the meaning of S. 2 of the Bengal Non Agricultural Tenancy (Temporary Provisions) Act, although he has himself erected some *ekchalas*. (*Henderson, J.*) AJIT KUMAR DAS *v.* ANUKUL CHANDRA **45 C.W.N. 678 = 73 C.L.J. 527 = A.I.R. 1941 Cal. 718.**

BENG. NON-AGRIC. TEN. (TEMP. PROV.) ACT (1940), S. 3.

——**Ss. 3 and 6**—*Applicability—Appeals—Appeal by tenant against decree for ejectment.*

The provisions for stay contained in Ss. 3 and 6 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act do not apply to an appeal. The words "every suit and proceeding in any Court for ejectment of a non-agricultural tenant" used in these sections cannot be said to include an appeal. In any case, a tenants' appeal against a decree for ejectment can in no sense be brought within the words "suit for ejectment". (*Edgley and Biswas, JJ.*) PRANKRISHNA MUKHERJEA *v.* JNANANDA ROY. **I.L.R. (1941) 2 Cal. 273 = 45 C.W.N. 967.**

——**S. 3**—*"Ejectment on account of the non-payment of rent"—Interpretation.*

The words "ejectment on account of the non-payment of rent" in S. 3 of the Bengal Act IX of 1940 are not used for purposes of indicating that the cause of action for ejectment must be the non-payment of rent, as under the substantive law non-payment of rent cannot be a ground for ejectment of a non-agricultural tenant. The Legislature meant that if a tenant was in arrears, a suit for ejecting such a tenant would be a suit for ejectment "on account of the non-payment of rent". (*Mitter, J.*) PURNENDU NATH TAGORE *v.* NARENDRA NATH. **194 I.C. 581 = 14 R.C. 1 = 45 C.W.N. 22 = A.I.R. 1941 Cal. 302.**

——**S. 3**—*Suit for ejectment "on account of non-payment of rent"—Interpretation.*

Per *Mukherjea, J.—Obiter*: The words 'suit or proceeding for ejectment on account of non-payment of rent" in S. 3 of the Non-Agricultural Tenancy Act refer to that class of cases where under the terms of the lease itself the lessee forfeits his tenancy by reason of non-payment of rent. As a relief against forfeiture in such cases is provided in S. 114 of the T. P. Act, the Legislature probably thought it proper to exempt this class of cases from the operation of S. 3 of the Non Agricultural Tenancy Act. (*Mukherjea and Biswas, JJ.*) PROVABATI DEBI *v.* PROTAP CHANDRA MAZUMDAR. **45 C.W.N. 991 = 74 C.L.J. 104.**

——**S. 3**—*Suit for ejectment of defendant as tenant—When may be stayed—Suit for ejectment of defendant as trespasser—Procedure to be followed.*

A suit for ejectment may be one to eject a tenant on the ground that the defendant was a tenant under the plaintiff and his tenancy has subsequently ceased to exist, or it may be one to eject a trespasser on establishment of the plaintiff's title. In the former case, if the plaint itself shows that the defendant is a non agricultural tenant, and ejectment was not sought on the ground of non-payment of rent, the Court is bound to stay the suit under S. 3 of the Non-Agricultural Tenancy Act at its very inception. If any dispute arises as to the character of the tenancy, the Court is bound to take evidence, and if it comes to the conclusion that the defendant in fact is a non-agricultural tenant, then also the suit must be stayed. If, on the other hand, the suit purports to be one for ejecting a trespasser, different considerations arise. As the plaintiff does not admit the defendant to be a tenant, the suit cannot be stayed *in limine*. The Court must proceed to hear the suit in the ordinary way and take evidence. If after taking evidence it forms an opinion that the defendant is really a tenant and non agricultural tenant within the meaning of the Act, it is not bound to stop the proceedings forthwith unless it further finds that the suit, as it stands, could be regarded as a suit to evict the defendant as a tenant on

BENG. NON-AGRIC. TEN. (TEMP. PROV.) ACT (1940), S. 3.

the ground that the tenancy has been determined in any lawful manner. If the Court allows the plaintiff to convert a suit for possession against a trespasser into one for ejectment of a tenant, it is certainly bound to stay the suit. But if, on the other hand, the suit is one which must necessarily fail, if the defendant is found to be a tenant and the plaintiff does not want to treat it as a suit for ejectment of a tenant, the Court should dismiss the suit on the finding that the plaintiff failed to prove his case, and the question of stay will come, if and when the plaintiff institutes a fresh suit against the defendant, seeking to eject him on the ground that the tenancy which was found in his favour in the previous suit had since then been determined. (*Mukherjea and Biswas, JJ.*) PROVABATI DEBI *v.* PROTAP CHANDRA MAZUMDAR. **45 C.W.N. 991=74 C.L.J. 104.**

——**Ss. 3 and 6**—*"Suit or proceeding"—If includes appeal—Appeal by tenant against decree for ejectment.*

Per *Biswas, J.*—The words "Suit or proceeding" used in S. 3 or S 6 of the Bengal Non-Agricultural (Temporary Provisions) Act do not include an appeal. Even assuming that an appeal is not excluded from the scope of these provisions, a tenant's appeal against a decree for ejectment cannot be deemed to be a proceeding *for* ejectment. It is a proceeding *against* ejectment. The provisions of Ss. 3 and 6 would not consequently apply to it.

Per *Mukherjea, J.*—It cannot be said that the expression "proceeding" as used in Ss. 3 and 6 of the Act is not sufficiently wide to include an appeal or that an appeal arising out of a suit for ejectment of a non-agricultural tenant is not hit by the provisions of these sections. (*Mukherjea and Biswas, JJ.*) JAHUR MIA *v.* ABDUL GAFFUR. **196 I.C. 346=14 R.C. 223=45 C.W.N. 603=A.I.R. 1941 Cal. 452.**

——**Ss. 6 and 3**—Applicability—Appeals—Appeal by tenant against decree for ejectment. *See* BENGAL NON-AGRICULTURAL TENANCY (TEMPORARY PROVISIONS) ACT, SS 3 AND 6. **45 C.W.N. 967.**

BENGAL PATNI REGULATION (VIII OF 1819). S. 8, second—*Principal village—Criterion.*

Neither the area nor the *hastabud* can be regarded as the true or only criterion for deciding the question whether a village is to be regarded as the principal village within the meaning of S. 8, second, of the Patni Regulation. The importance of the village is the guiding test (*Mitter and Khundkar, JJ.*) KAMALA RANJAN ROY *v.* BHOLANATH. **45 C.W.N. 727.**

——**S. 8, second**—*Publication of mofussil notices—Publication at cutchery or at principal village—Zemindar, if has option—Cutchery of patnidar—If includes that of dar-patnidar.*

The manner in which Mofussil notices are to be served is regulated by the provisions of S. 8 (second) of the Patni Regulation. This part of the Regulation does not authorise two alternative methods of service to be chosen at the option of the zemindar. If there is a cutchery in existence which satisfies the description given therein, the publication must be at that cutchery. If there is no cutchery on the land of the defaulter, that is to say, a cutchery of the patnidar on the land of the patni taluk, it is then and then only that it would be open to the zemindar to publish at the principal town or village of patni mahal. The cutchery on the land of the defaulter, that is to say, on the land of the patni taluk, must be a cutchery of the patnidar If there be no cutchery of the patnidar on the land of the patni, but there are cutcheries of the dar-patnidars or subordinate tenure-holders or others holding under the patnidar, the zemindar is not required to effect the Mofussil service on such cutcheries.

BENGAL PATNI REGN. (1819), S. 14-A.

(*Mitter and Khundkar, JJ.*) KAMALARANJAN ROY *v.* BHOLA NATH. **45 C.W.N. 727.**

——**S. 11**—*Sale of patni tenure—Liability of purchaser for rent for previous period.*

When a patni tenure is properly and validly sold under the provisions of Regulation VIII of 1819 for arrears of rent due in respect of the same, the purchaser cannot be saddled with the rent charge for any previous period. He takes it free and clear of any such obligation and the utmost that can be said is that, liability for rent for any previous period is transferred to the surplus sale proceeds. (*Derbyshire, C.J. and Mukherjea, J.*) GOURI SANKAR *v.* JATINDRA NATH. **A.I.R. 1941 Cal. 255.**

——**S. 14**—*Reversal of sale—Indemnity to purchaser—Right to collection charges against Zamindar.*

On reversal of a patni sale under S. 14 of the Regulation, the auction-purchaser is not entitled to claim from the Zamindar the collection charges incurred by him. (*Mitter and Akram, JJ.*) BIJOY CHAND *v.* OFFICIAL TRUSTEE OF BENGAL. **I.L.R. (1941) 1 Cal. 90=195 I.C. 423=14 R.C. 96=45 C.W.N. 90=A.I.R. 1941 Cal. 337.**

——**S. 14**—*Reversal of patni sale—Indemnity to purchaser—Right to interest on purchase-money deposited and on rent paid to Zamindar—Purchaser, if bound to apply to Collector for refund of surplus sale proceeds—Or to show that collections made by him fall short of amount of rent paid to zemindar.*

On the reversal of a patni sale under S. 14 of Regulation VIII of 1819, the auction-purchaser is entitled to apply to the Court which set aside the sale for a decree against the zamindar for the purchase-money deposited by him in the collectorate and for the amount of rent paid by him to the zamindar between the date from which the sale took effect and the date of its reversal together with interest at a reasonable rate from the date of payment till repayment. The auction-purchaser is not bound to apply to the Collector for refund of the surplus sale proceeds. The zamindar should move the Court for an order requiring the Collector to send the money to that Court and the Court should adjust the amount sent towards the decree against the zamindar. Further, the auction purchaser is not bound to show that the collections, less the collecting charges, made by him fall short of the amount of rent which he paid to the zamindar and claim only the difference between the two as the amount of his loss. For, the legal effect of the decree reversing the sale is as if the sale had never been held and any retention by the zamindar of the amount of rent paid to him is itself a loss to the auction-purchaser, such retention being of another's, the auction-purchaser's money. (*Mitter and Akram, JJ.*) BIJOY CHAND *v* OFFICIAL TRUSTEE OF BENGAL. **I.L.R. (1941) 1 Cal 90=195 I.C 423=14 R.C. 96=45 C.W.N. 90=A.I.R. 1941 Cal. 337.**

——**S. 14**—*Reversal of patni sale—Rent for period between date of sale and its reversal—Liability of patnidar.*

The legal effect of a decree reversing a patni sale is as if the sale had never been held. It is he and he only who is liable to pay patni rent to the zamindar for the period between the date from which the sale took effect and the date of its reversal. (*Mitter and Akram, JJ.*) BIJOY CHAND *v.* OFFICIAL TRUSTEE OF BENGAL. **I.L.R. (1941) 1 Cal. 90=195 I.C. 423=14 R.C. 96=45 C.W.N 90=A.I.R. 1941 Cal. 337.**

——**S. 14 A**—Locus standi *to apply—Hindu reversioner.*

A reversionary heir to the estate of a Hindu is competent to make an application for setting aside a patni

BENG. PERM. SETTL. REGN. (1793) Art. 6.

sale under S. 14-A of the Patni Regulation as a person holding an interest in the patni by virtue of a title acquired prior to the sale, although he cannot be regarded as the defaulting tenure-holder within the meaning of this section. (*Mukherjea and Biswas, JJ.*) ABDUL AWAL *v.* UDAY CHANDRA DAS. **45 C W N. 998 = 74 C L.J. 176.**

BENGAL PERMANENT SETTLEMENT REGULATION (I OF 1793), Art. 6—*Effect of—Bihar Agricultural Income tax Act—If* ultra vires.

The effect of the Regulation is that re-assessment and re settlement of the lands should be for ever barred and the Government would no longer be entitled to increase the jama by reason of an increase in the zamindar's income. It contains no promise that zamindar should in respect of the income which he derives from the zamindari be exempted from liability to any future general scheme of property taxation, or that the income of a zamindari should not be subjected with other incomes to any future general taxation of incomes. Consequently the tax imposed on agricultural income of zamindars of permanently settled estates by the Bihar Agricultural Income-tax Act, 1938, is in no way an infringement of the rights granted to zamindars by the Permanent Settlement Regulations. The Act does not in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations and therefore cannot be said to be *ultra vires* on that ground. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR.

20 Pat. 573 = 194 I C. 663 = 14 R.P. 17 = 7 B.R. 818 = 1941 I.T.R. 386 = 4 F.L.J. (H.C) 178 = 22 Pat.L.T. 863 = A.I.R. 1941 Pat. 306 (S B.).

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), Ss. 4 and 6—*Certificate against dead man—Effect of—Substitution of heirs—Permissibility.*

A certificate against a dead man is a mere nullity. As the Act makes no provision for the substitution or addition of his heirs as certificate debtors, the only course open to the certificate officer was to make a new certificate before the new rule which was published in the Calcutta Gazette on 21st May, 1936, came into force. (*Henderson, J.*) NALINI KANTA ROY *v.* SURESH CHANDRA CHAKRAVERTY.

I.L R. (1941) 1 Cal. 63 = 45 C W.N. 632 = 73 C.L.J. 45 = A I R. 1941 Cal. 329.

——**Ss. 4 and 5**—Certificates signed without filling in blanks—If legal—Sale on basis of such certificate—Validity. *See* 1940 Dig., Col. 64 SUDHIR CHANDRA CHAKRAVARTHI *v.* SUDHANSHU KUMAR.

191 I C. 266 = 13 R C. 223.

——**Ss. 5 and 6**—Jurisdiction of certificate officer—Property situate outside his district. *See* 1940 Dig., Col. 64. SECRETARY OF STATE *v.* SYED SADEK REZA. **193 I.C 807 = 13 R.C 453 = A.I.R. 1941 Cal. 167.**

——**S. 7**—*Scope—Proceedings for arrears—Separate accounts opened in respect of some co-sharers after period of arrears and payment of quota by them—Proceedings against all—If bad.*

Where certificate proceedings have been started to realise dues from all the co sharers of an estate or village, the fact that separate accounts have been opened with regard to some of the co-sharers after the period for which the arrears are due would not make the proceedings without jurisdiction, though they may have paid their own quota. Such payment does not do away with the liability of the entire estate to pay the arrears due from the whole estate. (*Manohar Lal, J.*) NISAR

BENG. PUB. DEM. RECOV. ACT (1913), S. 20.

MAHOMED KHAN *v.* TANQUIR AHMAD.

194 I.C. 479 = 13 R.P. 729 = 7 B R. 782 = A I.R. 1941 Pat. 529.

——**Ss 7 and 52**—*Scope—Certificate against dead man—No order of substitution and no notice sent to heirs—Effect—Heirs—If bound.*

S. 52 of the Bengal Public Demands Recovery Act applies only where a certificate debtor dies after the issue of the certificate and before it is fully satisfied. It does not apply to a case where the original certificate itself is issued against a dead man. The entire proceedings based upon the certificate so issued against a dead person are wholly inoperative to affect the heirs of the deceased, when no order for substitution of the heirs was ever passed in the proceedings and no fresh notice sent as is provided under S. 7 of the Act. Where the debtor dies after the proceedings are properly started against him, but no notice is served on the heirs or steps taken under S. 50 to appoint a guardian for a minor heir, the heirs cannot be said to be on record and the proceedings and sale will not bind the heirs, and their shares will not be affected by the sale. (*Manohar Lall, J.*) NISAR MAHOMED KHAN *v.* TANQUIR AHMED. **194 I. C. 479 = 13 R.P. 729 = 7 B.R. 782 = A.I R. 1941 Pat. 529.**

——**S. 8**—Order prohibiting tenants from paying rent and for sale of property outside District—Jurisdiction of certificate officer. *See* 1940 Dig, Col. 64. SECRETARY OF STATE *v* SYED SADEK REZA

193 I.C. 807 = 13 R.C. 453 = A.I.R. 1941 Cal. 167.

——**S. 15**—*Certificate Officer accepting bid obtained by peon—Sale, if valid.*

There is nothing in S. 15 of the Public Demands Recovery Act to suggest that the certificate officer must himself do everything in connection with the sale and not have the work carried out by his Nazir or other officers. The mere fact that the certificate officer directed a peon to go to the Mofussil and obtain bids and accepted a bid so obtained, does not affect the validity of the sale. (*Henderson, J.*) NAGENDRA NATH ROY *v.* DINENDRA NATH ROY. **45 C.W.N. 193.**

——**S. 20**—*Certificate sale for arrears of rent—Representation of tenancy by some of tenants—Applicability of principle—B. T. Act, S. 146-A.*

Although S. 146 A of the Bengal Tenancy Act may not in terms apply to a certificate sale for arrears of rent, the principle of representation of the tenancy by some of the tenants embodied therein will. The certificate procedure is no doubt a summary mode for recovery of arrears of rent, but S. 20 (3) of the Public Demands Recovery Act makes it clear that the certificate holder may yet bring the tenure or holding to sale. He can, of course, do so by joining as certificate-debtors all the persons interested in the tenancy, but even where he has not done so, he can succeed by showing that the persons against whom the proceedings are taken also represent the interest of those who have been left out, in other words, that the persons named in the certificate as debtors do in fact represent the tenancy in its entirety. Whether one or some of the co sharer tenants can be regarded as a representative of the whole body of co-tenants is essentially a question of fact which has got to be determined on evidence like any other fact, and where as here it has to be decided *de hors* the provisions of S. 146 A of the Bengal Tenancy Act, the tests laid down therein may only serve as a guide so far as they go. It cannot be said that consistently with the provisions of this section, there may not still be other conditions in which the presence of even one or some of the tenants as defendants will be as effective as that of all

BENG. PUB. DEM. RECOV. ACT (1913), S. 20.

(*Biswas, J.*) NURJAN BIBI *v.* SAYEMALI MULLA. **45 C.W.N. 460.**

——**S. 20**—*Representation of tenancy — Bengal Tenancy Act, S. 146-A.*

S. 146 A of the Bengal Tenancy Act does not codify the general law regarding representation and does not apply to certificate sales. The question whether the defendants represented the entire interests of the tenants for the purposes of the Public Demands Recovery Act must be decided under the general law without reference to that section. It does not follow from the fact that the defendants are the only persons whose names appear in the rent roll that they represent the entire tenancy right. Again the mere fact that one of the defendants alone paid the rent would not make him the representative of all the tenants for all purposes. (*Sen, J.*) FAZALAR RAHIM *v.* KHORSED ALAM.

I.L.R. (1941) 1 Cal. 339 = 45 C.W.N. 277 = A.I.R. 1941 Cal. 333.

——**S. 20**—*Sale of property for amount of certificate and also for subsequent arrears—Legality of sale.*

Under the Public Demands Recovery Act, property can be sold only for the sum due under the certificate. A sale of the property not only for the amount of the certificate but also for the arrears of subsequent years for which no certificate had been issued is illegal. (*Sen, J.*) FAZALAR RAHIM *v.* KHORSED ALAM.

I.L.R. (1941) 1 Cal. 339 = 45 C.W.N. 277 = A.I.R. 1941 Cal. 333.

——**S. 20(3)**—*Title of purchaser—Interest of tenant who is neither certificate debtor nor represented by him—If passes.*

S. 20 (3) of the Public Demands Recovery Act presupposes that there has been a sale of the entire interest of all the tenants of the tenure or holding. It does not and cannot mean that the interest of a tenant of the holding or tenure who is neither a certificate debtor nor represented by a certificate debtor can be sold in execution of a certificate. (*Sen, J.*) FAZALAR RAHIM *v.* KHORSED ALAM. **I.L.R. (1941) 1 Cal. 339 = 45 C.W.N. 277 = A.I.R. 1941 Cal. 333.**

——**S. 29**—*Scope—Suit to declare that sale did not affect interests of plaintiff—Bar of.*

S. 29 of the Bengal Public Demands Recovery Act applies only to the case of a proper certificate, the section assumes that the certificate was a proper certificate. But when there was no proper certificate at all, having been issued against a dead man, the heirs to whom no notice was sent and who were not at all on the record are not debarred from bringing a suit to have it declared that the sale did not affect their interests in the property. (*Manohar Lall, J.*) NISAR MAHOMED KHAN *v.* TANQUIR AHMAD. **194 I.C. 479 = 13 R.P. 729 = 7 B.R. 782 = A.I.R. 1941 Pat. 529.**

——**S. 37**—Adjustment of certificate debt—Question relating to—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 64. SECRETARY OF STATE *v.* SYED SADEK REZA. **193 I.C. 807 = 13 R.C. 453 = A.I.R. 1941 Cal. 167.**

——**Ss. 37 and 35**—Question if certificate was "duly filed"—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 64. SECRETARY OF STATE *v.* SYED SADEK REZA. **193 I.C. 807 = 13 R.C. 453 = A.I.R. 1941 Cal. 167.**

——**S. 37**—Scope—Suit to set aside sale on ground other than fraud—Jurisdiction of Civil Court—Sale held on date different from that mentioned in sale proclamation—Suit to set aside such sale—Maintainability. *See* 1940 Dig., Col. 65. TIKENDRAJIT GHOSE *v.* MRITUNJOY MONDAL (JADAV MONDAL). **13 R.C. 272 = 191 I.C. 571.**

BENGAL REGULATION (1793).

——**S. 46**—*Applicability—Question between auction-purchaser and representatives of certificate debtor.*

S. 46 of the Bengal Public Demands Recovery Act is no bar to a suit in which the question is between the auction-purchaser and the representatives of the certificate debtor. (*Manohar Lall, J.*) NISAR MAHOMED KHAN *v.* TANQUIR AHMAD. **194 I C 479 = 13 R.P. 729 = 7 B.R. 782 = A.I.R. 1941 Pat. 529.**

——**Sch. I, Cl. (8)**—"*Any arrear of rent*"—*If limited to rent of tenancies governed by B. T. Act.*

Sch. I, Cl. (8) of the Public Demands Recovery Act, authorises the issue of a certificate for the recovery of any arrear of rent in the case of property under the management of the Court of Wards. The term "rent" must not be limited to the rent of tenancies governed by the B. T. Act. (*Henderson, J.*) BALCHAND *v.* BIJOY CHAND MAHTAB. **73 C.L.J. 450 = 45 C.W.N. 1004 = A.I.R. 1941 Cal. 661.**

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 5—Search warrant executed by different officer—Legality of search. *See* 1940 Dig., Col. 65. EMPEROR *v.* GOBINDA CHANDRA DAS. **13 R.C. 304 = 192 I.C. 182 = 42 Cr.L.J. 253.**

——**Ss. 5 and 6**—Expression—"Common gaming house" not used in search warrant—Prosecution, if entitled to benefit of S. 6. *See* 1940 Dig., Col. 65. EMPEROR *v.* GOBINDA CHANDRA DAS. **13 R.C. 304 = 192 I.C. 182 = 42 Cr.L.J. 253.**

——**Ss. 5 and 6**—*Warrant stating that house is used for gambling—Recovery of instruments of gaming—Presumption, if arises.*

A warrant issued under S. 5 of the Bengal Public Gambling Act must indicate that the Magistrate has reason to believe that the house which he directs to be searched is used as a common gaming-house, or, in other words, as a house which is used by its owner or occupier for the purpose of making profit out of gambling transactions which take place therein. A warrant which merely states that the Magistrate has reason to believe that the house is used for certain gambling is not legal, and if the house is searched under such a warrant, the presumption which is raised under S. 6 of the Act cannot arise from the instruments of gaming found therein. In such a case, it must be proved by independent evidence that the owner or occupier of the house derived a profit from the use of these instruments of gaming (*Edgley, J.*) JITENDRA BHUBAN DAS *v.* EMPEROR. **I L R. (1941) 1 Cal 58 = 195 I.C. 7 = 14 R C. 39 = 42 Cr.L.J. 643 = 45 C W.N. 24 = A.I.R. 1941 Cal 413.**

——**S. 6**—*Race-books found in house—Evidentiary value.*

The fact that certain instruments of gaming, such as race-books, were found in the house is not sufficient to show that the house is common gaming house, though they might be treated as evidence. (*Edgley, J.*) BENOY KRISHNA ROY *v.* EMPEROR. **192 I.C. 736 = 13 R.C. 344 = 42 Cr.L.J. 319 = A.I.R. 1941 Cal. 32.**

BENGAL REGULATION (XIX OF 1793), Ss. 7 and 8—Assessment of rent—Suit for—Damages for period prior to suit—If can be recovered. *See* 1940 Dig., Col. 65. JUGAL CHARAN *v* DEBENDRANATH. **192 I.C. 518 = 13 R.C. 316.**

—— **(XXVII OF 1793)**—Applicability—Hats and bazaars coming into existence subsequent to date of Regulation. *See* 1940 Dig., Col. 66. MASOOD AHMAD *v.* BIKAN MAHURI. **A I.R. 1941 Pat. 6.**

BENGAL REGULATION (1793), S. 7.

——**Ss. 7 and 8**—Half of produce—Material time. *See* 1940 Dig., Col. 65. JUGAL CHARAN *v.* DEBENDRANATH. **192 I.C. 518=13 R.C. 316.**

——**S. 9**—Applicability—Lands held in assertion of lakhiraj rights but no grant before or after 1790 proved—Assessment of rent—Civil suit—Maintainability. *See* 1940 Dig., Col. 66. JUGAL CHARAN *v.* DEBENDRANATH. **192 I.C. 518=13 R.C. 316.**

——**S. 9**—Land held under invalid lakhiraj grant—Assessment of revenue—Civil suit—Maintainability—Bengal Regulation II of 1819, S. 30—Bengal Act VII of 1862, S. 2. *See* 1940 Dig., Col. 66. JUGAL CHARAN *v.* DEBENDRANATH. **192 I.C 518=13 R.C. 316.**

——**(I OF 1829)**—*Revision—Powers of Bihar and Orissa Board of Revenue—Questions of fact—Interference—Grounds.*

The Bihar and Orissa Board of Revenue has general powers of supervision and control and it can set aside an order declared by law to be final if such orders had been made without jurisdiction. As a supervising Court the Board may interfere for the purpose of preventing gross abuse or gross injustice. Although the Board does not, as a matter of practice, often interfere on questions of fact, it cannot be said that it can in no circumstances interfere on questions of fact. (*Middleton.*) RAM KESHWAR SINGH *v.* DEOKI SINGH.
(1941) P.W.N 311=7 B.R. 684.

BENGAL RENT ACT (X OF 1859), Ss. 160 and 151—*Order of Deputy Collector in execution proceedings—Appeal and second appeal.*

In S. 160 of the Rent Act, the word 'suit" does not include execution proceedings. No appeal or second appeal lies from an order passed by a Deputy Collector in those proceedings. (*Henderson, J.*) SAKKAL SARDAR *v.* ISWAR DAS THIRANI.
I.L.R. (1941) 2 Cal. 366

BENGAL REVENUE FREE LANDS REGULATION (VIII OF 1800). S. 10—No entry in Pergunah register relating to lakhiraj—Non-registration of grant—Presumption. *See* 1940 Dig., Col. 67. PROVINCE OF BENGAL *v.* MRITUNJOY ROY.
191 I.C. 499=13 R.C. 246.

BENGAL TENANCY ACT (VIII OF 1885), Ss. 3 and 26-F—*Occupancy holding purchased before* 1928—*Purchase recognised by one of co-sharer landlords—Purchaser, if tenant—His right to pre emption.*

A purchaser of an occupancy holding before the amending Act of 1928 was passed, whose purchase was recognised by one of the co-sharer landlords is a tenant within the definition in S. 3 of the B. T. Act. He has, therefore, a right of pre-emption under S. 26-F of that Act. (*Henderson, J.*) ALTAB ALI *v.* ABDUL MAJID.
45 C.W.N. 1068=A.I.R. 1941 Cal. 716.

——**S. 3 (17) proviso, (as amended by Act IV of 1928)**—*Retrospective effect.*

The proviso to S. 3 (17) is not retrospective in effect. (*Henderson, J.*) SUDHINDRA CHANDRA SINGHA *v.* JADAV MARAK. **A.I.R. 1941 Cal 717.**

——**S. 4**—*'Under-raiyat'—Sub-lessee of homestead land under occupancy raiyat—T. P. Act—If applicable to sub-lease.*

Where the lands included in the holding of an agricultural raiyat consist partly of agricultural and partly of homestead lands, and the portion which can be used as homestead is let out for residential purposes, the under-tenant will be an under-raiyat within the meaning of S. 4 of the B. T. Act, and the provisions of the T. P. Act will not be applicable to the sub-tenancy. (*Mukherjea and Roxburgh, JJ.*) ARUN KUMAR SINHA *v.* DURGA CHARAN BASU. **196 I.C. 702=73 C.L.J. 604=45 C.W.N. 805=A.I.R. 1941 Cal. 606.**

BENGAL TENANCY ACT (1885) . 23.

——**S. 5**—*Status of tenant—Tenure-holder or raiyat.*

A kabuliyat executed prior to the Bengal Tenancy Act did not clearly indicate whether the tenant was to cultivate the land himself or lease it out to others. In one place it said that besides enjoying the land in raiyati right the tenant would have no right of sale or transfer without the consent of the landlord and there were further restrictions on his right to cut away and appropriate trees. The executants of the kabuliyat was Rajbansi by caste and Jotedar by profession. At the inception of the tenancy the area was considerably less than 100 bighas and the C. S. records described the tenant as settled raiyat.

Held, that in the circumstances of the case the presumption raised by the C. S. records in favour of the tenant was not rebutted and that he was a raiyat and not a tenure-holder. (*Mukherjea, J.*) SURENDRA MOHAN SARDAR *v.* NAGENDRA CHANDRA LAHIRI.
196 I.C. 121=14 R.C. 178=73 C.L.J. 73=A.I.R. 1941 Cal 480.

——**S. 5 (5)**—*Tenant claiming to be raiyat—Onus of proof.*

Where the land demised has more than 100 bighas in area, the presumption arising under S. 5 of the B. T. Act is that the settlement holders are tenure-holders. The onus is on those who claim to be raiyats to rebut the said presumption, and this they can do by a reference to the lease itself, if the lease is of an unambiguous nature, but if it is ambiguous, the surrounding circumstances must be looked at. (*R.C. Mitter and Latifur Rahman, JJ.*) SYED UDDIN AHAMMED *v.* HEMANTA KUMARI DEVI. **72 C.L.J. 402.**

——**S. 18-A**—Sale certificate — If instrument of transfer. *See* 1940 Dig., Col. 67. BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSH. **191 I.C. 824=13 R.C. 285.**

——**S. 22**—Co-sharer landlord in exclusive possession—Thikadar under—Settlement of land on settled raiyat owning share in proprietary interest—Accrual of occupancy rights—Subsequent collectorate partition—Land allotted to another co-sharer—Right of latter to recover possession—Bengal Estates Partition Act, S. 99 *See* 1940 Dig., Col. 68. INDER CHANARA *v.* RADHAKRISHNAJI. **13 R.P. 501=7 B.R. 521=192 I.C. 515=A.I.R. 1941 Pat. 24.**

——**Ss. 23 and 76**—*Land let out as raiyati for agricultural purpose—Conversion of portion into tank and raising remainder for erection of house—If prohibited by S. 23—Such user, if constitutes improvements—Remedy of landlord.*

Where one portion of the land which was let out as raiyati land for the purpose of agriculture is converted into a tank and the remaining portion is raised for the purpose of the erection of a dwelling house thereon, so that no portion of the land can be used for agriculture, the land is used in a manner which is prohibited by S. 23 of the Bengal Tenancy Act. The excavation made on the land and the construction proposed to be made do not constitute improvements within the meaning of S. 76 of the Act under this section, the improvement must be an improvement to the holding in which the construction is made. The Act does not empower a tenant to utilise one holding for the purpose of improving another holding irrespective of the question whether such use would impair the value of the former holding. Again, the improvement must be consistent with the purpose for which the holding was let and it must add to the value of the holding. In the above circumstances, the

BENGAL TENANCY ACT (1885) S. 26-C..

landlord is entitled to a mandatory injunction upon the tenant directing him to restore the land to its original condition and also to an injunction restraining him from using the land in such a way as to render it unfit for the purpose of agriculture. (*Sen, J.*) RAJA KAMALA-RANJAN *v.* ABDUL GAFUR. **45 C.W.N. 464.**

——S. 26-C—*Applicability—Gift of occupancy holding by Mahomedan.*

The words 'every transfer" in S. 26-C are quite general, and must be held to include a transfer by a Mahomedan, so that the result will be that a gift of an occupancy holding by a Mahomedan must not only comply with the rules of Mahomedan law, but also satisfy the requirements embodied in S. 26-C. (*Biswas, J.*) SRIMATIJAN *v.* FULJAKHATUN.

A I R. 1941 Cal. 266.

——S. 26 E—*Application for confirmation of sale—Limitation—Limitation Act, Art.* 181.

There is no period of limitation within which an application for confirmation of sale under S. 26-E of the Bengal Tenancy Act could be made. Such an application would not attract Art. 181 of the Limitation Act which contemplates a case where a Court has got to be moved by an application and without which it is not bound to exercise its powers. S. 26 E, as it stood prior to the Amendment Act of 1938, nowhere laid down that an application was necessary for confirmation of the sale. (*Mukherjea and Biswas, JJ.*) MANDI MIA *v.* SEKANDER MIA. **195 I.C. 708=14 R.C 128= 45 C.W.N. 493=A I.R. 1941 Cal 411.**

——S. 26-E—*Application for confirmation of sale rejected for non payment of landlord's fee—Fresh application—If competent.*

Where an application by the purchaser for confirmation of sale under S. 26 E of the Bengal Tenancy Act was rejected by the Court for non compliance with its order directing payment of landlord's fees, and the Court, however, did not direct a forfeiture of the purchase-money and a re-sale of the property under sub S. (3) of that section, it is competent for the purchaser to make another application for confirmation of the sale. (*Mukherjea and Biswas, JJ.*) MANDI MIA *v.* SEKANDER MIA. **195 I.C. 708=14 R.C. 128= 45 C.W.N. 493=A.I.R. 1941 Cal. 411.**

——S. 26-E—*Payment of landlord's fees—Time limit.*

There is no time limit prescribed by S. 26 E of the Bengal Tenancy Act for the payment of the landlord's fees. The Court can indeed specify the time within which the fees have got to be paid and in default can forfeit the purchase-money and direct a re-sale, but so long as it is not done, an application for the payment of the landlord's fees is not barred. (*Mukherjea and Biswas, JJ.*) MANDI MIA *v* SEKANDER MIA.

195 I.C. 708=14 R.C. 128=45 C.W N. 493= A.I.R. 1941 Cal. 411.

——S. 26-E—*Sale of holding before repeal of section—Confirmation of sale subsequent to repeal—Landlord's fee, if must be paid.*

If a sale of an occupancy holding in execution of a money decree was held prior to the repeal of S. 26 E of the Bengal Tenancy Act by the Amendment Act of 1938, the purchaser applying for confirmation of the sale after the repeal of that section is bound to pay the landlord's fees under the provisions of that section before he can have the sale confirmed. When the repealing enactment repeals a substantive right as well as the procedure by which the right was enforced, in such cases if the right is saved in respect of any transaction which was com pleted prior to the introduction of the Act, the remedies in respect of such rights are also saved under S. 8 of the

BENGAL TENANCY ACT (1885), S. 26-F.

Bengal General Clauses Act. (*Mukherjea and Biswas, JJ.*) MANDI MIA *v.* SEKANDER MIA.

195 I.C. 708=14 R C. 128=45 C.W.N. 493= A.I.R 1941 Cal. 411.

——S. 26-F (as amended)—Applicability—Document of transfer executed before and registered after section coming into force. *See* 1940 Dig., Col. 69. GOBARDHAN BAR *v.* GUNADHAR BAR.

193 I.C. 530=13 R.C 433=A.I.R. 1941 Cal. 78.

——S. 26-F (as amended)—Applicability—Purchase by co-sharer jointly with strangers—Right of pre-emption of other co-sharers. *See* 1940 Dig., Col. 69. KHODAJA *v.* ABDUL KHALEQUE.

I L R. (1941) 1 Cal. 303.

——S. 26-F—*Co-sharer not served with notice under S. 26-C—Application by, for pre-emption—Limitation.*

Although there is no limitation for an application for pre-emption under S. 26-F of the Bengal Tenancy Act by a co-sharer tenant on whom no notice of transfer under S. 26-C has been served, it is not open to him to apply at any time. He must apply within a reasonable time from the date of his knowledge of the transfer. (*Henderson, J.*) AYETUNNISSA BIBI *v.* JAHAR ALI.

45 C.W N. 735.

——S. 26-F—*Landlords purchasing 8 annas share in tenancy—If co-sharers of tenant vendors—Sale by tenants of remaining 8 annas share—Right of landlords to pre emption.*

If the landlords purchase an 8 annas share in an occupancy tenancy, their interest as landlords is kept distinct from their interest as tenants under S. 22 of the Bengal Tenancy Act, and they are, therefore, co-sharers of the tenant vendors within the meaning of S. 26-F of the Act. If the tenants sell their remaining 8 annas share, the landlords are entitled to pre-emption under that section. (*Henderson, J.*) AMJOD TALUKDAR *v.* ROHINI KANTA. **73 C L J. 526=45 C.W.N. 901.**

——S. 26-F—*Order allowing pre-emption—Second appeal.*

A second appeal is not competent from an order allowing pre-emption under S. 26-F of the B. T. Act. (*Henderson, J.*) SANTOSH KUMAR *v.* UPENDRA NATH. **45 C.W.N. 790.**

——S. 26-F (as amended)—Proceeding under—Parties—Co-sharer tenants—If necessary parties. *See* 1940 Dig., Col. 70. GOBARDHAN BAR *v.* GUNADHAR BAR. **193 I.C. 530=13 R.C. 433= A.I.R. 1941 Cal. 78.**

——S. 26 F—Right of pre-emption—Purchaser of occupancy holding before 1928—Purchase recognised by one of co sharer landlords. *See* B. T. ACT, SS. 3 AND 26 F. **45 C W N. 1068.**

——S. 26-F—Right to apply—Unrecognised purchaser of share of occupancy holding. *See* 1940 Dig., Col. 70. ABDUL MAJID *v.* ALTAB ALI. **191 I C. 494= 13 R C. 245.**

——Ss. 26-F (New) and 48-G—*Right to pre-empt—Co-sharer of under-raiyati holding with occupancy rights.*

Under the new S. 26-F read with S. 48-G of the B.T. Act, the right of pre-emption is not available to a co-sharer of an under-raiyati holding with occupancy rights. (*Henderson, J.*) SANTOSH KUMAR *v.* UPENDRA NATH. **45 C.W.N. 790.**

——S. 26-F (New)—*Scope of enquiry—Question whether transfer is* benami—*If relevant.*

The question whether the transfer is *benami* is entirely irrelevant to a proceeding under S. 26-F of the Bengal Tenancy Act. It is entirely outside the scope of this section to enquire into and investigate questions of this

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kind. (*Henderson, J.*) SINDHURAM *v.* AMBICA CHARAN. **45 C.W N. 658.**

——**S. 26 F**—*Shares of applicants after pre emption —How determined.*

If there is only one applicant from among the joint landlords, he obtains the whole interest. This right depends not on his share in the landlord's interest but on the fact that he provided the whole of the consideration. Again, under sub-S. (4) a co sharer may apply to join in an application; but he must deposit the amount which the Court fixes as his share of the consideration and expenses. The share which might be claimed by the other co-sharers who have not joined in the application would pass to the original applicant. Hence, it is clear that the shares after pre-emption will depend not on the original shares but on the amount of consideration money re-pectively contributed. (*Henderson, J.*) REAZADDI BEPARI *v.* YAKUB BEPARI.

A I.R. 1941 Cal. 416.

——**S. 26-F (as amended)**—Transfer executed before but registered after amended section coming into force—Right of co-sharer tenant to apply for pre-emption. *See* 1940 Dig., Col. 70. UMASHASHI DEVI *v.* RADHA BINODINI DEVI. **72 C L.J. 387.**

——**S. 26-F (1) (a)**—'*Purchase*'—*Meaning of.*

Under S. 26 F (1) (*a*) of the Bengal Tenancy Act, the transfer excepted is one to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase. Such purchase does not mean the actual pur chase which has given rise to the claim for pre-emption. (*Henderson, J.*) SINDHURAM *v.* AMBICA CHARAN.

45 C.W.N. 658.

——**S. 26 F (2)**—"*Consideration money*"—*Meaning.*

Under S. 26-F (2) of the Bengal Tenancy Act, an applicant must deposit the consideration money as stated in the notice of transfer. Where it appears from the kobala that the parties valued the property at a certain amount free from incumbrances but it transpires from the actual notice that only a portion of it was paid in cash and the balance was unpaid on the ground that it is due on the incumbrance, the amount actually paid in cash is the consideration money to be deposited. (*Henderson, J.*) HAFIZUR RAHMAN *v.* AMJAD ALI TALUKDAR. **I.L.R (1941) 2 Cal. 279 = 73 C L.J. 529**

——**S. 26-F (5) and (6) (as amendedby Act VI of 1938)**,—*Application by co-sharers—Court allotting whole of share to one of applicants and dismissing claim of other applicants—Legality of order.*

In the case of an application by co-sharers under S. 26-F an order allotting the whole of the share sought to be pre-empted to one of the applicants, and dismissing the claim of the other applicants without apportioning the share between them is in direct contravention of sub-S. (5) of that section. Apportionment means the division of the property amongst the persons entitled to it and in making the apportionment the Court must allot something to all of them. (*Henderson, J.*) NABIRUDDIN SARKAR *v.* OSMAN GANI. **A.I.R. 1941 Cal. 481.**

——**S. 26-G**—Applicability—Mortgage giving mortgagee all rights of usufructuary mortgagee and also right of sale. *See* 1940 Dig. Col. 70. KHOAJ JAMADAR *v.* ABDUL SOBHAN KHAN. **191 I.C. 713 = 13 R.C. 274.**

——**S. 26 G**—Mortgage — Construction —Usufructuary mortgage by conditional sale. *See* 1940 Dig., Col. 71. MAHENDRA NATH SARDAR *v.* KALI PADA HALDAR. **I.L R (1940) 2 Cal. 573 = 194 I C. 508 = 13 R.C. 513.**

——**S. 26 G**—Mortgaged land represented as mokarari holding—Mortgagor, if estopped from showing that it is occupancy holding. *See* 1940 Dig., Col. 71. MAHENDRA NATH SARDAR *v.* KALI PADA HALDAR. **I.L.R. (1940) 2 Cal. 573 = 194 I.C. 508 = 13 R.C. 513.**

BENGAL TENANCY ACT (1885), S. 26-G.

——**S. 26-G (1) (a) and (5) (after amendment in 1938)**—*Validity—If* ultra vires *of Provincial Legislature—Section, if conflicts with Ss.* 62 *and* 68 *of T. P. Act—Scope of section—Personal covenant in nature of indemnity clause in usufructuary mortgage—If alters nature of mortgage.*

S. 26-G of the B. T. Act as it stood after amendment in 1938 is not *ultra vires* of the Provincial Legislature. Sub-S. (1) (*a*) of this section which was introduced by Act VI of 1938, so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage which was entered into before Act IV of 1928 to recover possession of the mortgaged property after the expiry of 15 years or the period mentioned in the bond, whichever is less, is undoubtedly in conflict with the provisions of S. 62 of the T. P. Act. But this repugnancy is perfectly immaterial, as this is a matter which is not covered by the concurrent list. This relates to transfer of, or contracts relating to, agricultural lands, and the Provincial Legislation is valid, even though it contradicts any existing Indian Law. If the Provincial Legislature has power to make a legislation with regard to future transfers, it can certainly, in virtue of its plenary powers, give retrospective effect to such provision so as to affect transfers made before 1928. S. 26-G (5), so far as it provides that the consideration shall be extinguished, is not in conflict with S. 68 (1) (*a*) of the T. P. Act under which the mortgagee has a personal remedy against the mortgagor. It is only a pure usufructuary mortgage that conforms to the type defined in S. 58 (*d*) of the T. P. Act, which comes within the purview of S. 26 G of the B. T. Act. If there is a personal covenant to pay, the mortgage will cease to be a usufructuary mortgage and it can rank only as an anomalous or mixed mortgage, which is excluded from the purview of that section. If this construction is sound, no conflict with S. 68 (1) (*a*) of the T. P. Act is possible, for in cases where that section will come into operation, S. 26-G of the B. T. Act will have no application at all. But the presence of a personal covenant to pay in a usufructuary mortgage, which is in the nature of an indemnity clause as when the mortgagor undertakes to pay interest or compensation or the whole or a portion of the mortgage-money if the mortgagor is dispossessed from the mortgaged property, will not alter the nature of the mortgage, and the case will still come under S. 26-G of the B. T. Act. Such an agreement is no part of the mortgage transaction, for it comes into effect only when the mortgage fails. It is a collateral agreement, and whether it is enforceable or not is another matter. (*Mukherjea and Roxburgh, JJ.*) AKBAR ALI *v.* MAFIJUDDIN. **45 C.W.N. 823 = 74 C.L J. 370.**

——**Ss. 26 G (5) and 3 (3)**—Complete usufructuary mortgage—Mortgage with possession for certain period —Period considered sufficient to extinguish loan—Personal covenant to indemnify mortgagee if loan is not so extinguished—Nature of mortgage. *See* 1940 Dig., Col. 73. PRAFULLA CHANDRA GOPE *v.* SOARU MAHOMED. **191 I.C. 720 = 13 R.C. 277.**

——**Ss. 26-G (5) and 3 (3)**—Mortgage—Construction. *See* 1940 Dig., Col. 73. GAYAMANI BEWA *v.* DHARANIDHAR JANA. **191 I.C. 175.**

——**S. 26 G (5)**—Mortgage including both occupancy holdings and tenures—Mortgagor's right to recover possession of occupancy holdings. *See* 1940 Dig., Col. 74. PRAFULLA CHANDRA GOPE *v.* SOARU MAHOMED. **191 I.C. 720 = 13 R.C. 277.**

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——S 26 G (5)—Mortgage of occupancy holding describing it as mokarari tenancy—Mortgagee cognisant of actual facts—Estoppel against mortgagor. *See* 1940 Dig., Col. 74. BHUTNATH JANA *v.* GOPAL PROSAD SAHU. **193 I.C. 26 = 13 R.C. 361.**

——S. 26-G (5)—Mortgagors in possession as adihars under mortgagee—If competent to apply for restoration of possession. *See* 1940 Dig., Col. 74. PRAFULLA CHANDRA GOPE *v.* SOARU MAHOMED. **191 I.C. 720 = 13 R.C. 277.**

——S. 26-G (5) and (6)—*Mortgagor put into possession by order of District Judge—Order reversed in revision—Recovery of possession by mortgagee—Proper remedy—C. P. Code, S.* 144.

An application under S. 26-G (5) and (6) of the B. T. Act by the mortgagor to be put into possession was dismissed by the Munsif but was allowed by the District Judge and in accordance with that decision the mortgagor was put into possession. In revision the decision of the District Judge was set aside and that of the Munsif restored. The mortgagee applied for restitution under S. 144, C. P. Code.

Held, that the proper remedy of the mortgagee was by an application under S. 144, C. P. Code, and that a suit by him would be barred. (*Henderson, J.*) GURU PROSAD *v.* SHEIKH KARIM BUX. **45 C.W.N. 346.**

——S. 26-G (7)—*Retrospective operation.*

Sub-S. (7) of S. 26-G of the B. T. Act inserted by Act XVIII of 1940 has not the effect of making competent appeals which were incompetent when filed. There is nothing to suggest that it has such retrospective effect. (*Henderson, J.*) KARAM NEWAJ *v.* NITTYAMOYEE DASSYA. **45 C.W.N. 397.**

——Ss. 26-J and 188—Sale of occupancy holding under erroneous description as mokarari before repeal of sections—Landlord's right to recover balance of landlord's fees by application—If subsists after their repeal—Bengal General Clauses Act, S. 8 (*c*) and (*e*). *See* 1940 Dig., Col. 75. DHIRENDRA NATH ROY *v.* IJJAT-ALI MIAH. **194 I.C. 511 = 13 R.C. 514.**

——S. 29—*Applicability—Suit for assessment of fair rent.*

In a suit for assessment of fair rent S. 29 can have no application. (*Henderson, J.*) GOPAL CHANDRA *v.* DWARIKA NATH. **195 I.C. 864 = 14 R.C. 144 = A.I.R. 1941 Cal. 446.**

——S. 48 (c)—*Decree for ejectment against under-raiyat—If binds his sub-lessee.*

The principle that a decree for eviction against a lessee is binding on the sub-lessee even though the latter has not been made a party to the suit is not applicable to the case of a tenancy under the Bengal Tenancy Act. A sub-lessee under an under-raiyat who acquires the status of an under-raiyat, can be ejected only under the provisions of S. 48 (*c*) of that Act and not otherwise. (*Mukherjea, J.*) SERAJUL HUQ MIA *v.* ABJAL MIA. **I.L.R. (1941) 1 Cal. 382 = 196 I.C. 419 = 74 C.L.J. 388 = 45 C.W.N. 339 = A.I.R. 1941 Cal. 351.**

——S. 48-F—*Applicability—Sub lease created before* 1928.

S. 48-F of the B. T. Act does not apply to a sub-lease created before the Amending Act of 1928 came into force. (*Mukherjea, J.*) SERAJUL HUQ MIA *v.* ABJAL MIA. **I.L.R. (1941) 1 Cal. 382 = 196 I.C. 419 = 74 C.L.J. 388 = 45 C.W.N. 339 = A.I.R. 1941 Cal. 351.**

——S. 48-F—*Sub-lease by under-raiyat—Landlord's consent—If necessary.*

The word 'transfer' in S. 48-F of the B. T. Act is sufficiently wide to include a sub-lease as well, and an under-raiyat cannot sub-let his land except with the consent of the landlord. (*Mukherjea, J.*) SERAJUL HUQ MIA *v.* ABJAL MIA. **I.L.R. (1941) 1 Cal. 382 = 196 I.C. 419 = 74 C.L.J. 388 = 45 C.W.N. 339 = A.I.R. 1941 Cal. 351.**

BENGAL TENANCY ACT (1885), S. 76.

——S. 48-G—*Retrospective operation.*

S. 48-G of the B. T. Act cannot be said to be retrospective in its operation so as to attract the provisions of S. 65 when the decree for rent was obtained against an under-raiyat before the Amending Act IV of 1928 was passed. (*Mukherjea, J.*) ABDUS SAMAD MOLLA *v.* ABDUL GOFUR MOLLA. **I.L.R. (1941) 1 Cal. 409 = 196 I.C. 357 = 14 R.C. 227 = 45 C.W.N. 367 = A.I.R. 1941 Cal. 396.**

——S. 50—Presumption under — Applicability—Record of-rights finally published. *See* 1940 Dig., Col. 76. KHODADAT BIBI *v.* KAMALA RANJAN ROY. **192 I.C. 77 = 13 R.C. 301.**

——S. 50—Presumption under—Applicability—Suit to eject defendant as trespasser. *See* 1940 Dig., Col. 76. KHODADAT BIBI *v.* KAMALA RANJAN ROY. **192 I.C. 77 = 13 R.C. 301.**

——S. 50—Presumption under—Rebuttal—Slight variation in rent—If sufficient. *See* 1940 Dig., Col. 76. ABDUL WAHEB *v.* NAGENDRA CHANDRA LAHIRI. **I.L.R. (1940) 2 Cal. 559 = 192 I.C. 685 = 13 R.C. 335.**

——S. 51 — Presumption under — Applicability—Written lease. *See* 1940 Dig., Col. 76. ATUL KRISHNA BOSE *v.* ZAHED MONDAL. **193 I.C. 635 = 13 R.C. 445 = A.I.R. 1941 Cal. 102.**

——S. 52—*Excess area found on re-measurement—Settlement of increased rent—Previous measurement not proved to be inaccurate—Deduction from total area—If may be allowed—Rule of practice.*

Where on re-measurement an increase in the area of the land settled with a tenant is found, deduction from such increased area can be allowed for the purpose of settling increased rent although it is not proved that the previous measurement, on the basis of which the settlement was made, was in any way inaccurate or wrong. When the subsequent measurement is made during the cadastral survey operation and the previous measurement was a private measurement made by the landlord without the aid of any scientific instrument, it would not be improper for the Court to make some deductions from the survey area with a view to reduce the two areas to a common standard for comparison. In the absence of any better materials, it would be proper for the Court to adopt as a matter of practice the rules laid down by the settlement authorities according to which a deduction of 5 per cent. from the total area is allowed when the previous measurement is proved to have been done with more than usual accuracy and in all other cases a deduction of 10 per cent. is permitted. (*Mukherjea and Biswas, JJ.*) JANAKINATH GUHA *v.* BAZLER RAHAMAN. **I.L.R. (1941) 2 Cal. 24 = 45 C.W.N. 575.**

——S. 75-A (2)—*Applicability—Decree for enhancement under S.* 105—*Decree passed before section coming into force.*

S. 75-A, sub-S. (2) of the B. T. Act, applies to a decree for enhancement of rent made by a Revenue Officer under S 105 of that Act. It is immaterial that the decree was passed before that section came into force, as the decree is one made under the provisions of the Act and is, therefore, within the terms of that section. (*Henderson, J.*) NAGENDRA CHANDRA LAHIRI *v.* MOULVI MD. ABDUS SOBHAN SAHIB. **45 C.W.N. 1001.**

——S. 76—Land let out as raiyati for agricultural purpose—Conversion of portion into tank and raising

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remainder for erection of house—Such user, if constitutes improvements. *See* B. T. ACT, SS. 23 AND 76.
45 C.W.N. 464.

——**S. 85-A**—*Applicability — Patni tenure—Surrender by fractional patnidar.*

The provision for surrender as contained in S. 85-A of the B. T. Act is totally incompatible with and contrary to the essential incidents of a patni as laid down in Regulation VIII of 1819, and in view of the provision of S. 195 (*e*) of the B. T. Act it cannot be made applicable to a patni tenure. Even if it applies, it cannot possibly entitle a fractional patnidar to surrender his undivided share in the taluk unless his co-sharers also joined with him. (*Derbyshire, C.J. and Mukherjea, J.*) NITYA RANJAN MUKHERJEE *v.* NIRANJAN CHANDRA.
195 I C. 79=14 R.C. 43=
74 C.L.J. 393=45 C.W.N. 137=
A.I.R. 1941 Cal. 330.

——**S. 86**—*Validity of surrender—Tenant selling tenancy not transferable and subsequently surrendering it to landlord.*

Even in the case of sale by a tenant of a holding not transferable, the vendee acquires all the rights of the original tenant unless there has been an abandonment, a relinquishment or repudiation of the tenancy. A surrender of the tenancy to the landlord by the original tenant subsequent to sale is incompetent. (*Edgley, J.*) KALA MIA *v.* KSHETRA MOHAN PAL.
A.I.R. 1941 Cal. 269.

——**S. 86-A**—*Retrospective effect.*

S. 86 A of the Bengal Tenancy Act merely lays down a rule of evidence, but has no retrospective effect. It has no application to a case where the diluvion and the abatement of rent took place before its enactment. (*Henderson, J.*) GOPAL VAKTA *v.* GOPAL MUNSHI.
195 I.C. 450=14 R.C. 100=45 C.W.N. 679=
A.I.R. 1941 Cal. 432.

——**S. 95**—*Common manager and proprietors—Powers of borrowing.*

Per *Nasim Ali, J.*—There is no authority or principle which precludes a proprietor or a set of proprietors of an estate under the management of a common manager appointed by the District Judge under S. 95 of the Bengal Tenancy Act from borrowing money without the permission of the District Judge for purposes unconnected with the management of the estate. He can pay off the debt incurred by him out of his share of the income of the estate which may be paid to him by the common manager or in any other way he likes provided he does not interfere with the management of the common manager. A creditor, therefore, can lend money to him agreeing to the repayment of the debt by such proprietor or set of proprietors. The common manager is not bound to pay directly to such a creditor out of the share of that particular proprietor or set of proprietors in the profits of the estate unless the order of the District Judge to that effect is obtained as under S. 98 (4) of the Act the common manager is to deal with and distribute the profits of the estate in accordance with the orders of the District Judge. If a proprietor or a set of proprietors want to borrow money for purposes unconnected with the management of the estate and desires that the debts to be incurred by him or them is to be paid out of his or their shares of the profits of the estate in the hands of the common manager, such a proposal can be considered by the District Judge as a matter dealing with the profits of the estate. Although the common manager is an officer of the Court, there is nothing in law which prevents a particular proprietor or a set of proprietors from authorising him to raise in his own name a particular loan as their agent. He will not

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be personally liable for its repayment, unless he pledges his personal credit. (*Nasim Ali and Pal, JJ.*) SUKUMARI GUPTA *v.* DHIRENDRA NATH ROY.
73 C.L.J. 356=A.I.R. 1941 Cal. 643.

——**S. 102 (gg), (as amended in 1907)**—Survey ordered before coming into force of amendment—Omission to record irrigation rights or to prepare fard-i-abpashi—Effect of—If negatives irrigation rights. *See* 1940 Dig., Col. 78. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. 191 I C. 275=7 B R. 153=
A.I.R 1941 Pat. 118.

——**S. 103 B (5)**—Presumption under—Availability against person challenging correctness of entry under S. 106. *See* 1940 Dig., Col. 78. ABDUL WAHEB *v.* NAGENDRA CHANDRA LAHIRI.
I.L.R. (1940) 2 Cal. 559=192 I C. 685=
13 R.C. 335.

——**Ss. 103-B (5), 102 and 101**—*Tenancy not governed by Act—Entry as to its permanency—Presumption.*

Per *Pal, J.*—An entry in the record-of-rights as to the permanent character of a tenancy which is not governed by the B. T. Act gives rise to the statutory presumption under S. 103 B (5) of that Act, when such entry was made under an order made by the Local Government under S. 101 after its amendment in 1928. S. 102 (*h*) of the Act authorises a Revenue Officer to make such an entry and the authority is not taken away by the proviso to that section. (*Nasim Ali and Pal, JJ.*) JOGENDRA KRISHNA *v.* SUBASHINI.
I.L.R. (1941) 2 Cal. 44=74 C.L.J. 145=
45 C.W.N. 590=A.I.R. 1941 Cal 541.

——**S. 104**—*Fresh settlement—Effect of—Rights of tenant.*

A fresh settlement will not abrogate the rights of the tenant if the landlord gets a lease from the Government and is in a position to fulfil his obligations to the tenant. (*Mukherjea, J.*) SRIKANTA MRIDHA *v.* PRAFULLA CHANDRA GHOSH.
74 C.L.J 139.

——**Ss. 105 and 105 A**—*Withdrawal of proceeding under S. 105—Determination of special issue under S. 105-A—Jurisdiction of Court.*

When in a proceeding instituted under S. 105 of the Bengal Tenancy Act for settlement of rent a special issue is raised by the landlord under S. 105-A as to the correctness of certain entries in the settlement record, the Court has jurisdiction to hear and decide that issue although the landlord subsequently withdraws his substantive application under S. 105. (*Bartley and Roxburgh, JJ.*) SANAT KUMAR *v.* DEBENDRA NATH.
45 C.W.N, 304=A.I.R. 1941 Cal. 332.

——**S. 106**—*Scope of suit—Enquiry into title—Power of Revenue officer.*

The suit contemplated by S. 106 of the Bengal Tenancy Act is for decision of a dispute regarding any entry made in or omission from the record. If investigation of title is necessary for such a purpose it will certainly be within the competence of the Revenue officer exercising jurisdiction under this section to do that. No doubt in a suit under this section the Revenue officer has primarily to go on the question of actual possession. But there may be cases where the determination of the question of possession itself may be dependent on the question of title, as when the character of the disputed land is not such as to admit of continuous occupation by either party and both the parties claim title to it and assert their respective possession of the same by reason of some occasional acts of enjoyment. In such a case who is in possession is to be determined by the fact of the title. each having the same apparent actual possession. (*Pal, J.*) CHAIRMAN, DISTRICT BOARD

BENGAL TENANCY ACT (1885), S, 146-A.

RANGPUR *v.* JAGATPAT SINGH DUGAR.
73 C.L.J. 397 = 45 CW.N. 797 = A.I R, 1941 Cal. 676.

——**S. 146 A**—Applicability—Certificate sale. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 20.
45 C.W.N. 277.

——**S. 146-A**—Rent suit—Principle of representation—Condition. *See* 1940 Dig., Col. 79. HARAN CHARAN MANDAL *v.* HIRALAL NASKER.
194 I.C. 172 = 13 R C. 486 = A.I.R. 1941 Cal. 88.

——**S. 146 A (3,**—*Interpretation.*

The proper interpretation of sub-S. (3) of S. 146-A of the B. T. Act is that the four sub clauses must be read in a disjunctive way. If the landlord institutes a rent suit against a person falling within any one of the descriptions in any one of the said four sub clauses and gets a decree, that decree will be regarded as a rent decree and the sale in execution thereof as a sale under Chap. XIV of the Bengal Tenancy Act provided that the parties who have interest in the tenancy and who have been left out of the suit do not fall within any one of the categories described in the other three sub clauses of sub S. (3,. (*Mitter, J.*) RAMANATH BANERJEE *v.* GIRISH CHANDRA SINHA.
I.L R. (1941) 1 Cal. 278 = 196 I.C 602 = 45 C.W.N. 119 = A.I R. 1941 Cal. 515.

——**S. 149 (3)**—*Order under—Appeal, if lies—Appeal filed against order—Further appeal or revision to High Court—If competent.*

No appeal lies from an order under S. 149 (3) of the B. T. Act. But if an appeal is filed against the order, a further appeal to the High Court from the decision of the appellate Court is competent, and not an application in revision. (*Henderson, J.*) RAMAN CHANDRA *v.* KEDAR NATH. **197 I.C. 15 = 45 C.W.N. 930 = A.I.R. 1941 Cal. 441**

——**S 153**—*Decision on amount of rent annually payable—Decision giving effect to tenant's plea of suspension of rent—If amounts to.*

Whether, when the Court gives effect to the tenant's plea of suspension of rent, it can be said to have decided a question relating to the amount of rent annually payable by the tenant as is contemplated by the proviso to S. 153 of the B. T. Act, depends on the nature of the pleadings and the facts of a particular case. When the tenant has not been put in possession of any portion of the demised premises or has been permanently deprived of it and the Court either directs suspension or abatement of rent generally, it cannot be said that a question of the amount of rent payable by the tenant is not decided in such cases. Even if a case of total suspension of rent is different in principle from one of abatement or apportionment of rent, it may be fairly argued that in a case where the plea taken by the tenant is one of partial dispossession by the landlord, a question would always arise as to whether the rent should be suspended in its entirety or would be apportioned merely and if the Court allowed suspension, that would amount to an implied decision that there should not be any apportionment in that particular case. (*Mukherjea and Roxburgh, JJ.*) ATAR MIAN *v.* INDRA KUMAR.
196 I.C. 639 = 45 C.W.N. 761 = A.I.R. 1941 Cal. 556.

——**S. 158-B (2)**—*Absence of notice—Legality of sale.*

Per *Mukherjea, J.*—A sale held in execution of a rent decree without complying with the provisions as to notice in S. 158-B (2) of the B. T. Act (which is now S. 148-A (7) of the present Act) is not a nullity out and out, and void for want of jurisdiction. The sale is still good as a money sale and it would pass the right, title and interest of the judgment-debtor. It is not correct to say that it is an irregular sale, which will mean that it has to be set aside by a proper proceeding.

Per *Roxburgh, J.*—The issue of notice under S. 158-B (2) is not mandatory and is not a condition precedent to give the Court jurisdiction to sell. In omitting to give proper notice under this provision, the Court commits an irregularity and the sale of the entire holding remains good subject to proceedings under O. 21, R. 90, C. P. Code. The irregularity cannot have the effect of turning that sale into something of a different character, namely, a sale merely of the right, title and interest of the judgment-debtor. (*Mukherjea and Roxburgh, JJ.*) RAJJAB ALI KHAN *v.* BHUPATISH CHANDRA ROY.
74 C.L.J. 360.

BENGAL TENANOY ACT (1885), S 167.

——**S. 158-B (2)**—*Absence of notice—Waiver by co-sharere.*

Per *Mukherjea, J.*—The provision for giving notice in S. 158-B (2) of the Bengal Tenancy Act is intended merely to safeguard the interests of the other co-sharer landlords. It is the co-sharers alone who can impeach the sale on the ground of notice and it is open to them also to waive their right to notice, and treat the sale as a rent sale. If the co sharers after being apprised of the sale keep quiet and do not take any steps, it would amount to waiver of their right to notice. (*Mukherjea and Roxburgh, JJ.*) RAJJAB ALI KHAN *v.* BHUPATISH CHANDRA ROY. **74 C.L.J. 360.**

——**S. 159**—*Annulment of encumbrance—Right of purchaser of under raiyati holding.*

S. 159 of the B. T. Act by itself cannot give the purchaser of an under-raiyati holding at a sale in execution of a decree for rent the right to annul incumbrances as provided for in that section. The purchaser will have this right only if the decree for arrears created a charge under S. 65 of that Act. (*Mukherjea, J.*) ABDUS SAMAD MOLLA *v.* ABDUL GOFUR MOLLA.
I.L R. (1941) 1 Cal, 409 = 196 I C. 357 = 14 R.C. 227 = 45 C.W.N. 367 = A.I R. 1941 Cal. 396.

—— **Ss. 159 and 161**—Reservation of power to annul incumbrances—Scope and object. *See* 1940 Dig., Col. 81. PROFULLA NATH TAGORE *v.* SANTOSH KUMAR DAS. **I.L.R. (1940) Kar. (P C.) 394 = I.L.R. (1941) 1 Cal. 1 = 1941 P W.N. 278 = 45 C.W.N 309.**

——**Ss. 164 to 167**—*Sale of tenure at rent sale—Sub-tenant under defaulting tenant—Position of—If becomes tenant under purchaser till annulment and trespasser thereafter.*

When a tenure is purchased at a rent sale, a sub-tenant under the defaulting tenant does not become automatically a tenant under the purchaser and remain a tenant till the tenancy is put an end to by a notice under S. 167 of the B. T. Act. If the purchaser exercises his right to annul the incumbrance, the position of the sub-tenant will be that of a trespasser from the very moment of the sale. He can be treated as a tenant if the time for exercising his right of annulling incumbrances has expired. (*Mukherjea and Biswas, JJ.*) PROVABATI DEBI *v.* PROTAP CHANDRA MAZUMDAR.
45 C.W.N 991 = 74 C.L J. 104.

——**S. 167**—*Annulment of sub-tenancy—Right of purchaser—Nature of sub-tenancy—If material.*

A purchaser of a raiyati holding at a sale held in execution of a rent decree is entitled to annul an under-raiyati jama, although it consists of homestead lands within the jurisdiction of a Municipality. The right of the purchaser to annul an incumbrance which includes a sub-tenancy depends on whether or not the decree in execution of which the purchase is made is a rent-decree and is wholly irrespective of the nature of the sub-

BENGAL TENANCY ACT (1885), S. 167.

tenancy sought to be annulled. It is, therefore, immaterial whether the sub tenancy is for an agricultural purpose or not. (*Biswas, J.*) BIDYAT LATA DASI v. AHADALI SHEIK. **45 C.W.N. 165.**

——**S. 167**—Fresh notice—Power of Court to issue—Question of service of previous notice pending in appeal. *See* 1940 Dig., Col. 81. KIRAN CHANDRA DAS *v.* MATILAL BISWAS. **191 I.C. 796 = 13 R.C. 282.**

——**S. 167**—*Mortgage of non-transferable occupancy holding—If amounts to incumbrance—Landlord-purchaser at rent sale not annulling such mortgage—Mortgagee's right to sue on mortgage—Mortgagee purchasing at mortgage sale—If can sue for possession against landlord—Landlord not made party to mortgage suit—Remedy of mortgagee-purchaser.*

A transfer by way of mortgage of a non-transferable occupancy holding or of a portion of it is certainly a limitation of the interest of the tenant and hence amounts to an incumbrance within the meaning of S. 161 of the B. T. Act, and as an incumbrance it does not stand *ipso facto* cancelled by the rent sale, but has to be annulled by the purchaser under S 167 of the Act. It would make no difference that the purchaser was the landlord himself and not a stranger. If the landlord purchaser does not annul the mortgage, then in a suit to enforce the mortgage bond to which he is made a party, no question of transferability of the holding could be raised by him. But such a question could certainly be raised by him if the mortgagee purchases the holding in execution of his decree and sues to recover possession of the same from the landlord purchaser or the persons with whom the land has been settled by him. The plea, however, is of no help if the mortgage sale took place after 1928 when the occupancy holdings were made transferable by law. If, however, the mortgagee-purchaser did not make the landlord-purchaser a party to his mortgage suit, he cannot maintain a suit for possession against him and his only remedy would be a suit to enforce his mortgage security. (*Mukherjea and Roxburgh, JJ.*) BIDHURANJAN SARKAR *v* SOLEMAN PRAMANIK.

I.L.R. (1941) 2 Cal 209 = 73 C.L.J 578 = 45 C.W.N. 883 = A.I.R. 1941 Cal. 613.

——**S. 167**—Order refusing to issue notice—Revision—C. P Code, S. 115. *See* 1940 Dig., Col. 81. KIRAN CHANDRA DAS *v.* MATILAL BISWAS. **191 I.C. 796 = 13 R.C. 282.**

——**Ss. 170 and 171**—Right to deposit—Unrecognised transferee of non-transferable holding. *See* 1940 Dig., Col. 82. HARAN CHARAN MANDAL *v* HIRA LAL NASKER. **194 I.C. 172 = 13 R.C 486 = A.I.R 1941 Cal. 88.**

——**S. 174**—*Application under—Nature of—Compromise—Application to record—If competent—C. P. Code, O. 23, R. 3.*

An application under S. 174, B. T Act, not being a proceeding in execution within the meaning of O. 23, R. 4, S. 141 applies and therefore an application to record a compromise arrived at in the course of an application under S. 174 is competent under O. 23, R 3. (*Henderson, J.*) KAMALA KANTA CHATTOPADHYA *v.* NIHARIKA DEBI. **A I R 1941 Cal. 559.**

——**S. 178, Proviso (1)**—*Scope—Reclamation lease—Stipulation for interest contravening S. 67—Validity.*

S. 178, proviso (1) of the B. T. Act is a limitation upon the entire section and not upon sub-S. (3) only. If, therefore, a lease is granted *bona fide* for reclamation of waste lands, that proviso will apply and any stipulation for payment of interest, even though it contravenes S. 67 of the B. T. Act, will be valid and operative.

BERAR INAM RULES (1859), R. 3.

(*Mukherjea, J.*) SRIKANTA MRIDHA *v.* PRAFULLA CHANDRA GHOSH. **74 C.L.J. 139.**

——**S. 182**—*Homestead'—Meaning of.*

The word "homestead" used in S. 182 of the B. T. Act means the place where the raiyat actually resides. If there is a piece of *bastu* land which is not held as a part of an agricultural tenancy and on which the raiyat does not actually reside, that section would not be attracted. (*Mitter, J.*) RAMNATH BANERJEE *v.* GIRISH CHANDRA SINHA.

I.L.R. (1941) 1 Cal. 278 = 196 I.C. 602 = 45 C.W.N. 119 = A.I.R. 1941 Cal. 515.

——**S. 182**—Tenant of homestead subsequently acquiring raiyati right in contiguous village—If acquires raiyati right in homestead land. *See* 1940 Dig., Col. 83. ANANTAMONI DASI *v.* BHOLA NATH.

195 I.C. 870 = 14 R.C. 146 = A.I.R. 1941 Cal. 104.

BENGAL VILLAGE LOCAL SELF-GOVERNMENT ACT (V OF 1919), S. 8—Election of president of Union Board—Jurisdiction of Civil Court. *See* BENGAL VILLAGE LOCAL SELF-GOVERNMENT ACT, S. 17 A. **A.I.R. 1941 Cal 115.**

——**S. 8**—*Suit for declaration that rival candidate is not properly elected as president—Plaintiff, if can be declared president.*

In a suit by a candidate for a declaration that his rival candidate is not properly elected as president of a union board the plaintiff is not entitled to a declaration that he (plaintiff) is the president unless it has been found that under the rules made by the Local Government he has been duly elected as president. (*Henderson, J.*) GOLAM MORTUZA *v.* MANIRUDDIN AHMAD.

194 I.C. 116 = 13 R.C. 490 = A.I.R. 1941 Cal 115.

——**S. 17-A**—*Election of president of Union Board—Jurisdiction of Civil Court.*

The Civil Courts have jurisdiction, unless their jurisdiction has been definitely taken away. There is no section in the Bengal Village Local Self Government Act which takes away the jurisdiction of the Civil Court to decide that certain person is not properly elected as a president of a union board. S 17-A is concerned only with the election of members of a union board. (*Henderson, J.*) GOLAM MORTUZA *v.* MANIRUDDIN AHAMAD. **194 I.C. 116 = 13 R.C. 490 = A.I.R. 1941 Cal. 115.**

BENGAL WAKF ACT (XIII OF 1934), S. 73 (2)—*Applicability—Wakf not in direct charge of commissioner.*

Per *Khundkar, J.*—S. 73 (2) of the Bengal Wakf Act applies although the Wakf is not in the direct charge of the Commissioner of Wakfs. (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL. **46 C.W.N. 59.**

BERAR ACTS RULES, ETC.

Cotton Market Rules.
Inam rules (1859).
Land Revenue Code (1928).
Patels and Patwaris Law (1900).

BERAR COTTON MARKET RULES, R. 56 (3)—Scope and applicability. *See* 1940 Dig, Col. 84 EMPEROR *v.* P. R. MEHTA. **191 I.C. 54 = 13 R.N. 163 = 42 Cr L J. 66.**

BERAR INAM RULES (1859)—Assignment of share in inam certificate—Failure of heirs—Devolution. *See* 1940 Dig., Col. 85. SHRIRAM *v.* BANYA BAI.

194 I.C. 454 = 13 R.N. 369.

——**R. 3**—*Scope of—Hyderabad Jagir—Nature—Effect of R. 3 upon it.*

R. 3 of the Berar Inam Rules must be construed as declaring that the estate that is certified as having

BERAR INAM RULES (1859), R. 4.

been granted is a restricted estate, but that it is larger than a life-estate, and has to be continued, after the death of the first cerrificate holder into his widow, lineal heirs, undivided brothers, etc. When one comes to collateral heirs of two removes one reaches the end of the relationship to which the estate may pass, and further degrees of relationship are disallowed except under special orders. That makes this a restricted tenure and it is further restricted and differentiated from a fee simple tenure by conditions as to payment of legacy duty. In the case of Hyderabad Jagir, by custom, it is not personal to the grantee but continues to his descendants and R. 3 limits who those descendants are and declared that any one outside the degree of relationship mentioned therein will not take unless special orders are passed. (*Stone, C.J. and Bose, J.*) RAJE VINAYAKRAO *v.* RAJE SHRINIWASRAO. **1941 N.L.J. 503 = A.I.R. 1941 Nag. 334.**

——**R. 4**—*Successor—Meaning.*

Though the term successor in R. 4 of the Berar rules is not of equal import to the term 'lieneal heirs' it is of a wider import. (*Stone, C.J. and Bose, J.*) RAJE VINAYAKRAO *v.* RAJE SHRINIWASRAO. **1941 N.L.J. 503 = A.I.R. 1941 Nag. 334.**

——**R. V**—*Construction—Inam certificate—Construction.*

The words 'he will be allowed the benefits of Cl. (2), of R. V, but without the option of refusal' in R. V (5) of the Berar Inam Rules is a misprint for 'he will be allowed the benefits of Cl. (3), Rule V, but without the option of refusal'. The option in Cl.(3) is one given in all cases of an inamdar and it consists in this: the grantee has the option to turn his restricted tenure into a freehold. All he has to do is to consent to payment of a quit rent of a certain amount. Where an inam certificate stated that it was granted for maintenance and under the column headed 'Tenure and condition attached to the continuance of the grant' were the following remarks 'upheld under Inam Rule V, S. 5, one-fourth assessment being levied on the next and three following successions until full assessment is attained,' it was held the grant was of an ordinary heritable estate of unlimited duration (the 'freehold' of the Inam Rules) the holder or holders after the fourth paying full assessment, and that all such heirs—those equal in right—would hold as cotenants and any one of them could ask for partition which would only last for his lifetime. (*Stone, C.J. and Clarke, J.*) SITARAM SINGH *v.* CHITTARANJAN. **1941 N.L.J. 558.**

BERAR LAND REVENUE CODE (1928), Ss. 24, 25, 38 and 159—*Irregularity in proclamation—Ground for setting aside sale—Provision of law—Scope of revisional powers.*

S. 24 of the Berar Land Revenue Code gives the requirement as to publication of proclamation. S. 25 does not save from being void the publication of proclamation in which a vital incident prescribed in the process of publication has been omitted. The inference is that a proclamation which is not completed in the manner prescribed is void without reference to the terms of S. 159. The omission of posting the proclamation at a place of public resort on or near the land concerned is a very serious defect that leaves the local publication anything but complete. In such a case the Revenue Officers have the power to set aside the sale. It is open to the Commissioner to undertake revisional proceedings under S. 38 *suo motu* with reference to such sales. (*Burton, F.C.*) RAMAWATAR *v.* NARAYANDAS. **1941 N.L.J. 555.**

BERAR LAND REV. CODE (1928), Ch. XIV.

——**S. 38**—Scope of revisional powers. *See* BERAR LAND REVENUE CODE, SS. 24, 25, 38 AND 159. **1941 N.L.J. 555.**

——**S. 159**—Power of setting aside sale—Grounds. *See* BERAR LAND REVENUE CODE, SS. 24, 25, 38 AND 159. **1941 N.L.J. 555.**

——**S. 159**—*Revenue sale—Collusion between village officers in regard to—Purchase by village patel—Liability to be set aside.*

Where though a revenue sale was perfectly legal under the Berar Land Revenue Code, it was shown that the village officers colluded to get that particular field sold so that one of them, the patel, could purchase it for an inadequate price, it was *held*, that the patel far from having acquired an equity as auction purchaser had acquired a definite disqualification. It was further held that the fraud of the village officers was a fraud to which Government itself was indirectly a party and that therefore the auction sale must be set aside. (*Greenfield, R. A.*) VENKATA SUBBAYYA *v.* KESHAO PANDURANG. **1941 N.L.J. 52.**

——**S. 164 (a)**—*Applicability—Recovery of commission in respect of sale for arrears of land revenue.*

Where on a sale for arrears of land revenue, the defaulter deposits the amount due along with the commission and the sale is set aside on the ground of an irregularity and the defaulter is permitted to withdraw the commission, the auction purchaser can recover it under S. 164 (*a*) in as much as it is apportionable as costs in respect of the case. (*Burton, F.C.*) LAXMIBAI *v.* NARAYAN. **1941 N.L.J. 228.**

——**S. 183 and C. P. Debt Conciliation Act**—*Pre-emption in case of transfer in conciliation of debt.*

Where in the settlement of a debt by the Conciliation Board certain property of the debtor was transferred to the creditor, it was *held* not desirable to encourage applications for pre-emption in cases of such transfers. (*Stone, C. J.*) DHANRAJ *v.* VITHOBA **1941 N.L.J. 623.**

——**S. 183 (2)**—*Suit under—Power of Court to increase the figure of value.*

The Court is not bound by S 183 (2) of the Berar Land Revenue Code, to accept the price paid, if it is below the market value. If the price is fixed decidedly above the market value, it is not fixed in good faith. The same is equally true if the price is much below the value of the land. Where the price fixed in a sale deed was very low and it was so fixed on an understanding that the transaction was really to be a mortgage and not a sale, on an application for pre-emption, it was held, that the Court could go into the question of fair price, and it directed the pre-emptor to pay the nominal price mentioned in the sale to the vendee and the balance to the vendor. (*Grille, J.*) SHEOLAL PANDU *v.* YEDU VYANKAT SING. **1941 N.L.J. 491 = A.I.R. 1941 Nag. 353.**

——**S. 192 (1), Proviso**—Construction—Suit involving question of interpretation of sanad—Jurisdiction of Civil Court to try. *See* 1940 Dig, Col. 86. SHRINIWAS RAO *v.* SECRETARY OF STATE. **I.L.R. (1941) Nag. 107 = 191 I.C. 619 = 13 R N. 199.**

——**Ch. XIV**—*Pre-emption—Sale by father manager of Hindu joint family—Minor members—If vendors—If can sue for pre-emption.*

Where a Hindu father manager of joint family sells family property in his own name and in the name of his minor son as well, the latter can under Ch. XIV of the Berar Land Revenue Code pre-empt. Addition of the minor's name in the sale-deed does not make him a vendor. (*Stone, C.J. and Bose, J.*) DAMODHAR *v.*

BERAR PATELS & PATWARIS LAW (1900).

NARAYAN. 195 I.C. 671=14 R N. 64= 1941 N.L.J. 296=A.I R. 1941 Nag. 199.

BERAR PATELS AND PATWARIS LAW (1900) —*Hereditary claims by Muslims to offices—Law applicable—Rule of seniority—Adoption, if recognized.*

Mahomedan Law does not recognize adoption. Where hereditary claims are made by Muslims to village offices, it is the accepted practice in Berar to apply the rule of seniority. (*Binney, F. C.*) HAKUMDDIN *v.* GULAM MOHIUDDIN. 1941 N.L.J. 554.

——**S. 7**—*Patwaris—Rotation—Desirability—Substitute, one of the maliks—Nature of his position.*

Though it may be administratively inconvenient to introduce rotation between so large a number of families as seven, it is more inconvenient to have seven malik patwaris continually disputing as to who should represent them. Further there is no community of interest between them such as might induce them to agree to a nomination. Hence rotation should be introduced. The legal position with reference to the substitute is that even if he were one of the maliks, he is not appointed in his own right as malik patwari but as a representative of the maliks. (*Greenfield.*) MANIKRAO *v.* MOTIRAM. 1941 N.L.J. 451.

BIHAR ACTS.

Agricultural Income-tax Act (VII of 1938).
Board of Revenue - Revisional Jurisdiction.
Money-Lenders Act (III of 1938).
Money-Lenders (Regulation of Transactions) Act (VII of 1939).
Municipal Election Rules (1937).
Public Demands Recovery Act (IV of 1914).
Restoration of Bakasht Lands and Reduction of Rent Act (IX of 1938).
Tenancy Act (VIII of 1885),
Bihar and Orissa Board of Revenue Act (I of 1913).
Co operative Societies Act (VI of 1935).
Excise Act (II of 1915)
Mining Settlement Act (IV of 1920).
Municipal Act (VII of 1922).
Private Irrigation Works Act (V of 1922).
Public Demands Recovery Act (IV of 1914),
Village Administration Act (III of 1922)

BIHAR AGRICULTURAL INCOME-TAX ACT (VII OF 1938)—Scope—If *ultra vires. See* BENGAL PERMANENT SETTLEMENT REGULATION, ART. 6. A.I.R. 1941 Pat. 306 (S.B.).

——**S. 2 (a)**—*Agricultural income—Cess received by proprietor of estate from tenure-holders and raiyats—If agricultural income or rent—Taxability.*

There can be no question that the cess payable by the proprietor of an estate under the provisions of the Bengal Cess Act are proper deductions from their gross income as such deductions are expressly provided for by S. 6 (*b*) of the Bihar Agricultural Income-tax Act. The cesses received by the proprietor from their tenure-holders and raiyats cannot, however, be regarded as part of the rent for the purposes of the Agricultural Income-tax Act and therefore taxable. But it can be taxed if it can be regarded as part of the agricultural income of the proprietor. It is clear from the provisions of the Cess Act that the cess received by the proprietor, who is the only person liable to pay the cess due to the local authorities and the only person entitled to the cess payable by the tenure-holders and raiyats, is income derived from land used for agricultural purposes and does form part of this income. It is part of his agricultural income and is liable to be taxed under the

BIHAR AGRIC. INCOME-TAX ACT (1938), S. 2.

Bihar Agricultural Income-tax Act. It makes no difference whether the cess money is received by reason of an agreement or by reason of a right given by statute. (*Harries, C.J., Fazl Ali and Manohar Lal, JJ.*) PROVINCE OF BIHAR *v.* PRATAP UDAI NATH SAHI DEO. 20 Pat. 699=194 I.C. 203=1941 I.T.R. 313= 13 R.P. 677=4 F.L.J. (H.C.) 109=7 B.R. 723= 1941 P.W.N. 354=22 Pat.L.T. 485= A.I.R. 1941 Pat. 289 (S.B.).

——**S. 2 (a)**—*Construction—'Rent or income'—Meaning of.*

The word 'revenue' in the Income-tax Act is used to denote income or a revenue receipt as opposed to a capital receipt and therefore covers all income from agricultural land other than rent. No real distinction can be drawn between the expressions 'rent or revenue' in S. 2 (1), Income-tax Act, and 'rent or income' in S. 2 (*a*), Bihar Agricultural Income-tax Act. Therefore it cannot be said that by the use of the words 'rent or income' in S. 2 (*a*), Bihar Agricultural Income-tax Act, the Provincial Government are taxing something more than is permissible by the definition of agricultural income in S. 2 (1), Income-tax Act. The expression 'local rate' in S. 2 (1), Income-tax Act, is wide enough to cover cess which term is used in Bihar for local rates levied on immovable property for the benefit of local authorities. Consequently, the addition of the words 'local cess' in the definition of 'agricultural income' in S. 2 (*a*), Bihar Act, does not in any way extend the field of taxation, and since cess in Bihar is assessed and collected by officers of the Crown as such there is no real difference between the two definitions as far as the assessment and collection of cess is concerned. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. 20 Pat 573=194 I.C. 663=7 B.R. 818= 1941 I.T.R. 386=4 F.L.J (H C) 178= 14 R.P. 17=22 P.L T. 863= A.I.R. 1941 Pat. 306 (S.B.).

——**S. 2 (a)**—*Effect of on Bengal Regulation I of 1793—Protection from tax afforded to agricultural income by Bengal Regulation I of 1793—Repeal of.*

Per *Harries, C. J.*—On the principle that a subsequent general Act will repeal the provisions of an earlier special Act if the provisions of the subsequent Act are clear and unambiguous and clearly apply to the matters dealt with by the earlier special legislation, the Bihar Agricultural Income-tax Act repeals by necessary implication any provision in the earlier Bengal Regulation, I of 1793, which is inconsistent with it. The Bihar Agricultural Income-tax Act makes all agricultural income taxable without distinction, and therefore any protection afforded to agricultural income by the Bengal Regulation, I of 1793, is repealed by it. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. 20 Pat. 573=194 I.C. 663=7 B R. 818= 1941 I.T.R. 386=4 F.L.J. (H.C.) 178= 14 R.P. 17=22 P.L.T. 863= A.I.R. 1941 Pat. 306 (S.B.).

——**S. 2 (a)**—*Income from trees*—"Bankar", "Lahkar" *and* "Phalkar"—*If agricultural income.*

Bankar is income derived from the sale of wood from jungles ; *lahkar* is income from letting lands and trees for cultivation of lac; and *phalkar* is income from the fruit of jungle trees and bushes. Where the *bankar* is derived from virgin jungles or jungle land not actually cultivated, it cannot be said to be income derived from agricultural land or from agriculture, and therefore it cannot be assessed under the Bihar Agricultural Income-tax Act. Lac does not seem to be the result of any

cultivation but is the creation of a particular insect when placed on particular trees. Where nothing is done beyond placing the insect on the trees, *lahkar* cannot be regarded as agricultural income taxable under the Act. In the case *phalkar* or income derived from wild jungle fruit trees, the fruit gathered is not the result of cultivation but on the contrary it is the result of the absence of cultivation *Phalkar* is not therefore agricultural income taxable under the Act. (*Harries, C J., Fazl Ali and Manohar Lall, JJ*) PROVINCE OF BIHAR *v.* PRATAP UDAI NATH SAHI DEO.

20 Pat. 699 = 22 Pat.L T. 485 = 194 I.C. 203 = 1941 I.T.R. 313 = 13 R.P. 677 = 4 F.L.J (H C.) 109 = 7 B R. 723 = 1941 P.W.N. 354 = A.I.R 1941 Pat. 289 (S.B.).

——**S. 2 (a)**—Salamis—*If income.*

Salami cannot be regarded as income as a matter of law. *Prima facie* it is not income. *Salami* may in certain cases be regarded as payment of rent in advance and in such cases *salami* can rightly be regarded as income. It is for the income-tax authorities to show that there exist facts which would make the salami income. In the absence of evidence of such facts, non-recurring premia and *salamis* paid to a proprietor once only as consideration for the settlement of agricultural land at the time of the granting of a lease cannot be held to be income within the meaning of the Bihar Agricultural Income tax Act. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) PROVINCE OF BIHAR *v.* PRATAP UDAI NATH SAHI DEO.

20 Pat. 699 = 194 I C. 203 = 1941 I T.R. 313 = 13 R.P. 677 = 4 F.L J. (H C) 109 = 22 Pat L.T. 485 = 7 B R. 723 = 1941 P.W.N. 354 = A.I R. 1941 Pat. 289 (S.B.).

——**S. 2 (a)**—*Scope—Provision for tax on income from revenue-free estates in Municipality—If renders whole Act* ultra vires.

It is open to the Court so to limit the definition of agricultural income in S. 2 (*a*), Bihar Act, as to bring it within the competence of the local Legislature. Revenue-free agricultural land in a municipality is subject to a local rate collected under the Bihar and Orissa Municipal Act, and therefore comes within the definition given in the Agricultural Income-tax Act. As the local rate however is collected by the servants of the municipality and not by the officers of the Crown as such, the income derived from such lands is not within the definition of agricultural income given in the Income-tax Act. Consequently, the Bihar Agricultural Income tax Act is *ultra vires* in so far as it purports to tax income from revenue-free estates in a Municipality, but this does not affect the remainder of the Act which applies to all other income rightly within its scope. In so far as it deals with other agricultural income, the Act is *intra vires* inasmuch as the offending portion of the Act is severable from the remainder of the Act. Therefore, the Bihar Agricultural Income-tax Act (VII of 1938) and the Amending Act (V of 1939) cannot be held to be *ultra vires* because the definition given in that Act does cover some income not falling within the definition of "agricultural income" in the Income tax Act. The omission to include Cl. (*c*) of S. 2 (1), Income-tax Act, in the definition contained in the Bihar Agricultural Income-tax Act cannot make the latter Act *ultra vires*, because the greater must include the less, and if the Provincial Government are entitled to tax all agricultural income as defined in S. 2 (1), Income-tax Act, then they are clearly entitled to tax a part only of such income. Consequently, the omission to tax some forms of agricultural income cannot render the whole of the Bihar Act *ultra vires* and of no effect. Nor can the substitution of the word Bihar' in the definition of 'agricultural income' in the Bihar Agricultural Income-tax Act for the expression "British India" in the definition in S 2 (1), Income-tax Act, affect the validity of the Bihar Act since the alteration was necessary to limit its application to the province of Bihar. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 7 B R 818 = 1941 I.T R. 386 = 194 I.C. 663 = 4 F.L J. (H C) 178 = 14 R.P. 17 = 22 P L.T. 863 = A I.R. 1941 Pat. 306 (S.B.).**

——**S. 2 (a)**—*Tax on income derived from agricultural sources—Nature of—If land tax.*

The tax imposed by the Bihar Agricultural Income-tax Act is a tax on income though limited to income derived from agricultural sources. It is in no sense a tax on the land because it is imposed on the income derived from the land and not on the land itself. The Act clearly imposes a tax on income. The tax is in no sense a land tax or any payment in the nature of a jama. The tax does not cease to be income-tax because the sources of the income are indicated by the Act. The jama paid by the zamindar of a permanently settled estate is more like rent than a tax. It is a payment made by the landlord from ancient times to the sovereign authority as a condition for holding the land. Although both rent and tax have to be paid to the Crown the two payments are historically and in essence of a different description and it will not be correct to say that the imposition of the agricultural income-tax is an augmentation of the Government revenue. (*Harries, C. J, Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 7 B R. 818 = 1941 I T R. 386 = 194 I.C. 663 = 4 F.L.J. (H.C.). 178 = 14 R P. 17 = 22 P L.T 863 = A.I R. 1941 Pat. 306 (S.B.).**

——**S. 2 (a)**—"*Zamindari income*" *and "income derived by zamindar from his zamindari"—Meaning of.*

Fazl Ali, J.—The expressions "zamindari income" and "income derived by a zamindar from his zamindari" have the same meaning and therefore no distinction can be drawn between the two. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 7 B R. 818 = 1941 I.T.R. 386 = 194 I C. 663 = 4 F.L.J. (H.C). 178 = 14 R P 17 = 22 P.L.T. 863 = A.I R. 1941 Pat. 306 (S.B.).**

——**S. 2 (a) (1) and S. 2 (a) (2) (1)**—*Applicability—Income of tenure-holder of revenue-free land and income of raiyat—Nature of.*

The income of a raiyat does not fall naturally within S. 2 (*a*) (1) but rather falls within S. 2 (*a*) (2) (1), Bihar Agricultural Income-tax Act. His income is derived from land by agriculture and clearly falls within the definitions given in both Income-tax Act and Bihar Agricultural Income-tax Act. A tenure-holder of revenue-free land not himself cultivating lands does derive income from land used for agriculture upon which cess is payable by the proprietor and that cess is assessed and collected by the Collector who is an officer of the Crown. It is assessed and collected by the Collector as such. Therefore, income of tenure holders of revenue-free land also falls within the definition given in both the Bihar Agricultural Income-tax Act and the Income tax Act and therefore the Bihar Agricultural Income tax Act cannot be held to be *ultra vires* because it taxes the aforesaid incomes. (*Harries, C. J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v* PROVINCE OF BIHAR **20 Pat. 573 = 7 B R. 818 = 1941 I.T.R. 386 = 194 I.C. 663 =**

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4 F.L.J. (H.C.). 178 = 14 R.P. 17 = 22 Pat L.T 863 = A.I R. 1941 Pat. 306 (S.B.).

——**S. 25 (2)**—*Scope of inquiry under—Contention that whole Act is* ultra vires—*If can be raised.*

On a reference to the High Court under S. 25 (2) of the Bihar Agricultural Income-tax Act, the assessee cannot raise the contention that the Act is *ultra vires* the powers of the Bihar Provincial Legislature. The High Court special bench is a tribunal expressly set up by the Act to hear references under S. 25 of the Act, and an argument that the whole of the Act is *ultra vires* cannot be urged before a tribunal which owes its very existence and jurisdiction to the Act itself. The question can be more appropriately and effectively raised in a suit challenging an assessment. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) PROVINCE OF BIHAR *v.* PRATAP UDAI NATH SAHI DEO. **20 Pat. 699 = 194 I.C. 203 = 1941 I T R. 313 = 1941 P.W.N. 354 = 7 B.R. 723 = 4 F.L.J. (H.C.) 109 = 13 R P. 677 = 22 Pat.L.T. 485 = A I.R. 1941 Pat. 289 (S.B.).**

——**S. 26 (6)**—*Scope and effect—Decision of High Court on reference—Binding nature of.*

Cases decided by the High Court under S. 25 of the Bihar Agricultural Income-tax Act are binding upon the income tax authorities under S. 25 (6) of the Act. They will not be entitled in the case of a conflict of authorities to follow decisions of other Courts or to rely on their own experience. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) PROVINCE OF BIHAR *v.* PRATAP UDAI NATH SAHI DEO. **20 Pat. 699 = 194 I C. 203 = 1941 I.T.R. 313 = 1941 P.W.N. 354 = 7 B R. 723 = 4 F.L.J. (H C.) 109 = 13 R.P. 677 = 22 Pat L.T. 485 = A.I.R. 1941 Pat. 289 (S.B.)**

BIHAR BOARD OF REVENUE—*Revision—Finding of fact—Interference—Absence of jurisdiction or gross injustice—If ground of interference.*

The Bihar Board of Revenue is always ready to interfere in cases where there is want of jurisdiction or where gross injustice has been done, even though the findings are findings of fact. (*N. F. Peck.*) BHOLA PRASAD *v.* LALDHARI KANDU. **7 B.R. 410 = 1941 P.W.N. 428.**

BIHAR MONEY-LENDERS ACT (III OF 1938), S. 2 (f)—"*Loan*"—*Amount taken by co-sharer in excess of his share of collections.*

Where by an arrangement between two co-sharers a common patwari should divide the collections from the tenants half and half and send to each his share, but the patwari instead makes over the entire amount to one of them, the latter is liable to pay the share of the other not as a loan but on account of the fact that he has received the money from the patwari on trust for or for the use of the other. The provisions of the Bihar Money-Lenders Act have, therefore, no application to such a case. (*Harries, C.J. and Manohar Lall, J.*) ADIT NARAYAN SINGH *v* BINAPANI. **193 I.C. 110 = 7 B.R. 578 = 13 R.P. 543 = 22 P L.T. 501 = A I R. 1941 Pat. 449.**

S. 7—*Applicability—Mortgage—Relief granted to enforce earlier bonds.*

Where the plaintiffs are being granted a relief to enforce the earlier bonds also and the Court passes a decree to enforce the earlier bonds as a part of the relief given to the plaintiffs to enforce their mortgage bond, S. 7 is applicable to the claims on the old bonds. (*Harries, C.J. and Manohar Lall, J.*) TIKA SAO *v.* HARI LAL. **195 I.C. 428 = 7 B.R. 924 = 14 R.P. 122 = A.I.R. 1941 Pat. 276.**

——**S. 7**—*Construction—"Amount of loan"—Meaning of—Bond for past liability—'Amount of loan'—What is.*

BIHAR MONEY-LENDERS ACT (1938), S. 13.

From the concluding portion of S. 7 of the Bihar Money-Lenders Act, it is clear that two classes of cases are contemplated : (1) loan advanced and (2) loan based on a document. The section is not meant to limit the amount of interest in all cases to the "amount of loan advanced." The words "the loan" in the passage ' if the loan is based on a document," mean the loan in respect of which the suit is brought, and must, when taken with the definition in S 2 (5) be held to include a bond executed for past liability, which liability may be in respect of principal as well as interest. In the case of such a bond the amount for which it is executed, is ' the amount of loan" within the meaning of S. 7. Although the expression "the amount of loan mentioned in or evidenced by such document," may suggest that to determine the amount of loan one must go behind the document, it could never have been the intention of the legislature, while enacting S. 7 to override the provisions of the Contract Act or the Evidence Act. (*Chatterji and Meredith, JJ.*) MADHO PRASAD SINGH *v.* MAKUTDHARI SINGH. **193 I.C. 661 = 13 R.P. 637 = 7 B.R. 641 = 22 Pat.L.T. 317 = A.I.R. 1941 Pat 378.**

——**S. 11**—Appeal—Order determining instalments—Appealability—C. P. Code, S. 47. *See* 1940 Dig., Col. 99. DHANUKDHARI SINGH *v.* RAMRATAN SINGH. **193 I.C. 670 = 7 B R. 646 = 13 R.P. 642 = A.I.R. 1941 Pat. 1.**

——**S. 11**—Applicability—Purchaser of mortgaged property—Right to apply. *See* 1940 Dig., Col. 99. LAL PARI *v.* JANKI RAI. **20 Pat. 108 = 191 I.C. 580 = 13 R.P. 328 = 7 B R. 232.**

——**S. 11**—Discretion of Court under—Circumstances to be considered in fixing and ordering instalments. *See* 1940 Dig., Col. 100. DHANUKDHARI SINGH *v.* RAMRATAN SINGH. **193 I C 670 = 7 B.R. 646 = 13 R P. 642 = A.I.R. 1941 Pat. 1**

——**S. 11**—*Notification exempting banks registered under Companies Act of* 1913—*Banks registered under Act of* 1882—*If included in notification.*

Where a Government notification exempting certain institutions from the operation of S. 11 of the Bihar Money-Lenders Act refers in specific terms to joint Stock Banks registered under the Indian Companies Act of 1913, that cannot be taken to include Banks registered under some other Act, *viz.*, the old Act VI of 1882. (*Fazl Ali and Meredith, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD. *v.* RADHA GOBINDA SINGH. **194 I.C. 649 = 14 R.P. 12 = 7 B R. 813 = A.I.R. 1941 Pat. 561.**

——**S. 12**—*Discretion—Order refusing to fix smaller number of instalments—Interference in revision.*

The Court under S. 12 of the Bihar Money-Lenders Act of 1938 has a discretion in fixing the number and amount of the instalments, having regard to the interests of the judgment-debtor and the decree-holders and other matters. such as the amount of the decree and the number of years it would take for the decree to be satisfied. Where the lower Court after taking these matters into consideration refuses to fix a smaller number of instalments, it cannot be said that the Court has failed to exercise the discretion which the Act confers on it, and the order cannot therefore be interfered with in revision. (*Rowland, J.*) SUKH DAYAL *v.* PAWAN JAI KUMAR JAIN. **1941 P.W.N. 507.**

——**S. 12**—Exercise of powers—Discretion of Court. *See* 1940 Dig., Col. 100. JAIGOBIND SINGH *v.* LACHMI NARAIN RAM. **21 Pat L T 1109 = (1940) 1 M.L.J. (Supp.) 14.**

——**S. 13**—Applicability—Decree in favour of bank—If exempted from Act. *See* GOVERNMENT OF INDIA

BIHAR MONEY-LENDERS ACT (1938), S. 13.

ACT (1935), S. 100. **22 Pat.L.T. 522.**

——**Ss. 13 and 14**—*Order for sale without fresh proclamation—Jurisdiction of Court—Waiver of fresh proclamation before application under S. 13—Effect of.*

S. 14 of the Bihar Money-Lenders Act makes it clear that after the property has been valued or such portion of it as is sufficient to satisfy the decree, a sale proclamation of the actual property to be sold must be drawn up, and in it must be stated the value of the property as determined by the Court under S. 13. The waiver of a fresh sale proclamation in the earlier stages of the case before an application under S. 13 was made, cannot possibly be construed as a waiver of an entirely new sale proclamation which S. 14 requires. The Court has no right or jurisdiction whatsoever to direct an immediate sale without first directing the issue of a fresh sale proclamation containing the matters set out in S. 14 of the Act. (*Harries, C.J. and Manohar Lall, J.*) GUNJARI MAHATANI *v.* NIL KAMAL PANDE.
193 I.C. 176=7 B.R. 590=13 R.P. 556=A.I.R. 1941 Pat. 418.

——**S. 15**—*Construction and scope—Holding in possession of usufructuary mortgage—If wholly liable to be sold in execution of decree.*

Under S. 15 of the Bihar Money Lenders Act, the exemption from execution sales is not confined to land in the possession of the judgment-debtor. The section cannot be taken to be excluding land which has been parted with by the judgment-debtor to a *sudbharnadar* (usufructuary mortgagee). S. 15 does not speak of land in the possession of the judgment debtor. It exempts from sale one acre of the land comprised in the holding. It cannot be held that because a holding is in the possession not of the judgment-debtor but of his *sudbharnadar* the whole of it can be brought to sale in execution of a decree. (*Dhavle, J.*) SARWAN CHAUDHURY *v.* CHANTARPA THAKUR. **22 P.L.T. 984=7 B.R. 752 (2)=194 I.C. 369=13 R.P. 710=1941 P.W.N. 552=A.I.R. 1941 Pat. 484.**

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII OF 1939), S. 2—"Debtor"—If includes judgment-debtor. *See* 1940 Dig., Col. 101. LAL PARI *v.* JANKI RAI. **20 Pat. 108=191 I.C. 580=13 R.P. 328=7 B.R. 232.**

——**S. 2 (f)**—*Applicability—Loan—Security bond in respect of future and contingent liability—If mortgage to secure loan.*

A mortgage created by a security bond when there has been no advance of any kind to the executant is not a mortgage to secure a loan as defined by the Bihar Money-Lenders Act. A bond bearing interest in respect of a future and contingent liability does not fall under S. 2 (*f*) of the Act. (*Harries, C.J. and Manohar Lall, J.*) BHULAN PRASAD SINGH *v.* RUP NARAIN SINGH. **195 I.C. 664=7 B.R. 955=14 R.P. 142=22 Pat L.T. 12=A.I.R. 1941 Pat. 233.**

——**Ss. 6 and 8**—*Compound interest on loan advanced before Act—Power of Court to relieve—Discretion—Exercise of.*

The Bihar Money-Lenders Act prohibits compound interest only on loans advanced after the commencement of the Act. There is no such prohibition with regard to loans advanced before the commencement of the Act. But S. 8 of the Act gives a discretion to the Court in the case of a loan advanced before the Act, to reopen the transaction and take an account and relieve the debtor of all liability in respect of interest in excess of the rates specified in the section. The section, however, does not lay down any conditions under which the Court may exercise its powers; it gives a wide discretion. But this discretion cannot be exercised arbitrarily. (*Chatterji and Meredith, JJ.*) MADHO PRASAD SINGH *v.* MAKUTDHARI SINGH. **7 B.R. 641=13 R.P. 637=193 I.C. 661=22 Pat.L.T. 317=A.I.R. 1941 Pat. 378.**

BIHAR M.L. (REG. OF TRANS.) ACT (1939), S. 7

——**S. 7**—Applicability and scope—If governs entire Act. *See* 1940 Dig., Col. 102. HANUMAN SINGH *v.* GAYA SINGH. **20 Pat. 177=7 B.R. 602=13 R.P 582=193 I.C. 381=A.I.R. 1941 Pat. 145.**

——**S. 7**—*Construction—"Amount of the loan advanced"—"Amount of the loan mentioned in such document"—Loan to manager of Hindu joint family under mortgage—Part found to be not for family necessity—Amount of loan—If whole amount or only that found binding on family.*

In a suit on a mortgage bond executed by the father and manager of a Hindu joint family, a finding that out of the sum due under the bond only a portion of it is binding on the joint family does not imply that as between the lender and the borrower there was not a valid contract of loan under which the whole amount could be recovered from the borrower by having recourse to his separate properties and from his share of the joint family property, it being found as a fact that the whole amount stated in the bond was really advanced. The other members of the family who impeach the validity and binding character of the transaction as against the family are no doubt entitled to rely on the rules of Hindu Law and to limit their liability to the binding portion of the debt; but on that portion interest will be calculated in accordance with the terms of the contract, except when the Court finds reason to reduce the contract rate. If and so far as the other members claim the benefit of S. 7 of the Money-lenders Act of 1939, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties. In determining the liability of the other members for interest under S. 7 of the Act, therefore, the maximum payable up to the date of the institution of the suit cannot be held to be the amount held to be the debt binding on the joint family out of the amount borrowed under the bond, but it must be held to be the amount found to have been actually advanced. Where the defendants, the mortgagor, his sons and grandsons are sued as representing one family, and there is one debt for which the claim is brought, there is no question of distinct and separate interests of the various defendants. Where the amount has been advanced to the father alone but is effective for creating a charge against the whole family in respect of a part of the amount only, the words "the amount of the loan advanced," or "the amount of the loan mentioned in such document," must obviously mean the whole amount which passed, as that was the loan. The fact that a part of it is not effective to create a charge on the family property is a different matter. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) LACHMESHWAR PRASAD SHUKUL *v.* KESHWAR LAL CHAUDHURI. **I.L.R. (1941) Kar. (F.C.). 1=191 I.C. 659=1941 O.L.R. 82=1941 A.W.R. (F.C.) 39=1941 M.W.N. 136=1941 O.A. 224=22 Pat.L.T 119=45 C.W.N.(F.R.) 66=1941 O.W.N. 372=1941 P.W N. 133=7 B.R. 362=3 F.L.J. 73=73 C.L.J. 51=53 L.W. 373=13 R.F.C. 4=1941 A.L.W 255=20 Pat. 429=A.I.R. 1941 F.C. 5=(1941) 1 M.L.J. (Supp) 49.**

——**Ss. 7 and 8**—*Bond in respect of old debt with interest—Interest awardable—Power of Court to reopen accounts.*

S. 7 of the Bihar Money-Lenders Act of 1939 is to be read with reference to the definition of "loan" in S. 2

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(*f*) of the Bihar Money-Lenders Act, 1938. Loan includes a transaction on a bond bearing interest executed in respect of past liability. The effect of S. 7 is that the money-lender cannot get a decree for more interest than the amount of loan mentioned in the bond. But under S. 8 (*b*), the Court has power subject to proviso (1) to reopen the account notwithstanding the bond which is an agreement purporting to close previous dealings and to create a new obligation. (*Rowland, J.*) JADUNANDAN PRASAD PANDEY *v.* MAHESHWAR NARAIN SINGH. **196 I. C. 473=14 R.P 198= 8 B.R. 27.**

——**S. 7**—"*Loan advanced*"—*Meaning of—Suit in respect of—Part of loan advanced barred by limitation —Effect of.*

Where a part of the loan advanced is time-barred, that part should be deemed not to have been advanced for purposes of S. 7 of the Bihar Money-Lenders Act, and the loan advanced can be taken to be only the part which is realisable. (*Varma and Manohar Lall, JJ.*) HAKIM SAIYID FIDA ALI *v.* BHUNESHWARI KUAR. **20 Pat. 770.**

——**T. 7**—"Loan"—Settlement of accounts by borrowing afresh—Nature of. *See* 1940 Dig., Col. 104. JAI GOBIND SINGH *v.* LACHMI NARAIN RAM. **21 Pat L.T. 1109=(1940) 1 M.L.J. (Supp.) 14.**

——**S. 7**—*Mortgage suit*—Pendente lite *interest—Power of Court to refuse—C. P. Code, O* 34, *Rr.* 2, 4 *and* 11.

S. 7 of the Bihar Money-Lenders Act does not deal with the interest payable after the date of the mortgage suit. *Pendente lite* interest is governed by O. 34, R. 4, C. P. Code. Under that rule read with O. 34, R. 2, the Court in passing a preliminary decree is bound to grant interest up to the date of such decree. O. 34, R. 11 does not affect the Court's power to allow *pendente lite* interest under O. 34, R. 2. Under that rule the Court has a discretion in the matter of awarding *pendente lite* interest but has no power to refuse such interest altogether. (*Harries, C.J. and Chatterji, J.*) SUKHRAJ RAI *v.* RATINATH PANJIARA. **196 I.C. 677 = 8 B.R. 83.**

——**S. 8**—Scope and effect of—Suits on promissory notes—Interest—If can be scaled down—Powers of Provincial Legislature. *See* GOVERNMENT OF INDIA ACT (1935), S. 100. **19 Pat 974.**

——**S. 8, Proviso**—*Scope and effect of—Payments made and appropriated towards interest before Act—If can be re-opened—Excess interest—If can be used in reduction of principal.*

The proviso to S. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act lays down that if any amount has been paid in excess of the specified rate, the creditor cannot be required to reduce the amount of the principal of the loan to the extent of that excess in spite of clauses (*a*) and (*b*) of S. 8. In the case of payments made before the Act where the creditor was entitled to charge interest at the rate specified in the bond, if on calculation the interest due to him be found to be in excess of what was paid to him actually, the creditor could appropriate those payments towards interest under the law. After the appropriation had been made the amounts so appropriated cannot be used to reduce the principal under S. 9, according to the proviso to S. 8 of the Act. (*Harries, C.J. and Fazl Ali, J.*) JAGATMAYA KUMARI *v.* RAM BAHADUR PRASAD. **22 Pat.L.T. 293=7 B.R. 561= 193 I.C. 561=13 R.P. 607=1941 P.W.N. 307= A.I.R. 1941 Pat. 459.**

——**S. 9**—Scope and operation of—If subject to S. 7. *See* 1940 Dig., Col. 105. HANUMAN SINGH *v.* GAYA SINGH. **20 Pat. 177=7 B.R. 602=13 R.P. 582= 193 I.C, 381=A.I.R. 1941 Pat. 145.**

BIHAR MONEY-LENDERS ACT (1939), S. 11.

——**S. 11**—*Appeal—Order fixing instalments—Appealability.*

An order fixing instalments under S. 11 of the Bihar Money-Lenders Act is not subject to appeal. (*Fazl Ali and Meredith, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD. *v.* RADHA GOBINDA SINGH. **194 I.C. 649=14 R.P. 12=7 B.R. 813= A.I.R. 1941 Pat. 561.**

——**S. 11**—*Applicability—Decree on basis of promissory note passed before Act—Application under S.* 11 *for instalment—Dismissal on ground that Act does not apply to suit on promissory note—Propriety.*

Where a decree had been passed on the basis of a promissory note before the enactment of the Bihar Money-Lenders Act, an application by the judgment-debtor under S. 11 of the Act for instalments cannot be dismissed on the ground that the Act does not apply to a suit on a promissory note. The liability on the promissory note had become merged in the decree debt on the passing of the decree before the Act and the Court should therefore consider whether the case is one in which it should exercise its powers under S. 11 of the Act. (*Agarwala, J.*) GOPALPRASAD *v.* RAMPRASAD GUPTA. **22 Pat.L.T. 752=7 B.R. 655= 194 I.C. 104=1941 P.W.N. 372= 13 R.P. 652=A.I.R. 1941 Pat. 377.**

——**S. 11**—*Discretion—Judgment-debtor voluntarily fixing date and amount of payment—Interference by Court.*

When the judgment-debtor has himself by voluntary agreement fixed the date and the amount which he can pay, the Court does not exercise a wise discretion in interfering with the arrangements made by the parties. The judgment-debtor, after making a part payment towards the decretal amount, agreed to pay the balance on a fixed date. Having failed to pay the balance as agreed he applied under S. 11 and was allowed to pay the balance by instalments,

Held, that in the circumstances the Court was wrong in exercising its discretion in ordering the balance to be paid by instalments. (*Agarwala, J.*) BINRAJ MARWARI *v.* MATHURI RAI **A.I.R. 1941 Pat. 512.**

——**S. 11**—"*Judgment-debtor*"—*Question as to—When to be raised—Donee of attached property made party judgment-debtor in execution—Order for instalment at donee's instance—Revision—Plea that order is without jurisdiction as donee had no* locus standi *to apply—Sustainability.*

Where a judgment-debtor whose property has been attached transfers the property by way of gift to another, and the donee is made a party judgment-debtor in execution proceedings, and at the instance of the donee an order for payment by instalments is made under S. 11 of the Bihar Money-Lenders Act of 1938, the decree-holder cannot in revision raise the objection that the order fixing instalments is without jurisdiction on the ground that the donee had no *locus standi* to apply under S. 11, not being a judgment-debtor. The decree-holder having failed to raise the plea that the donee was not a judgment-debtor in the Court of first instance, cannot be permitted to raise the plea in revision in the face of the order making the donee a judgment-debtor. That order too could not be attacked in revision as the proper time to raise such a question was the time when that order was passed. It would be too late to re-open that question in revision. (*Rowland, J.*) SUKH DAYAL *v.* PAWAN JAI KUMAR JAIN. **1941 P.W.N. 507.**

BIHAR MONEY LENDERS ACT (1939), S. 13.

——**Ss. 13 and 14**—Applicability and scope—Purchaser of mortgaged property impleaded in suit on mortgage—Decree—Right to apply under S. 13. *See* 1940 Dig., Col. 105. LAL PARI *v.* JANKI RAI.
20 Pat. 108 = 191 I.C. 580 = 13 R.P. 328 = 7 B R. 232.

——**S. 15**—Scope—Power of Court—Application for instalments in payment of decree amount—Maintainability. *See* 1940 Dig., Col. 106. JUGESHWARI PRASAD *v.* KAMALA PRASAD. **193 I.C. 224 = 7 B.R 595 = 13 R P 605.**

BIHAR MUNICIPAL ELECTION RULES (1937), R. 13 (1)—*Scope—Chairman—If bound to make formal appointment in writing.*

R. 13 (1) of the Bihar Municipal Election Rules does not require the Chairman of a Municipality to make an appointment in writing. The rule is not intended to deal with the manner of appointment at all; it only lays down which authority is to appoint a person to prepare the electoral rolls. (*Dhavle, J.*) BRIJBEHARI *v.* EMPEROR. **194 I.C. 108 = 7 B R. 690 = 22 Pat.L.T 443 = 1941 P W.N. 248 = 13 R.P. 657 = 42 Cr.L J. 508 = A.I.R. 1941 Pat. 539.**

BIHAR PUBLIC DEMANDS RECOVERY ACT (IV OF 1914), S. 7—*Scope—Amendment of certificate by adding guardian* ad litem *to minors—Fresh notice—Necessity—Coming into force of S. 158-A of Bihar Tenancy Act—Effect on application by private landlord.*

A certificate was obtained by a private landlord against certain tenure-holders, and the certificate was filed on 11-8-1938. On 10-12-1938, S. 158-A of the amended Bihar Tenancy Act come into force by which Ch. XIII of the B. T. Act was repealed, thus depriving private landlords of the privilege of recovering rent by certificate procedure On 31-3-1939, the certificate was amended by the appointment of a guardian *ad litem* for some minors who had been impleaded as majors. The guardian *ad litem* was already a party in his individual capacity.

Held (1) that after the amendment of the certificate, a fresh notice to the guardian *ad litem* must be issued under S. 7 of the Public Demands Recovery Act, in his capacity as guardian in addition to the notice already issued to him in his individual or personal capacity; (2) that once Ch. XIII-A of the Bihar Tenancy Act was repealed by the new S. 158-A, it was no longer legal, on the requisition of a private landlord, to issue a notice under S. 7 of the Public Demands Recovery Act. (*Middleton.*) KAMESHWAR SINGH *v.* RAJKISHORE LAL. **1941 P.W.N. 441**

BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF RENT ACT (IX OF 1938)—*Applicability to* bhaoli *lands.*

The Bihar Restoration of Bakasht Lands Act is not inapplicable to *bhaoli* lands. It does apply to such lands. (*N. F. Peck.*) MAHOMED NAIM *v.* RAM LAL GOPE. **7 B.R. 498.**

——*Conditional order of restoration—Date fixed for payment of 1st instalment of money—Non deposit—Effect of—Deposit after expiry of time—Jurisdiction to pass order for restoration.*

Where an order for restoration is passed under the Bihar Restoration of Lands Act, stating that the lands should be restored on the payment of a certain amount in five annual kists, the 1st instalment to be deposited on a fixed date, the order is a sort of conditional order which automatically lapses as soon as the date fixed is passed without either the deposit being made or additional time asked for. The application for restoration on which the order is made automatically stands rejected. On failure of the tenant to deposit the 1st instalment unless an application for time is made and granted, the Restoration Officer has no jurisdiction thereafter to pass an order for restoration on the ground that the deposit has been made subsequently. (*Middleton.*) RAMDHAN PURI *v.* JAGERNATH SAHAY. **7 B R 505 = 1941 P.W.N. 454.**

BIHAR RES. OF BAKASHT LANDS & RED. OF RENT ACT (1938), S. 3.

——*Rent Reduction Officer—Jurisdiction to reduce rent of holding in the absence of application by person in occupation.*

A holding of about 18 bighas of land with a rent of Rs. 75 was settled in the name of one *L*. After a time *L* surrendered the holding and about three years later *T* got his name mutated for half the original holding, *viz.*, 9 bighas on a rent of Rs. 38. *L* alone applied for reduction of a holding of 18 bighas with a rent of Rs. 76. There was no application by *T*, nor was there any application for reduction of the rent of Rs. 38. The Rent Reduction Officer passed an order reducing the rent from Rs. 38 to Rs. 19-6-0 in the name of *T*.

Held, that the order was without jurisdiction. (*Middleton.*) HIRDAY NARAIN JHA *v.* TIMA MANJHI. **7 B.R. 816.**

——*Review—Order of Collector—Finality—Subsequent ruling by Board of Revenue—If ground for review*

The orders of the officer appointed to discharge the duties of the Collector under the Bihar Restoration of Bakasht Land and Reduction of Arrears of Rent Act are final and cannot be re-opened on the strength of a subsequent ruling of the Board of Revenue. (*Middleton.*) AMIRUL HAQUE *v.* MATHURA DAS. **7 B.R 419 = 1941 P.W N. 244.**

——*Revision—Powers of Board of Revenue—Power to interfere in cases of non joinder or other defects in application.*

In cases under the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, it is open to the Board of Revenue in revision to consider whether the defects or omissions in an application, such as non-joinder, are so substantial that the application should be regarded as not maintainable and an order granting restoration is therefore without jurisdiction. (*Middleton.*) DASO KOERI *v.* RUPA MAHTO. **7 B.R. 630 = 1941 P.W.N. 246.**

——*Scope—Purchase by co-sharer—If excluded.*

A purchase by a co-sharer is not excluded under the Bihar Act IX of 1938. (*Middleton.*) INDRADEO PRASAD SINGH *v.* RAMBARAN SINGH. **7 B R. 754.**

——**S. 3**—*Applicability—Decree for arrears of rent—Sale of raiyati holding in execution—Purchase by co-sharer landlord—Application for restoration—Maintainability.*

S. 3 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act only speaks of a decree for arrears of rent; it makes no difference between rent decrees and money decrees. Purchase by a co-sharer landlord of a raiyati holding at a sale in execution of a decree for arrears of rent is not excluded by the Act. An application for restoration in such a case is maintainable. (*Middleton.*) NARSINGH NARAIN *v.* RUDRA NATH. **7 B R. 749 = 1941 P.W.N. 377.**

——**S. 3**—*Applicability — Holding purchased by landlord—Delivery of possession not effected—Application by tenant for restoration—Maintainability.*

A holding cannot be regarded as being in the possession or under the control of the landlord after he has purchased it but before he has applied for or obtained delivery of possession, so as to entitle the tenant to file an application for restoration under S. 3 of the Bihar Act IX of 1938. (*Middleton.*) RAM ASHRAYA SINGH *v.* KHABSURAT KUER. **8 B.R. 17.**

BIHAR REST. OF BAKASHT LANDS ACT (1938), S 3.

——**S. 3**—*Application by tenant—Deceased landlord's heirs not impleaded—Effect.*

In an application by the tenants under S. 3 of the Bihar Act IX of 1938, it is their duty to find out the names of all the heirs of one of the landlords whom they know to be dead; and to make them parties to their application. If they do not take the trouble to find out the names of such heirs and make them parties, their application is defective. (*Middleton.*) AMAR RAI *v* BALDEO SINGH. **1941 P.W.N. 431.**

——**S. 3**—*Application containing names of all tenants—Signature by one only—If bad.*

Where all the tenants concerned are named in the application, but only one signed, it is only reasonable to assume that he signed for all, especially when no objection was taken to it in the lower Court. (*Middleton.*) INDRADEO PRASAD SINGH *v.* RAMBARAN SINGH **7 B R. 754.**

——**S. 3**—*Bakasht lands wrongly described as raiyati in sale proclamation—Co sharer landlord, if estopped from claiming same as bakasht afterwards.*

The fact that a co-sharer landlord describes a land as raiyati land in the sale proclamation for sale of the holding for arrears of rent will not estop him from afterwards saying that the lands are *bakasht*, when, the lands are such. A description in a sale proclamation will not confer on any person a status which he does not possess under the law. (*Middleton.*) RAMPRATAP SINGH *v.* RAMPRATAP SINGH. **7 B.R 895.**

——**Ss. 3 and 4**—*Limitation—Application by tenant against one landlord only—Other landlords brought on record after one year—Application—If barred.*

A tenant applying under S. 3 of the Bihar Restoration of Lands and Reduction of Rent Act must, under S. 3 (3), file the application within one year from the date on which the section came into force. It is necessary for the applicant to bring in the whole body of the landlords upon the record within the period of one year prescribed. Where the application originally is filed against one landlord only and the remaining landlords are not brought on the record until after the expiry of one year, the application is beyond time and must fail. An amendment of the application under S. 4 does not affect the period of limitation laid down in S. 3 (3). (*N.F. Peck*) MAHOMED NAIM *v.* RAM LAL GOPE. **7 B.R 498.**

——**S. 3**—*Limitation—Application made in time—Amendment after period of limitation—Permissibility.*

There is no warrant for holding that an application under S. 3 of the Bihar Restoration of Land and Reduction of Arrears of Rent Act must be in all respects complete before the expiry of the period mentioned in the section. The Collector can entertain an incomplete application and when he has done so within the time limited, he can allow an amendment or a remedying of the defects after the period of limitation, provided it was entertained within that period. (*Middleton.*) AMIRUL HAQUE *v.* MATHURA DAS.

7 B R. 419 = 1941 P.W.N. 244.

——**S. 3**—*Single application in respect of three distinct sales held on different dates—Maintainability.*

A single application for restoration in respect of three khatas or holdings sold on different dates under decree, for different arrears is irregular and defective. There must be three separate applications although the parties in the three holdings are the same as also the points at issue and although there is no prejudice to the opposite party. (*Middleton.*) RAMPRATAP SINGH *v.* RAMPRATAP SINGH. **7 B.R. 895.**

——**S. 3 (1)**—*Applicability—Application for restoration against transferee of purchasing landlord—Maintainability.*

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An application for restoration is not maintainable against the transferee of a purchasing landlord. The words "said landlord" in S. 3 (1) of the Bihar Restoration of Bakasht Land Act mean the landlord who purchased the holding; and under S. 3 (1) at the time of the application for restoration by the *raiyat*, the land must be in the possession of the same landlord who purchased the holding. (*N. F. Peck.*) MANZAR HASSAN *v.* SUKHLAL GOPE. **7 B.R. 415.**

——**S. 3 (1)**—*Application for restoration against landlord—Latter pleading settlement of lands with his sons—Latter also claiming under gift of earlier date—Names of sons entered in P Register only after application—Effect.*

On 20—3—1939, an application for restoration was made under S. 3 of the Bihar Restoration of Bakasht Lands Act impleading *A R* as landlord. He entered appearance and pleaded that he had gifted the lands to his sons before 19—4—1938. The sons also contended that they got the lands by gift on 7—2—1939 and therefore the application was not maintainable. It was found that the names of the sons were recorded in Register D only on 23—1—1940.

Held, that the application was correctly filed against *A R* and was competent. (*Middleton.*) AZIZUR RAHMAN *v* LACHHMI SINGH. **7 B.R 511.**

——**S. 3 (1)**—"*Raiyat*"—"*Landlord*"—*Meaning of.*

The word "raiyat" in S. 3 (1) of the Bihar Restoration of Bakasht Lands and Reduction of Rent Act includes the whole body of the raiyats, and the word "landlord" in S. 3 (1) includes the whole body of landlords. (*N. F. Peck.*) MAHOMED NAIM *v.* RAM LAL GOPE.

7 B.R. 498.

——**S. 3 (1)**—"*Said landlord*"—*Meaning of.*

The expression "said landlord" in S. 3 (1) of the Bihar Restoration of Bakasht Lands Act means that the application only lies against the purchasing landlord, *i.e.*, that restoration can only be obtained from the landlord who purchases the holding. (*Middleton.*) AZIZUR RAHMAN *v.* LACHHMI SINGH. **7 B R. 511.**

——**S. 3 (2) (ii)**—*Application | Contents of—Statement of date of sale and amount of sale price—Necessity for.*

Under S. 3 (2) (*ii*) of the Bihar Restoration of Bakasht Lands Act, it is obligatory on an applicant to state the date on which and the amount for which a holding was sold. An application which does not state these particulars is defective. (*Middleton.*) RAMPRATAP SINGH *v.* RAMPRATAP SINGH. **7 B.R. 895.**

——**S. 3 (3)**—*Amendment altering character of application—If permissible after expiry of time fixed by S. 3 (3).*

An application filed within the time prescribed by S. 3 (3) of the Bihar Act IV of 1938 may be amended after the expiry of that period under certain circumstances; but an amendment which makes the application an entirely new application cannot be permitted. Where the Khata No. in a village in the original application is cut out and the date of sale is altered by means of an amendment, that entirely alters the character of the application and cannot be permitted after the expiry of the time limited by S. 3 (3). (*Middleton.*) RAM RANVIJAY PRASAD SINGH *v.* NARSINGH.

1941 P.W.N. 436 = 7 B.R. 756.

——**S. 5**—*Scope—Mandatory—Failure to give notice—If fatal*

Under S. 5 of the Bihar Act IX of 1938, it is mandatory to give notice of the application and of the date fixed for hearing and to send with the notice a copy of the application; failure to comply with these directions is fatal to the maintainability of the application. (*Mid-*

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dleton.) TRIBHUAN ROY *v.* RAMPATI AHIR.
7 B.R. 891=1941 P.W.N. 432.

——**S. 6**—*Objection by landlord to restoration—Grounds.*

S. 6 of the Bihar Act IX of 1938 enables a landlord to object to restoration either on the ground of himself cultivating the holding with his own stock or by his own servants, or on the ground that the holding is in the possession of a third party. If the holding is in the possession of a person falling under Ss. 6 (1) (*a*) or 6 (1) (*d*), the land is not liable to be restored. (*Middleton.*) MAHBUBUR RAHMAN *v.* DEOLAL SINGH.
7 B.R. 794

——**S. 6 (1)**—*Plea of petty landlord—Burden of proof—Nature of evidence to be let in.*

If a landlord under S. 6 (1) of the Bihar Restoration of Lands Act takes the objection that he is a petty landlord, he must show by evidence that he is a petty landlord. Merely to swear to an affidavit stating the amount of cess paid by all the shareholders, without any attempt to show what particular amount of cess any particular landlord paid or even what would be his share worked out on any particular basis, would not be sufficient to prove the allegation that the landlords are petty landlords. (*N. F. Peck.*) MAHOMED NAIM *v.* RAM LAL GOPE.
7 B.R. 498.

——**Ss. 6 (1) and 6 (2), proviso**—"*Third person*"—*Meaning of.*

The expression "third person" in S. 6 (1) (*d*) and in S. 6 (2), proviso cannot be construed as meaning any one other than the purchasing landlord and the original tenants. S. 6 (1) (*d*) refers to such third person being in possession and can thus only include persons with whom a settlement has been made by the landlord. (*Middleton.*) AZIZUR RAHMAN *v.* LACHHMI SINGH.
7 B.R. 511.

——**S. 7**—*Notice—Service on all landlords—If essential*

S. 7 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act clearly contemplates due service of notice on all the landlords named in the application. If notices are not served on all the landlords or not properly served on any, the Restoration Officer has no jurisdiction to decide the case *ex parte*. There were several landlords mentioned in an application by the tenants. A notice was issued on one landlord only; but after his name the word "*wagaira*" (and others) was mentioned and the notice was served on a servant of the one landlord mentioned.

Held, there was not complete service on all the landlords named in the application and the Restoration Officer had no jurisdiction to proceed *ex parte*. (*Middleton.*) MD. HABIBUR RAHMAN *v.* DEWAN GOPE.
7 B.R. 649.

——**S. 8 (1)**—*Burden of proof—Plea of "petty landlord"—Onus—Duty of landlord to adduce evidence.*

Under S. 8 (1) of the Bihar Restoration of Bakasht Land Act, the landlord has to appear on the date of the hearing of the application and put forward the ground that he is a petty landlord. If he makes that objection, he must show by evidence that he is a petty landlord. Where all that is done is to file an affidavit sworn to by the Patwari of the landlords stating that the landlord is a petty landlord without any attempt being made to show what particular amount of cess any particular landlord paid, that would not be sufficient proof. (*N.F. Peck.*) MANZAR HASSAN *v.* SUKHLAL GOPE.
7 B.R. 415.

——**S 11**—Application under—Limitation Act, S. 18—Applicability. *See* LIMITATION ACT, S. 18.
7 B.R. 1003.

BIHAR REST. OF BAKASHT LANDS ACT (1938) S. 16.

——**Ss 15 and 16**—*Applicability—Occupancy holding—Produce rent payable—Application for reduction of rent under S. 16—Competency.*

S. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has no application to an occupancy holding in respect of which produce rent and not money rent is payable. Such a holding comes within S. 16 of the Act and an application for reduction of rent of such a holding can properly be made under S. 16 of the Act. (*Harries, C.J. and Varma, J.*) SREE KANT LAL *v.* AJODHYA SINGH. **194 I.C. 99=7 B.R. 698=1941 P.W.N. 234=22 Pat L.T. 374=13 R.P. 653=A.I.R. 1941 Pat. 390.**

——**Ss. 15 and 20**—*Applicability—Post-sale stage of execution.*

Reading Ss. 15 and 20 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act together, it would seem that where the rent of an occupancy holding has been reduced under S. 112-A (1) (*d*) of the Bihar Tenancy Act, the landlord shall not even in an execution proceeding be entitled to recover from the raiyat any arrears of rent in excess of the rate allowed by the Rent Reduction Officer. There is nothing in these sections to confine their operation to stages of execution proceedings previous to the sale, and a judgment-debtor cannot be refused relief merely on the ground that the execution sale has already taken place: provided, of course, that the execution proceeding is still pending. The executing Court has power to act in accordance with S. 15 (*a*) of the Act, although the judgment-debtor's application is made after the expiry of 30 days from the date of sale. The executing Court clearly does not become *functus officio* merely on the expiry of the 30 days from the sale—that stage is only reached when the sale is confirmed and the execution case dismissed as on full satisfaction. (*Dhavle, J.*) P. C. LAL CHOUDHURY *v.* BILTO MAHTO.
7 B.R. 941=195 I.C. 490=14 R.P. 131=1941 P.W.N. 603=A.I.R. 1941 Pat. 572.

——**S. 16**—*Application under—Erroneous order on—If null and void—Executing Court—If can ignore wrong order.*

The fact that the order passed by a Rent Reduction Officer on an application for reduction of rent under S. 16 of the Bihar Act IX of 1938 is wrong does not necessarily make it an order without jurisdiction. If there is no inherent want of jurisdiction, and the application is one which the Rent Reduction Officer has jurisdiction to entertain, the fact that he finds the facts wrongly cannot make his order null and void; the order of the Collector reducing the rent cannot be ignored and effect must be given to it in execution proceedings. The executing Court cannot ignore an order with jurisdiction, however erroneous the order may be. (*Harries, C.J. and Varma, J.*) SREE KANT LAL *v.* AJODHYA SINGH.
194 I.C. 99=7 B.R. 698=1941 P.W.N. 234=22 Pat.L.T. 374=13 R.P. 653=A.I.R. 1941 Pat. 390.

——**S. 16 (1)**—*Applicability—Relationship of landlord and tenant—If should subsist at time of application for reduction.*

There is no warrant for holding that the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has no application if the relationship of landlord and tenant has ceased to exist when rent reduction proceedings are commenced. If a relationship of landlord and raiyat existed between the parties during the period in which the rent sought to be reduced accrued, then it matters not whether such relationship is subsisting when application is made under S. 16 (1) of the Act to reduce the arrears due to the ex-landlord.

BIHAR REST. OF BAKASHT LANDS ACT (1938), S. 17.

(*Harries, C.J. and Varma, J.*) SREE KANT LAL *v.* AJODHYA SINGH. **194 I.C. 99=7 B.R. 698=22 Pat.L.T. 374=1941 P.W.N. 234=13 R P. 653=A.I R. 1941 Pat 390.**

——**Ss. 17 and 19**—*Scope and effect of—Order reducing decretal amount and granting instalment—Absence of prior application for stay—Jurisdiction of executing Court to execute original decree and hold sale.*

Where an application is made under S. 16 of the Bihar Act IX of 1938 to reduce the rent due under a decree for arrears of rent, the Rent Reduction Officer is fully empowered to reduce the decretal amount due to convert the decree into an instalment decree. Under S. 19 of the Act, the moment the Rent Reduction Officer has reduced the arrears and granted instalments, execution of the original decree cannot proceed. The executing Court has to give effect to the order which is made with jurisdiction. Whether or not a previous application had been made to stay proceedings under S. 17 of the Act, pending the result of rent reduction proceedings, further execution cannot proceed once the Rent Reduction Officer has made an order reducing rent and granting instalments, and the executing Court has no jurisdiction to sell the judgment debtor's property in execution of the decree as it originally stood. (*Harries, C.J. and Varma, J.*) SREE KANT LAL *v.* AJODHYA SINGH. **194 I.C. 99=1941 P.W.N. 234=7 B.R. 698=22 Pat.L.T. 374=13 R.P. 653=A.I.R. 1941 Pat. 390.**

——**S. 18 (2)**—*Right to reduction under—Conditions to be satisfied by tenant.*

Upon a true construction of S. 18 (2) (*a*) of the Bihar Restoration of Bakasht Lands Act and Reduction of Arrears of Rent Act, the Collector must dismiss the application of a tenant under S. 16, unless the tenant has complied with the three requirements of that section, namely, S. 18 (2) (*a*) (*i*), S. 18 (2) (*a*) (*ii*) and S. 18 (2) (*a*) (*iii*). A tenant who has not complied with all the three has no right to claim a reduction of rent. (*Harries, C.J. and Varma, J.*) SREE KANT LAL *v.* AJODHYA SINGH. **194 I.C. 99=7 B.R. 698=22 Pat L.T. 374=1941 P.W.N. 234=13 R.P. 653=A.I.R. 1941 Pat. 390.**

——**S. 22**—*Commissioner's powers of interference—Order under S. 69, Bengal Tenancy Act, at variance with evidence—Interference.*

In view of S. 22 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, a Commissioner has no power to revise orders of the Restoration Officer under S. 69 of the Bengal Tenancy Act, unless the latter has acted without jurisdiction or there has been some material irregularity. Where the Restoration Officer accepts self-contradictory statements at their face value and brushes aside documents, and passes an order at variance with the evidence, his order is without jurisdiction and must be held to be perverse so as to justify interference in revision. (*Middleton.*) DIPA SINGH *v.* BANWARI SINGH. **8 B.R. 93.**

——**S. 22**—*Finding of fact—Interference—Power of Commissioner.*

A finding of fact should not be interfered with in revision by the Commissioner unless it can be characterised as perverse. The mere fact that the Commissioner considers that the Restoration Officer had not sufficient reasons for believing the genuineness of an alleged settlement cannot justify his interference with a finding of fact by the Restoration Officer. (*Middleton.*) SARJUG SINGH *v.* SHEO SHANKAR MAHTON. **8 B.R. 28.**

——**S. 22**—*Finding of fact—Interference—Powers of Commissioner.*

Unless a finding of fact arrived at by the Restoration Officer is perverse or contrary to the evidence, and can be said to be absolutely untenable, the Commissioner is not justified in upsetting a pure finding of fact in revision, merely because he thinks that there was no sufficient reason for the lower Court to reject a document. (*Middleton.*) MAHOMED MOBIN *v.* KEDARNATH THAKUR. **8 B.R. 42.**

BIHAR TENANCY ACT (1885), S. 38.

Unless a finding of fact arrived at by the Restoration Officer is perverse or contrary to the evidence, and can be said to be absolutely untenable, the Commissioner is not justified in upsetting a pure finding of fact in revision, merely because he thinks that there was no sufficient reason for the lower Court to reject a document. (*Middleton.*) MAHOMED MOBIN *v.* KEDARNATH THAKUR. **8 B.R. 42.**

BIHAR TENANCY ACT (VIII OF 1885), S. 22 (3)—Construction—Occupancy holding— Purchase by thicadar—Effect—Thicadar selling right to co sharer landlord—Rights and status of latter—If can resist claim of other co-sharers to share by partition. *See* 1940 Dig., Col. 108. HARIHAR PRASHAD SINGH *v.* HIT LAL SINGH. **192 I.C. 502=7 B.R. 472=13 R.P. 491.**

——**S. 26-A, (as amended in 1938)**—*Applicability to under-raiyat— Right of under-raiyat to transfer land.*

Occupancy holding in S. 26-A of the Bihar Tenancy Act refers to the holding of an occupancy *raiyat* and not the land of an *under-raiyat* having a right of occupancy. S. 26-A does not confer any right of transfer on an under-raiyat even when read with S. 48-B of the Act. (*Rowland, J.*) ABASS KHAN *v* MAHOMED HUSSAIN. **195 I C. 866=14 R P. 168=7 B R. 981=22 Pat.L.T. 749=A.I.R. 1941 Pat. 593.**

——**S. 26-B**—*Scope—Transfer after 1—1—1923—Landlord not recognising—Deposit of transfer-fee—If makes transfer binding on landlord—Questions of title—Jurisdiction of Revenue Court to decide.*

The procedure for payment of a landlord's transfer-fee under S. 26-B of the Bihar Tenancy Act cannot be utilised to compel the landlord to recognise a transfer which he had not previously recognised. Where a landlord has not recognised a transfer effected after 1—1—1923, it is not binding on him without notice as provided by the proviso in S. 26-B. He cannot be compelled to recognise a transfer by a tenant whom he had never recognised or accepted as a tenant. A Revenue Court is not the proper forum to decide contested questions of title such as whether a transfer is a real transaction or only nominal one, or whether the transferee and his heirs had been in possession. (*Middleton.*) GAWRI SHANKAR RAM *v.* GIRJA PRASAD SINGH. **7 B.R. 940.**

——**S. 26-N**—*Applicability—Rent decree fully executed prior to section coming into force.*

Though S. 26-N which was introduced into the Bihar Tenancy Act by the Bihar Tenancy (Amendment) Act, 1934, was expressly made retrospective, it could not possibly affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. The section will apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the Amending Act came info force, namely, on 10th June, 1935. It can have no application whatsoever when the transferee had been lawfully ejected before the Amending Act came into operation. The section cannot, therefore, affect the rights of a purchaser who had purchased the property in execution of rent decree and obtained possession before the Amending Act actually came into force. (*Harries, C.J. and Manohar Lall, J.*) RAJA JHA *v.* RAMCHANDRA JHA. **7 B.R. 720=194 I.C. 199=13 R.P. 674=1941 P.W.N. 450=22 Pat.L.T. 505=A.I.R. 1941 Pat. 455.**

——**S. 38, (as amended by Act VIII of 1937)**—*Repeal of—Effect—Suit for rent—Claim to abatement*

BIHAR TENANCY ACT (1885), S. 40.

on ground that land is covered with sand—Power of Court to grant relief.

Up to the amendment of the Bihar Tenancy Act in 1938 by the Amendment Act VIII of 1937 which repealed S. 38 of the Bihar Tenancy Act, an occupancy tenant had the right to maintain a suit for abatement of rent on the ground that his holding or a portion of it was covered with sand, and both occupancy raiyats and other tenants could, in a suit for rent against them, claim relief on the same ground relying on the rule of justice, equity and good conscience under which Courts have always the power to grant relief on this ground in suits for rent. The repeal of S. 38, by the Amending Act of 1937, has only deprived an occupancy raiyat of his right to obtain relief of abatement by suit, but the right of every tenant of agricultural land including occupancy raiyats to obtain relief by way of abatement in a suit for rent against him has not been affected by the Amendment Act. (*Agarwala, J.*) SHEONANDAN PRASAD SINGH *v.* KRISHNA CHANDRA

22 Pat L.T. 789 = A.I.R. 1941 Pat. 611.

——**S. 40**—*Scope—Illegal realisation by landlord—If can be taken into account—Application of past prices to ascertain cash values of previous realisations—Propriety.*

All illegal realisation by the landlord cannot be taken into consideration in commutation proceedings under S. 40 of the B. T. Act. Where a landlord who was under the record-of-rights entitled only to half, has been consistently realising 9/16 of the produce, the 1/16 is an illegal realisation and should not be taken into account. It is not correct under S. 40 to apply past prices for ascertaining the cash value of previous realisations; that would be inequitable to the tenants. (*Middleton.*) SAHODRI *v.* SH. ABDUL RAUF. **1941 P.W.N. 491.**

——**S. 48**—*Applicability—Occupancy holding—Raiyat carving out portion and settling same with tenant under registered patta for non agricultural purposes—Suit by heirs of raiyat against successor of tenant—Rent payable—Rate fixed by Act or rate fixed in patta—Transfer of Property Act—Applicability*

The applicability of the Bihar Tenancy Act depends upon the nature of the original tenancy and not on the character of the parcels which go to compose the land forming the tenancy. The provisions of the Act will apply if the lease is for agri ultural purposes and not because the land is agricultural. The land in dispute was the occupancy holding of *M*, who was the occupancy raiyat thereof. *M* settled a part of the land with defendant No. 1 who was the manager of an institution. He entered into possession under a registered patta, dated 14th November, 1918, agreeing to pay an annual rental of Rs. 32. The holding, out of which, the land was so settled was at the time an agricultural h lding. *M* died without issue. The plaintiffs, who were the heirs of *M*, brought a suit in 1938 against the 1st defendant and the 2nd defendant, the present manager of the institution, for recovery of arrears of rent contending that they sued in their capacity as co-sharer landlords, and that the suit was governed not by S. 48 of the Bihar Tenancy Act but by the T. P. Act. The defendants pleaded that the plaintiff's predecessor having been found to have been in possession as the *raiyat* of an occupancy holding, S. 48 of the B. T. Act applied. It was found that the object of the tenancy created in 1918 in favour of the 1st defendant was not for agricultural purposes, though the nature of the original tenancy was undoubtedly agricultural.

Held, (1) that the case was governed by the Bihar Tenancy Act, the holding being an agricultural holding; (2) that the 2nd defendant was an under-raiyat under the plaintiffs; and (3) that he was liable to pay rent not at the jama of Rs. 32 fixed under the patta of 1918, but only at the rate provided by S. 48 of the Bihar Tenancy Act. (*Manohar Lall and Chatterji, JJ.*) JADO SINGH *v.* BISHUNATH LALL.

196 I.C. 849 = 22 Pat L.T. 821.

BIHAR TENANCY ACT (1885), S. 52.

——**S. 48-A, (as amended by Act XI of 1938)**—*Scope and effect—Decree for ejectment—Appeal—S. 48-A, coming into force pending appeal—Effect of—Accrual of occupancy rights.*

Where during the pendency of an appeal from a decree in an ejectment suit, S. 48-A of the Bihar Tenancy Act as amended by Act XI of 1938 comes into force the defendant under-raiyat must be deemed to have acquired occupancy rights in the land in dispute if he has continuously held the land as an under-raiyat for more than 12 years before the suit. The fact that notice to quit was given to the tenant (defendant) during that period would not prevent the accrual of occupancy rights. (*Agarwala, J.*) JAI NARAIN RAUT *v.* DHANESHARI.

192 I.C. 181 = 13 R.P. 415 = 7 B.R. 328 = A.I.R. 1941 Pat. 222.

——**S. 48 A**—**(as amended in 1938)**, *Scope—Retrospective operation—Government of India Act, S. 292—Construction and scope—If affects applicability of S. 48-A, B. T. Act.*

S. 48-A of the Bihar Tenancy Act, as amended in 1938, is retrospective. The object of that section was to quiet titles which are more than 12 years old and to ensure that if during these twelve years the under-raiyats have not been ejected, they shall have the right to remain on the land as if they were occupancy tenants. In the application of the section to pending litigations, there is no distinction between cases where the decree of the lower Court is affirmed by the appellate Court and those in which it is reversed. Nor does S. 292 of the Government of India Act of 1935 prohibit the giving of retrospective effect to S. 48-A of the Bihar Tenancy Act. There is nothing in S. 292 to suggest that there was any intention to curtail the power of the Indian legislature or other competent authority to decide in what manner a new law should operate as against the existing rights. All that S. 292 provides is that the existing law shall remain in force until it is repealed and not that the rights which have accrued under that law shall continue to be exercised even after the date of the repeal. S. 292 can obviously have no application to a case where pending appeal the question of the applicability of S. 84-A of the new Bihar Tenancy Act arises after the old law has been changed and the new section has come into operation. If the Legislature can make new laws and unmake old laws, it can also create new rights as well as take away rights already accrued. It must be held that S. 48-A of the Bihar Tenancy Act was intended to be given effect to in the case of all under-tenants whose rights were in dispute at the time the section came into force irrespective of whether they had been holding lands since before its enactment or otherwise. (*Harries C.J. and Fazl Ali, J.*) BHAGWATI PRASAD *v.* SAHADEO UPADHAYA. **195 I.C. 339 = 14 R.P. 116 = 7 B.R. 918 = 4 F.L.J. (H.C.) 146 = 1941 P.W.N. 216 = 22 Pat L.T. 356 = A.I.R. 1941 Pat. 413.**

——**S. 52, (as amended in 1938)**—*Applicability—Suit for rent—Claim to abatement on ground of diluvion—Right to relief—Burden of proof.*

Where in a suit for rent of a holding the defendant-tenant pleads that a portion of the holding having diluviated, he is entitled to a proportionate abatement of rent, the case falls under S. 52 of the Bihar Tenancy Act which gives statutory recognition to the principle which

BIHAR TENANCY ACT (1885), S. 53.

has been recognised by Courts in India that a tenant, whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated. This relief cannot be denied on the ground that S. 38 of the Act which gave an occupancy raiyat a right to file a suit for abatement has been repealed by the Amending Act of 1937. The burden of proof is of course on the tenant who has to prove measurement and ascertainment and to show that the exact area diluviated in each year. (*Rowland and Manohar Lall, JJ.*) SITAL PRASAD *v.* SURENDRA NATH. **196 I.C. 558=14 R.P. 208=8 B.R. 36=22 Pat.L.T. 795.**

——**S. 53**—Rent—Instalments—When due. *See* 1940 Dig., Col. 108. CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **192 I.C. 213=13 R.P. 444=7 B.R. 344=1940 P.W.N. 994.**

——**S. 60**—*Suit for rent by assignee of rent—Assignee not a registered proprietor—Suit, if barred—Bengal Land Registration Act, S. 78.*

An assignment of the rents of a holding does not amount to a transfer of proprietary interest in the holding, and if the assignee sues for rent he does not sue as a proprietor. Therefore, neither S. 78 of the Land Registration Act nor S. 60 of the Bihar Tenancy Act will be operative to bar the suit by reason of the assignee not being a registered proprietor. (*Rowland, J.*) RAMSEWAK KURMI *v.* THAKURJI MAHARAJ. **196 I.C. 552=14 R P. 206=8 B.R 34.**

——**S. 60**—*Suit for rent by assignee of rent—Payment by tenant to registered proprietor—If valid discharge.*

In a suit to recover rent by an assignee of the rents of a holding which is held under a proprietor, payment by the tenant to the registered proprietor will be a valid discharge for rent under S. 60 of the Bihar Tenancy Act. The fact that the rents have been assigned will not operate to create a new tenancy the raiyats not being a party to the transaction and in the absence of any devolution of the proprietary interest. (*Rowland, J.*) RAMSEWAK KURMI *v.* THAKURJI MAHARAJ **196 I.C. 552=14 R.P. 206=8 B.R. 34.**

——**S. 65**—*Rent decree—Purchaser in execution not annulling encumbrance—Right to priority.*

The mere fact that a purchaser in execution of a rent decree has not availed himself of his statutory right to annul the encumbrances does not, in any way, affect the priority conferred on him by S 65 of the Bihar Tenancy Act. (*Agarwala, J.*) CENTRAL CO OPERATIVE BANK *v.* KASHI SAHU. **193 I.C. 108=13 R P. 545=7 B R 577=A.I R. 1941 Pat 243.**

——**(as amended in 1937), S 67**—Scope—If retrospective. *See* 1940 Dig., Col. 109. CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **192 I.C. 213=7 B.R. 344=1940 P W N. 994=13 R.P. 444.**

——**S. 67 (as amended by Act VIII of 1937)**—*Scope—If retrospective—Vested rights under old S. 67—If cut down.*

S. 67 of the Bihar Tenancy Act as amended by Act VIII of 1937 cannot be given retrospective operation so as to cut down the rights given by the old S. 67 which was repealed by the Amending Act of 1937. There is nothing in the new S. 67 to suggest that it was intended to apply to rights accrued before it came into force. (*Harries, C.J. and Fazl Ali, J.*) JAGMOHAN SINGH *v.* RAMNANDAN PRASAD NARAYAN SINGH. **20 Pat. 556=13 R.P. 526=1941 P.W N. 295=192 I.C, 851=7 B.R. 493=22 Pat.L.T. 219=A.I.R. 1941 Pat. 253.**

BIHAR TENANCY ACT (1885), S. 107.

——**S. 69**—*Applicability—Genuine dispute as to existence of relationship of landlord and tenant—Tenants not offering evidence of rent receipts or payment of rent—Right to apply—Proceedings taken—If can be quashed by Commissioner.*

Where there is a genuine dispute whether the relationship of landlord and tenant exists between the parties and the alleged tenants do not offer any evidence that they had got any rent receipts or had ever been sued for rents since the survey and settlement, the tenants have no right to apply and proceedings under S. 69 of the Bihar Tenancy Act cannot be maintained. In such a case, the Commissioner has jurisdiction to quash the proceedings taken by the Sub-Divisional Officer. (*Middleton.*) SHEOBARAN CHAUDHURY *v.* RAMSEWAK PANDEY. **7 B R. 931.**

——**Ss. 69 and 70 (3)**—*Application for division of crops by tenant after cutting part—If to be rejected—Application entertained by Sub Divisional Officer—Annulment of proceedings by Commissioner—If justified.*

There is no warrant for holding that when a tenant who has cut a part of the crop applies for division of the remainder the application is not maintainable; that is no ground for annulling the proceedings on the application entertained by the Sub Divisional Officer who has discretion whether to allow or disallow the application. (*Middleton.*) DEOSARAN MAHTON *v.* ISHWAR DHARI SINGH. **7 B.R. 859**

——**S. 69 (1) (a) and (b)**—*Scope—If mandatory.*

Cls. (*a*) and (*b*) of S 69 (1) of the Bihar Tenancy Act lay down the conditions precedent to the Collector making an order to divide the produce and must be complied with before proceedings are taken under the section. (*Middleton.*) RAMDULARI KUER *v.* SHVAM LAL OJHA. **1941 P.W.N. 378.**

——**S. 86**—Deed of surrender—Need for registration. *See* 1940 Dig., Col. 110. SINGHESHWAR JHA *v.* AJAB LAL MANDAR. **A I R. 1941 Pat. 142.**

——**S. 104-H**—Scope of—Suit by landlord for declaration of illegality of reduced rent roll fixed by revenue officer and for enhancement of rent to old rates—If falls under section. *See* COURT FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART. 17 (*iii*). **22 Pat.L T. 453.**

——**S. 107 (2)**—*Scope—Non compliance—Effect—Decision by Special Judge—Finality and binding character—Omission to prepare schedule and to make note in entry in record-of rights—If detracts validity or binding character of decision.*

Under S. 107 (1) of the Bihar Tenancy Act, the decision of the Special Judge in proceedings under Ss. 105, 105-A and 106 of the Act, has the force and effect of a decree of a Civil Court in a suit between the parties; and is final and conclusive in regard to the matters decided, subject to Ss. 108 and 109-A. The mere fact that no schedule of rents was prepared as required by S. 107 (2) and that no note was made in the record-of-rights of the rents settled cannot detract from the validity and binding character of the decision so as to leave the matter at large. Nor is the party in whose favour the decision is given debarred from enforcing the rights which were determined in his favour by a decision passed on contest by reason of the omission to prepare a schedule or to make a note as required by S. 107 (2). The only effect of the non preparation of the schedule is only that the record-of rights finally prepared under S. 103 A (2) has not been altered. It retains the preparation of correctness and therefore it is incumbent on the party seeking to enforce his rights under the decision of the Special Judge to prove that the entry in the record-of rights is not correct [as it has not been altered in accordance with S. 107 (2)]. He can prove it by

BIHAR TENANCY ACT (1885), S. 112-A.

evidence including the decision of the Special Judge which has the force and effect of a decree of a Civil Court. (*Rowland and Manohar Lall, JJ.*) RAM RAN BIJOY PRASAD SINGH *v.* BALESWAR OJHA.
22 Pat.L.T. 771=A.I.R. 1941 Pat. 609.

——**S. 112-A**—*Applicability— Kabuliyat creating holding—Provision against enhancement of rent—Application by raiyat for reduction—If barred.*

A provision in a kabuliat of 1914 creating a holding to the effect that the rent cannot be enhanced does not bar an application by the tenant or raiyat for reduction of rent under S. 112-A of the Bihar Tenancy Act; unless enhancement and reduction are both prohibited, it cannot be said that rent is fixed so as to bar an application for reduction. (*Middleton.*) BAIJNATH PRASAD SINGH *v.* JONG BAHADUR. **1941 P.W.N. 476.**

——**S. 112-A**—*Construction—Collector—If bound to cancel enhancements.*

S. 112-A of the Bihar Tenancy Act cannot be construed as meaning that all enhancements must be cancelled. Under the section the Collector *may* cancel enhancement; it is not the case that he *must* do so. (*Middleton.*) BUDHU SINGH *v.* RAMBILASH SINGH.
7 B.R. 913=1941 P.W.N. 588.

——**S. 112-A**—*New plea—Question of fact—Plea that reduction in rent not really a reduction but only represented remission by landlord—If can be entertained in revision.*

Whether a reduction of rents which is taken as a new settlement by the rent reduction officer is in reality a reduction or only represents a remission by the landlord is a question of fact, and must be raised at the earliest opportunity before the Rent Reduction Officer and should not be allowed to be raised for the first time before the Board of Revenue in revision. That is not a matter on which the Board will exercise its powers of revision over proceedings under S. 112-A of the Bihar Tenancy Act. (*Peck.*) RAI RADHA KRISHNA *v.* RADHIKA KUER. **1941 P.W.N. 593.**

——**S. 112-A**—*New plea—Question of fact—Question as to applicability of section on the ground of holding being a tenure—If can be entertained in revision.*

Whether a holding is an occupancy holding or only a tenure and so not governed by S. 112-A of the Bihar Tenancy Act, is a matter of fact which should be proved in the original Court. It is idle to advance such a plea at the stage of revision before the Board of Revenue. With such a matter of fact the Board is not concerned by way of revision. (*Peck.*) RAI RADHA KRISHNA *v.* RADHIKA KUER. **1941 P.W.N. 593.**

——**S. 112-A**—*Proceedings under—Scope—Notice to opposite parties—Necessity—Failure to give notice—Effect.*

Proceedings for rent reduction are no doubt summary, but it is contrary to all principles to pass any order to the detriment of a party without giving him any notice and without giving him an opportunity to be heard. An order passed without notice must be set aside. (*Middleton.*) MD. YUSUF *v.* PANCHI LAL RAUT. **7 B.R. 914.**

——**S. 112-A**—*Raiyat at fixed rent—Right to apply for reduction of rent.*

A raiyat at a fixed rent can have the rights of an occupancy raiyat, and if he does acquire occupancy rights, he is entitled to apply for reduction under S. 112-A of the Bihar Tenancy Act. (*Middleton.*) BAIJNATH PRASAD SINGH *v.* JONG BAHADUR.
1941 P.W.N. 476.

BIHAR TENANCY ACT (1885), S. 112-A.

——**Ss. 112-A and 113**—*Relative scope and operation of—S. 112-A—If excluded from operation of S. 113.*

S. 112-A of the Bihar Tenancy Act is not excluded from the operation of S. 113 of the Act; S. 113, by its very words, applies to the rent of a holding settled under Ch X. (*Middleton.*) BUDHU SINGH *v.* RAMBILASH SINGH. **7 B.R. 913=1941 P.W.N. 588.**

——**S. 112-A (as amended in 1934)** *Successive applications under—Maintainability.*

Where an application under S. 112 A of the Bihar Tenancy Act, as amended in 1934, has been disposed of on the merits, a subsequent application is barred under S. 113. (*Middleton.*) JAIGOBIND CHOUBEY *v.* SHYAM BIHARI SINGH. **7 B.R. 994.**

——**S. 112 A (a)**—*Applicability—Application for settlement of rent—Amendment subsequently—S. 112-A (d)—If can be applied.*

S. 112 A (*a*) of the Bihar Tenancy Act does not apply to a case under S. 105, because it applies only to enhancements under Ss. 29 and 30 of the Act, and an application for settlement of rent under S. 105 is entirely different from a suit for enhancement of rent under S. 30 But where an application under S. 112-A (*a*) has been amended, the Rent Reduction Officer would be justified in applying S. 112-A (*d*) of the Act. (*Middleton.*) G. B. SOLANO *v.* JANGI SINGH.
1941 P.W.N. 247=7 B.R. 752 (1).

——**S. 112-A (a) and (d)**—*Illegal enhancement—Ignoring of—If amounts to cancellation of enhancement.*

An illegal enhancement of rent can be ignored under S. 112 A (*a*) of the B. T. Act for the purpose of applying cl. (*d*) of S. 112-A. Such ignoring of an illegal enhancement does not amount to a cutting off or cancellation of an enhancement for the purpose of S. 112-A of the Bihar Tenancy Act. (*Middleton.*) SAUDAGAR SINGH *v.* CHANDRESHWAR PRASAD NARAIN SINGH.
1941 P.W.N. 473.

——**S. 112-A (b)**—*Date of commutation—Date of final order or date from which commutation is directed to take effect—Material date.*

Clause (*b*) of S. 112 of the Bihar Tenancy Act refers to the date when the rent was commuted and the date of commutation for the purposes of cl. (*b*) is the date of the final order of commutation, although the commutation is, by the order, directed to take effect from a previous year. The date from which it is to take effect is not the material date. (*Middleton.*) JAGAT KISHORE PD. NARAIN SINGH *v.* NAKHOO MAHTON. **1941 P.W.N. 488.**

——**S. 112 A (b)**—*Scope — Commutation order passed in 1937 but directed to take effect from October, 1936—If falls under section.*

For purposes of S. 112 (*b*) of the Bihar Tenancy Act, the commutation order under S. 40 must have been passed between 1st January, 1911 and 31st December, 1936. The crucial date is the date of commutation order and not the date from which it was to be given retrospective effect. An order of commutation made in 1937, though directed to take effect from October, 1937, does not come within S. 112-A (*b*). (*Middleton.*) RAM BACHAN SINGH *v.* RANJIT NARAIN SINGH.
1941 P.W.N. 487=7 B.R. 801.

——**S. 112-A (1) (d)**—*"Current prices"—Procedure for working out reductions.*

Though the expression "current prices" is not defined in the Bihar Tenancy Act, the proper thing to be done in reduction cases is to take the average of that last complete year for which figures are available at the time of the order of the Rent Reduction Officer. (*Middleton.*)

BIHAR TENANCY ACT (1885), **S. 112-A.**

RAM NARESH SINGH *v.* SHEO PRASAD GUPTA.
1941 P.W.N. 589.

——**S. 112-A (d)**—*Date from which rent first became payable—Crucial date for purposes of comparison and reduction.*

For the purposes of S. 112-A (*d*) of the Bihar Tenancy Act, the crucial date is the date from which the first rent became payable; where a decree of the High Court gave a decree for year fasli 1314, different from the previous rent, the rent fixed clearly becomes payable in fasli 1314. That year has therefore to be taken for purposes of comparison and reduction under S. 112-A (*d*). (*Middleton.*) MAJID-UD-DIN AHMAD *v.* LOKENATH PANDEY. **7 B.R. 939.**

——**S. 112-A (d)**—*Date from which a rent first became payable—Crucial date—Decree of Civil Court fixing rent from a prior year—Effect—Retrospective effect of order.*

For the purposes of Cl. (*a*) of S. 112-A of the Bihar Tenancy Act, the crucial date is the date from which the rent first became payable. When a Civil Court has given a decree in 1935 for rent from the year 1927 at a rent different from the former rent, the new rent must be held to have first become payable from 1927. There is no reason for holdlng that there can be no retrospective effect in an order under which a rent becomes payable. Such orders are frequently passed in commutation and rent reduction cases. (*Middleton.*) RAMAWTAR LAL *v.* MANGAL PRASAD SAH. **8 B.R. 85.**

——**S. 112-A (1) (d)**—*Date when rent first became payable—Rent fixed by compromise in proceedings under S* 109, *in* 1915—*Allegation that civil suits were decreed on such basis with effect from* 1915—*Failure to prove—Effect—Crucial date.*

In certain cases cash rent was settled by compromise in proceedings under S. 109 (*c*) of the Bihar Tenancy Act in 1915. It was alleged, but not proved, that there were civil suits pending and that they were decreed at the cash rent so settled by compromise with effect from 1911.

Held, that in the absence of proof of such allegation, the year 1915 must be taken as the year when the rent first became payable. (*Peck.*) THAKUR PRASAD *v.* BRAHMDEO PANDEY. **1941 P.W.N. 660.**

——**S 112-A (d)**—*Jurisdiction—Application under S.* 112-*A* (*e*)—*No application for amendment—Jurisdiction of Rent Reduction Officer to act* suo motu *and to reduce under Cl.* (d).

Where applications for reduction are filed under S. 112-A (*e*) of the Bihar Tenancy Act, and no application is made to amend them, the Rent Reduction Officer has no jurisdiction to act *suo motu* and give relief under Cl. (*d*) of S. 112-A. (*Middleton.*) RAJA PRASAD SINGH *v.* PANO KUMRI. **8 B.R. 53.**

——**S. 112-A (1) (d)**—*Rent—When first becomes payable—Rent fixed in suit for assessment of rent—Landlord accepting it from year prior to date of decree—When rent first becomes payable—Date of decree or date of acceptance.*

Where in a suit brought by a landlord against persons in possession of his land upon which they had encroached, for assessment of rent of the land in dispute and for compensation for use and occupation for faslis 1336 and 1337, the Court fixes the rate of rent and allows compensation for use and occupation at the same rate; and the landlord accepts the rent so decreed from a date prior to the date of the decree fixing the rent, the rent first becomes payable for purposes of S. 112-A (1) (*d*) of the Bihar Tenancy Act, from the date on which the landlord so accepts the rent decreed and not from the date of the decree in the suit by which the rent is fixed.

BIHAR TENANCY ACT (1885), **S. 155.**

The rent has to be reduced under Cl. (*d*) of S. 112-A (1) of the Act, reckoning the year from which the landlord accepts the rent as the year when the rent first became payable. (*Peck.*) RAM KISHUN SINGH *v.* RAI RADHA KRISHNA. **1941 P.W.N. 592.**

——**Ss. 112 A (d) and 113**—*Scope—Reduction of rent refused under S.* 112—*Effect—Application for reduction—Bar of.*

Where in proceedings under S. 112 of the Bihar Tenancy Act, reduction of rent is refused on the finding that the rent had been existing since 1297 Fasli, that amount to a settlement which under S. 113 bars a reduction under S. 112-A (*d*) of the Act. That is a bar for 15 years to the application of S. 112-A, except on the ground of alteration in the area or any of the grounds specified in S. 112-A (*c*). (*Middleton.*) RAMCHARAN KOERI *v.* SAJEEWAN PRASAD SINGH. **1941 P.W.N. 662.**

——**S. 112-A (d)**—*Successive applications—Competency—First application dismissed for default—Second application allowed* ex parte—*Setting aside by Collector—Remand by Commissioner for re-hearing in the presence of both parties—Propriety.*

An application under S. 112-A (*d*) of the Bihar Tenancy Act was rejected by the Rent Reduction Officer, in the absence of the applicant, who was however allowed to make a second application, and the same was granted in the absence of the landlord. The Collector in appeal set sside the order holding that the lower Court had no jurisdiction to entertain the second application. The Commissioner in revision remanded the case for rebearing in the presence of both parties.

Held, in revision by the Board of Revenue, that the Commissioner's order was proper and cannot be held to be without jurisdiction. (*Middleton.*) SAKHI CHAND *v.* LACHMI NARAYAN SINGH. **8 B.R. 32.**

——**S. 116**—Applicability—Conditions. *See* 1940 Dig., Col. 110. LALA RAJBALI LAL *v.* PARTAPPUR CO., LTD. **191 I.C. 296 = 13 R.P. 293 = 7 B.R. 170.**

——**S. 116**—Construction — "Lease for term of years"—Meaning of. *See* 1940 Dig., Col. 111. LALA RAJBALI LAL *v.* PARTAPPUR CO., LTD. **191 I.C. 298 = 13 R.P. 293 = 7 B.R. 170.**

——**S. 121**—*Distraint of crops for realisation of produce rents—Permissibility.*

There is nothing in S. 121 of the Bihar Tenancy Act to restrict its operation to arrears of rent payable in cash or to make an exception in favour of arrears of rent payable by division of the produce. The section permits distraint of crops for the realisation of produce rents in the same manner as for the realisation of cash rents. (*Varma and Rowland, JJ.*) SAJIWAN PRASAD SINGH *v.* KARAMDHARI SINGH. **196 I.C. 174 = 14 R.P. 182 = 8 B.R. 5.**

——**S. 148-A**—*Rent suit—Co-sharer landlords made* pro forma *defendants—If bound by decree and execution—If can treat same as nullity.*

There is no warrant for holding that co-sharer landlords who are joined as *pro forma* defendants in a rent suit are entitled to treat the suit and execution of the decree therein as a nullity. (*Dhavle, J.*) CHANDRA MAHTON *v.* EMPEROR. **197 I.C. 63 = 22 Pat.L.T. 388 = 1941 P.W.N. 91 = A.I.R. 1941 Pat. 546.**

——**S. 155**—Notice—Validity—Misuse complained of incomplete at time of issue of notice—If renders notice defective. *See* 1940 Dig., Col. 111. SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SINGH. **192 I.C. 200 = 13 R.P. 425 = 7 B.R. 341 = 1941 P.W.N. 43.**

BIHAR TENANCY ACT (1885), S. 155.

——**S. 155 (1)**—Contents of notice—Express demand to quit land in the alternative—If essential. *See* 1940 Dig., Col. 111. SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SINGH. **192 I.C. 200 = 13 R.P. 425 = 7 B.R. 341 = 1941 P.W.N. 43.**

——**S 155 (1)**—Notice—Notice issued by Court and stated to be issued by Court—Landlord's name appearing as being the applicant seeking issue of notice—Validity. *See* 1940 Dig., Col 111. SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SINGH.
192 I.C. 200 = 13 R.P. 425 = 7 B.R. 341 = 1941 P.W.N. 43.

——**S. 158-A, (as amended in 1938)**—Scope—Pending applications by private landlords—If affected. *See* BIHAR PUBLIC DEMANDS RECOVERY ACT, S. 7.
1941 P.W.N. 441.

——**Ss. 158-B (2), 163(5) and 163-A, (as amended in 1938)**—Construction and scope—Pending application for execution—If governed by—Intention of legislature. *See* 1940 Dig., Col. 113. BIGAN SINGH *v.* SYED SHAH ZAFFER HUSSAIN. **191 I.C. 436 = 13 R.P. 319 = 7 B.R. 214.**

——**S. 169 (1) (c)**—Auction-purchaser—Liability of for rent between date of sale and its confirmation. *See* 1940 Dig., Col. 113. CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **192 I.C. 213 = 13 R.P. 444 = 7 B.R. 344 = 1940 P.W.N. 994.**

——**S. 169 (1) (c)**—Sale—Effect of on charge for rent—Extent to which it is extinguished. *See* 1940 Dig., Col. 113. CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **192 I.C. 213 = 13 R.P. 444 = 7 B.R. 344 = 1940 P.W.N. 994.**

——**S. 177-A**—*Applicability — Money executions—House of judgment-debtor—Exemption from liability to sale.*

S. 177-A of the Bihar Tenancy Act is not inapplicable to money executions. The section gives exemptions which are not, in terms at any rate, confined to rent executions. It follows from the proviso to Cl. (*b*) of the section that the houses of raiyats and under-raiyats are saved from execution sales when the execution relates to decrees for arrears of rent due in respect of lands other than the sites of the houses. Execution against the site of a house on a decree for arrears of rent due in respect of other land is obviously a money execution as distinguished from a rent execution and it is precisely in such cases that S. 177-A (*b*) exempts houses from sale. What S. 177-A (*b*) saves, however, is a house belonging to the raiyat and occupied by him as such. It must therefore be clearly found that the house in fact is occupied by the raiyat. (*Dhavle, J.*) BIKRAMA LAL *v.* RAM RAN BIJAYA PRASAD SINGH. **194 I.C. 226 = 13 R.P. 687 = 7 B.R. 733 = A.I.R. 1941 Pat. 508.**

——**S 177-A (b), (as amended in 1937)**—"Occupied by him"—Meaning of. *See* 1940 Dig., Col. 113. BAIJNATH RAM MARWARI *v.* RAM KUMAR SINHA.
191 I.C. 128 = 7 B.R. 147 = 22 Pat.L.T. 109

——**S. 178-B, (as amended by Act VIII of 1937)**—*Scope—If retrospective—Arrears of rent accrued due before passing of Act and sued for before section came into force—If affected—Decree for* 50 *per cent. of produce—Jurisdiction of Court to make.*

New legislation cannot take away accrued rights unless such intention is manifest and clear from the terms of the legislation. S. 178-B of the Bihar Tenancy Act, introduced by Act VIII of 1937, cannot be construed as having a retrospective effect. It does not in any way prohibit the Courts from decreeing a greater proportion of the produce in respect of rent accrued due before the passing of the Amendment Act. All that the sections means is that after the passing of the Act a landlord shall not be entitled to more than nine-twentieths of the produce and there is nothing in the section to suggest that the landlord's rights which had already accrued were to be affected in any way. S. 178-B does not therefore apply to arrears which had accrued due before the section was enacted and which had been sued for before the section came into force. In such a suit therefore the Court can decree to the landlord not only nine-twentieths but fifty per cent. of the produce of the land. (*Harries, C.J. and Fazl Ali, J.*) JAGMOHAN SINGH *v.* RAMNANDAN PRASAD NARAYAN SINGH.
20 Pat. 556 = 192 I.C. 851 = 13 R.P. 526 = 1941 P.W.N. 295 = 7 B.R. 493 = 22 Pat.L.T. 219 = A.I.R. 1941 Pat. 253.

——**S. 188**—Scope—Notice under S. 155—Suit by some of the co-sharer landlords for ejectment after expiry of notice—Maintainability. *See* 1940 Dig., Col. 114. SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SINGH. **192 I.C. 200 = 13 R.P. 425 = 7 B.R. 341 = 1941 P.W.N. 43.**

——**Sch. III, Art. 6**—Scope—If controlled by S. 15, Limitation Act. *See* LIMITATION ACT, S. 15.
1941 P.W.N. 183.

BIHAR AND ORISSA BOARD OF REVENUE ACT (I OF 1913)—Revisional powers—Extent of—Questions of fact—Interference. *See* BENGAL ACT I OF 1829.
1941 P.W.N. 311.

——**S. 6**—*Powers of Board—Question of fact—Interference.*

The powers of the Board of Revenue to interfere in revision are very wide. It has power to interfere on questions of fact in order to prevent gross abuse or gross injustice. (*Middleton.*) AWADH SINGH *v.* BASUDEO SINGH.
7 B.R. 688.

——**S. 6**—*Review—Powers of Board—Extent of—Grounds.*

The B. and O. Board of Revenue has very wide powers of review conferred upon it by S. 6 of the Bihar and Orissa Board of Revenue Act; they are not, however, powers which the Board will exercise lightly. Review by the Board as the highest Revenue Court should be granted only in exceptional cases where a serious error has been undoubtedly committed. The mere fact that one member of the Board might take a different view either of the law or of the facts if he heard the original application, is no sufficient reason for him to review the order of his predecessor. (*Middleton.*) SHYAM SUNDER KUER *v.* DWARIKA SINGH.
1941 P.W.N. 326.

——**S. 6**—*Review—Powers of Board of Revenue—Grounds—Questions of fact.*

The powers of the Board of Revenue to review its orders are clear and unfettered, such powers being conferred on the Board by S. 6 of the Bihar and Orissa Board of Revenue Act. As a matter of practice, however, the Board would be reluctant to review its orders save in very exceptional circumstances, more so on question of fact. The mere fact that one member of the Board might take a different view of the case, if he heard it originally, from that taken by his predecessor, is no ground whatever for review. (*Middleton.*) RAM KESHWAR SINGH *v.* DEOKI SINGH.
1941 P.W.N. 311 = 7 B.R. 684.

BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT (VI OF 1935), S. 4 (2)—*Scope and effect of—If retrospective—If revives liabilities or proceedings already dead under old Act—Award under new Act after liability had ceased to exist before new Act—Validity of.*

S. 4 (2) of the Bihar and Orissa Co-operative Societies Act is not retrospective in the sense that it revives

B. & O. CO-OP. SOCIETIES ACT (1935), S. 24-A.

liabilities and proceedings which have ceased to exist. It is a saving clause which can keep alive that which had life under the old Co-operative Societies Act of 1912, but cannot give life to something which was already dead or which had never existed at all under the old Act. Under S. 39 of the Co-operative Societies Act of 1912, the registration of a society was cancelled on 8—1—1932. After the Bihar Act (VI of 1935) came into force on 29—6—1935, the liquidator under S. 44 (3) of the new Act determined the amount due by a past member, and certificate proceedings were then started against that member.

Held, (1) that the member in question ceased to be a member on 8—1—1932 when the society ceased to exist and his liability for the debts of the society ceased on 7—1—1934 and for his own debts on 7—1—1935, in view of S. 23 of the Act. Since he was neither a member nor a past member at the time the award was made against him, the award made against him must be held to be without jurisdiction; since no proceedings at all were started against him under the old Act, he had a right of immunity before the new Act came into force and nothing in the new Act could deprive him of that immunity. (*Middleton.*) DAMODAR THAKUR *v.* RAKTOO MAHTON. **7 B.R. 689.**

——**S. 24 A**—*Scheme adopted and approved by Registrar—Effect—Decree obtained by creditor subsequent to scheme—Executability.*

A composition arrived at in pursuance of the provisions of the Bihar Co-operative Societies Act does not stand on the same footing as a private agreement where pending a suit by a creditor against a Co operative Society, a scheme of composition is adopted approved by the Registrar, that binds the plaintiff in the suit who is a party to the scheme. If he continues the suit and obtains a decree, the decree cannot be executed and the scheme can be pleaded in bar of execution. The creditor's remedy is to obtain satisfaction of the decree in the manner provided for in the scheme. (*Rowland and Shearer, JJ.*) MAHAMAYA OJHAIN *v.* LAHERIA SARAI CENTRAL CO OPERATIVE BANK, LTD.
194 I.C 468 = 13 R.P. 727 = 7 B R. 780 = 1941 P W N. 531 = A.I.R 1941 Pat. 497.

——**S. 48**—*Award against estate of deceased member—If nullity.*

An award under the Co-operative Societies Act is not a decree, although it resembles a decree. Where an award is made against the estate of a deceased member of a Co operative Society under S. 48 of the Act, it is not a nullity, because the Act makes definite provision for an award against the estate of a deceased member. Such an award cannot be held to be a nullity on the analogy of a decree against a dead man being a nullity. (*Middleton.*) RAMCHANDRA SINGH *v.* CENTRAL CO OPERATIVE BANK, NAWADA. **1941 P.W.N. 536 = 7 B.R. 930.**

——**S. 54**—*Order under—If part of award—Finality.*

An order of apportionment by the Registrar under S. 54 of the Bihar and Orissa Co-operative Societies Act is not part of award under S. 48, so as to clothe it with finality under S. 48 (9) of the Act. The two things are entirely relevant. The apportionment order under S. 54 is nowhere declared in the Act to be final and cannot therefore be regarded as final in the sense that it cannot be challenged in any Court. (*Middleton.*) RAMAUTAR MAHTON *v.* CENTRAL CO-OPERATIVE BANK. **7 B.R. 686.**

——**Ss. 54 and 55**—*Relative scope and effect—Deceased member—Apportionment of estate—Award within*

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two years of death—Requisition for certificate to enforce award made after two years—If barred.

S 54 of the Bihar and Orissa Co-operative Societies Act only applies to sums recoverable from registered societies under S. 48 and other sections, but not to sums due to a society from its members. S. 54 is subject to S. 55 which is virtually a proviso to it. The effect of S. 55 is that the estate of a deceased member for the debts of a registered society as they existed on the death of the deceased would continue for a period of two years from such date. If an apportionment of the estate of the deceased member is made under S. 54 of the Act, his heirs are not liable for a longer period than two years from the date of his death. Where, though an award was made within two years of the death, the requisition for a certificate to enforce the award is not made within two years of the death, it is clearly barred by time. (*Middleton.*) RAMCHANDRA SINGH *v.* CENTRAL CO-OPERATIVE BANK, NAWADA.
1941 P.W N. 536 = 7 B.R. 930.

——**S. 57 (2)**—*Liquidator taking proceedings against member on award issued by Registrar—Suit by member against liquidator without Registrar's sanction—Maintainability.*

The liquidator is empowered by S. 44 (3) (*a*) of the Bihar and Orissa Co-operative Societies Act to take proceedings to execute an award issued by the Registrar against a member of the Co-operative Society in liquidation. If the member is aggrieved by the liquidator's action, he may apply to the Registrar to interfere with the liquidator's act under S. 56 or to grant leave for the institution of a suit under S. 57 (2) of the Act. A suit by him against the liquidator is not maintainable in the absence of the Registrar's sanction for its institution. (*Agarwala, J.*) LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE SOCIETY *v.* DOMI RAM CHAUDHARY.
193 I.C. 142 = 7 B.R. 585 = 22 Pat L.T. 465 = 1941 P.W.N. 373 = 13 R.P 549 = A.I.R. 1941 Pat. 438.

BIHAR AND ORISSA EXCISE ACT (II OF 1915). S 19 (4)—*Construction—"Any person or class of persons"—If mean public generally—Power of Local Government to enforce total prohibition under S. 19 (4).*

The phrase "any person or class of persons in S. 19 (4) of the Bihar and Orissa Excise Act must be considered as a whole and should not be split up, so as to take the words "any person" separately as meaning every one in the province or in any particular part thereof. The phrase, taken as a whole and given its natural meaning means not the public genarally in the province or in any particular area therein, but means any person or class of persons designated by name or description. The words "any person" cannot mean any or all persons in the province or any part thereof. The Local Government under S. 19 (4) of the Act can prohibit by notification the possession of any intoxicant by any designated person or class of persons; the words of the sub section are not wide enough to empower the Local Government by notification to prohibit the public generally from being in possession of intoxicants or any form thereof. S. 19 (4) is an exception to the other provisions of S. 19, and the powers contained therein are intended to meet special cases such as habitual drunkards addicts, classes of persons addicted to drink or drug or such like. It was never the intention of the Legislature to confer on the Provincial Government the power to enforce total prohibition of alcoholic liquor or intoxicating drugs throughout the province or in any particular district. The main object of the Act is to collect excise duties, though it undoubtedly contains provisions for

B. & O. EXCISE ACT (1915), S. 19.

the regulation and governance of the trade in intoxicants as well as imposition and collection of duties upon such intoxicants. But powers of regulation and governance of a trade do not, however, give the Provincial Government a right totally to prohibit all trade in intoxicants unless there are express words in the statute giving such a power. (*Harries, C.J., Fazl Ali, Varma, Manohar Lall and Shearer, JJ.*) KANHAI SAHU *v.* EMPEROR.
20 Pat. 181 = 7 B.R. 375 = 192 I.C. 307 = 42 Cr.L.J. 273 = 13 R.P. 486 = 21 Pat.L.T. 1042 = 1940 P.W.N. 948 = A.I.R. 1941 Pat. 53 (S.B.).

——**S. 19 (4)**—*Scope—Powers of Provincial Government to enforce total prohibition—Notification No.* 1600, *L. S. G., dated* 26-3-1939—*Validity—If* ultra vires—*Breach of—Offence—S.* 47 (a).

The Notification dated 26 3-1939, No. 1600, L. S. G. issued to the Provincial Government of Bihar is *ultra vires* the powers of that Government under S. 19 (4) of the Bihar and Orissa Excise Act, and such a notification cannot be made under S. 19 (4). Consequently there can be no conviction under S. 47 (*a*) of the Act for being in possession of country liquor in contravention of that notification. To sustain a conviction for breach of a notification under S. 47 (*a*), the notification must be one which the Provincial Government were empowered by stutute to make. (*Harries, C.J., Fazl Ali, Varma, Manohar Lall and Shearer, JJ.*) KANHAI SAHU *v.* EMPEROR.
20 Pat. 181 = 7 B.R. 375 = 192 I.C. 307 = 42 Cr.L.J. 273 = 13 R.P. 486 = 21 Pat.L.T. 1042 = 1940 P.W.N. 948 = A.I.R. 1941 Pat. 53 (S.B.).

——**S. 47 (a)**—Possession of liquor in contravention of Notification of 26-3-1939—Offence—Conviction—Sustainability. *See* BIHAR AND ORISSA EXCISE ACT, S. 19 (4).
20 Pat. 181 = 1940 P.W.N. 948 = A.I.R. 1941 Pat. 53 (S.B.).

BIHAR AND ORISSA MINING SETTLEMENT ACT (IV OF 1920), S. 25 (1) (x)—*Bye-laws—Construction—"Nuisance"—Meaning of.*

A Mines Board of Health constituted for a Mining Settlement area under the Bihar and Orissa Mining Settlement Act framed, among others, two bye laws, one of which defined "nuisance" as including "any act, omission, place or thing which in the opinion of the Medical Officer of Health is injurious to the public health." The second bye-law provided that "No person shall commit a nuisance, or allow a nuisance to continue on his premises."

Held, that though the definition of "nuisance" in the first bye-law was unreasonable in so far as it makes the Medical Officer of Health the sole judge of nuisance and left no option to the Court but blindly to act upon his opinion, since the definition was not exhaustive, the Court must in each case find out whether there has been any nuisance affecting the public health; (2) that in the second bye-law, the word "nuisance" must be taken to mean nuisance affecting the public health. (*Chatterji, J.*) JHARIA MINES BOARD *v.* KARTAR ADDHARONI.
194 I.C. 403 = 14 R.P. 9 = 42 Cr.L.J. 578 = 7 B.R. 760 = 1941 P.W.N. 539 = A.I.R. 1941 Pat. 482.

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922), S. 86—*Latrine tax—Formality not observed—Assessment, if* ultra vires

Under S. 86 of the Bihar and Orissa Municipal Act, where the holdings in question do not contain dwelling-houses, latrines, urinals or cesspools, latrine tax can be imposed only if "in the opinion of the Commissioners at a meeting, a latrine, urinal or cesspool is required." In other words, this formality must be observed as a condition precedent to the imposition of the latrine tax.

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Otherwise, the assessment is *ultra vires* and without jurisdiction. (*Harries, C.J. and Chatterji, J.*) SHIVA PRASAD *v.* THE COMMISSIONERS OF DARBHANGA MUNICIPALITY.
196 I.C. 370 = 14 R.P. 192 = 8 B.R. 15.

——**S. 115 (2)**—Applicability—Illegal enhancement of assessment—If can be looked into in revision of assessment as legal—Notice—Necessity. *See* 1940 Dig., Col. 96. PANCHANAN MUKHARJI *v.* COMMISSIONER OF CUTTACK MUNICIPALITY.
7 B.R. 143.

——**Ss 116 and 117**—Applicability—Amendment of valuation list. *See* 1940 Dig., Col. 96. PANCHANAN MUKHARJI *v.* COMMISSIONER OF CUTTACK MUNICIPALITY.
7 B.R. 143.

——**S. 117**—"Heard and determined"—Meaning—Objections disposed of without hearing assessee—Assessment—Legality of. *See* 1940 Dig., Col. 96. PANCHANAN MUKHARJI *v.* COMMISSIONER OF CUTTACK MUNICIPALITY.
7 B.R. 143.

——**S 119**—*Scope—Assessment* ultra vires—*Assessee's right of suit.*

S. 119 of the Bihar and Orissa Municipal Act contemplates that the assessment is made in accordance with the provisions of the Act, and if the assessee is to raise any objection to that assessment he must have recourse to the proceedings laid down in the Act. But where the assessment itself is *ultra vires*, the assessee need not take any proceedings under the Act, and can at once bring a suit in the Civil Court. In such a case the fact that the assessee failed to take the specific grounds raised in the suit in the petition of objection filed by him under S. 116 is immaterial, as he cannot be in a worse position then if he had filed no objection at all under that section. (*Harries, C.J. and Chatterji, J.*) SHIVA PRASAD *v.* THE COMMISSIONERS OF DARBHANGA MUNICIPALITY.
196 I.C. 370 = 14 R.P. 192 = 8 B.R. 15.

——**S. 192**—*Sentence—Imprisonment in default of payment of fine—If can be rigorous—Penal Code, S.* 67.

A person committing an offence under S. 192 of the Bihar and Orissa Municipal Act is liable to be fined but is not liable to imprisonment otherwise than in default of payment of the fine. Therefore, by reason of S. 67, I. P. Code, the imprisonment to be awarded in default of payment of the fine must be simple, and cannot be rigorous. (*Agarwala, J.*) PARASNATH RAI *v.* MUNICIPAL CORPORATION OF RANCHI.
7 B.R. 731 = 194 I.C. 213 = 13 R.P. 695 = 42 Cr.L.J. 533 = 1941 P.W.N. 591 = A.I.R. 1941 Pat. 401.

——**S. 198**—*Jurisdiction—Magistrate with second class powers—If empowered to act under.*

A Magistrate with second class powers is not a Magistrate who can deal with the matter under S. 198 of the Bihar Municipal Act. If he deals with a matter under S. 198, his order is without jurisdiction. (*Dhavle, J.*) CHAIRMAN, BIHAR MUNICIPALITY *v.* RAMNANDI KUER.
197 I.C. 74 = 1941 P.W.N. 459 = 22 Pat.L.T. 510 = A.I.R. 1941 Pat. 548.

——**S. 198**—*Proceeding under—Nature of—If "prosecution"—Conviction or acquittal—If can be recorded—Cr. P. Code, S.* 245.

In a proceeding under S. 198 of the Bihar and Orissa Municipal Act, there can be no question of conviction or acquittal. The proceeding under the section is not a prosecution and S. 245, Cr. P. Code, does not apply to a proceeding under S 198. (*Dhavle, J.*) CHAIRMAN, BIHAR MUNICIPALITY *v.* RAMNANDI KUER.
197 I.C. 74 = 1941 P.W.N. 459 = 22 Pat.L.T. 510 = A.I.R. 1941 Pat. 548.

B. & O. MUNICIPAL ACT (1922), **S.** 282.

——**Ss. 282 (1) and 291 (j), (as amended in 1934)**—Bye-laws under—Scope—Druggist's shop—Licence-fee before amendment—If annual fee or for all time—Amendment — Effect — Liability of druggist's shop registered prior to amendment to pay annual license-fee—Amendment—It *ultra vires*. *See* 1940 Dig., Col. 97. CUTTACK MUNICIPALITY *v.* SURENDRA NATH SAHU.
191 I C. 495=13 R P. 325=7 B R. 209.

BIHAR AND ORISSA PRIVATE IRRIGATION WORKS ACT (V OF 1922), S. 5—Collector's powers—Invasion of private rights—If authorized—Permission from owner of field for taking earth—Necessity. *See* BIHAR AND ORISSA PRIVATE IRRIGATION WORKS ACT, S. 42 (*d*). **22 Pat.L.T. 753=1941 P W.N. 190=A.I.R. 1941 Pat. 300.**

——**S. 42 (d)**—*Applicability—Owner of field refusing permission for earth to be dug from field and preventing same being taken—Offence—Powers of Collector under S.* 5.

Under S. 5 of the Bihar and Orissa Private Irrigation Works Act, read with Ss. 3 and 4, the Collector has power to order any necessary repair work to be done; but the section does not in terms authorize the invasion of any private rights. The person executing the work should obtain the consent of those from whom he requires permission to take earth from their lands and other facilities. No offence can be said to be committed under S 42 (*d*) of the Act by a person who refuses permission for earth to be dug from his culturable field and in preventing the earth from being taken. (*Rowland, J.*) BHAROSA SINGH *v.* KAMLA PATI.
195 I.C. 260=7 B.R. 888=22 Pat L.T. 753=14 R.P 99=42 Cr.L.J. 712=1941 P.W.N. 190=A.I.R. 1941 Pat. 300.

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (VI OF 1914), S. 25—"*Conclusive*"—*Meaning of—Order under S.* 23—*Appealability—S.* 60.

The word "conclusive" in S. 25 of the Bihar and Orissa Public Demands Recovery Act does not mean non appealable. An order under S. 23 cannot therefore be regarded as one not subject to appeal, merely because of the provisions of S. 25, especially in view of the clear and definite provision in S. 60 of the Act which says that all orders except one are appealable. There is thus no contradiction between S. 25 and S. 60. (*Middleton.*) LIQUIDATOR, DHUNDHWA CO-OPERATIVE SOCIETY *v.* PHAGU SAO. **8 B.R. 26.**

——**S.** 29—*Construction—Order setting aside sale—Payment of whole certificate debt—If condition precedent.*

According to the proper construction of S. 29 (1) (*b*) of the Bihar and Orissa Public Demands Recovery Act, the certificate debtor or debtors should pay the amount actually due from him or them before the merits of the application under S. 29 to set aside the sale are even considered by the Court. In any case, before any orders setting aside the sale are passed under the section, the certificate dues should be paid up. (*Peck.*) NURUL HASAN *v.* ABDUL QUDDUS. **1941 P.W.N. 241.**

——**S.** 29—*Material irregularity—Amount of interest differently entered in office copy of sale proclamation and in copy served on judgment-debtor—Effect of—Sale—If vitiated.*

The mere fact that the interest due under the certificate as mentioned in the office copy of the sale proclamation was different from the amount entered in the copy served on the certificate-debtor is not a material irregularity vitiating the sale. It is at the most a petty irregularity, and could not possibly affect the amount of bid so as to cause substantial injury to the debtor.

B. & O. PUB. DEM. RECOV. ACT (1914), **S.** 63.

Unless it is established that the property was sold for a low price as a result of a material irregularity, a sale cannot be set aside under S. 29 of the Bihar and Orissa Public Demands Recovery Act. (*Middleton.*) KASHINATH SINGH *v.* TASHIR AHMAD.
8 B.R. 6=1941 P.W.N 663.

——**S.** 29—*Material irregularity—Non-affixture of copy of sale proclamation in office of certificate officer—Effect of—Substantial injury.*

The object of publication of the sale proclamation in the certificate office is that professional bidders and the public may know what is coming up for sale, and the absence of bidders may very well cause substantial injury. It is certainly an irregularity when no copy of the sale proclamation is affixed to a conspicuous part of the certificate office as required by statutory R. 26 of Sch. II of the Act. Where in such a case property yielding an income of over Rs. 2,000 is sold for Rs. 800, it must be held that substantial injury is caused by the material irregularity, and the sale must be set aside under S. 29. (*Middleton.*) FATMA BEGUM *v.* NATHUNI LAL. **7 B.R. 617.**

——**S.** 29—*Scope of inquiry—Certificate Officer—Power to enquire into proportionate liability of each of several debtors—Functions of Revenue Court.*

The question before the certificate officer in proceedings for setting aside a sale under S. 29 of the Bihar and Orissa Public Demands Recovery Act of 1914 is to see that the whole certificate dues are paid up before the sale is set aside and not to enter into questions as to what amount is due from each or any particular certificate-debtor. This is more so in a case where it is admitted that each and every certificate debtor is jointly and severally liable for the whole of the debt. It is not the function of the certificate Court to be led into a discussion in a case of joint liability as to the principle on which particular liability should be laid down. Nor is it the function of the certificate officer to pass such orders as would lead the Courts to which he is subordinate to discuss complicated matters of liability, obligation and equity which are the proper functions of the Civil Court and not of the Revenue Courts. (*Peck.*) NURUL HASAN *v.* ABDUL QUDDUS.
1941 P.W.N. 241.

——**S.** 60—Scope—If conflicts with S. 25—Order under S. 23—Appealability. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT, S. 25.
8 B.R. 26.

——**S.** 63—*Scope—Powers of certificate officer—Power to set aside sales contrary to S.* 29.

Orders under S. 63 of the Bihar and Orissa Public Demands Recovery Act should only be passed in exceptional cases, and it is quite clear from the wording of the section that in passing an order under S. 63 the certificate officer must come to a finding that some mistake or error has occurred in the course of the proceedings: S. 63 no doubt gives wide powers to the certificate officer but it certainly does not give him power to pass an order contrary to the mandatory section of the Act governing the transaction involved. A sale can be set aside only under S. 29 of the Act on the applicant complying with certain conditions. Where the conditions are not complied with, the certificate officer cannot adopt some procedure of his own under S. 63 of the Act to set aside a sale. There must be some mistake or error to justify an order under S. 63, and the error or mistake must be one that is apparent immediately, such as some clerical mistake or clear mistake of diction. (*Peck.*) NURUL HASAN *v.* ABDUL QUDDUS.
1941 P.W.N. 241,

BIHAR AND ORISSA VILLAGE ADMINISTRATION ACT (III OF 1922), Ss. 53 (2) (b) and 57 (2)—Effect of—Panchayat—If "Court". *See* CR. P. CODE, S. 435. 1940 P.W N 973= A I R. 1941 Pat 169.

——**Ss. 53 (2) (b) and 77**—Panchayat—Stay of proceedings in criminal case—Power of Sub Divisional Magistrate to order. *See* CR. P. CODE, S. 435 (4).
1940 P.W.N. 973 = A.I.R. 1941 Pat. 169.

——**S.** 68—*Right of trial by Magistrate—When to be claimed.*

Under S. 68 of the Village Administration Act which confers upon an accused person a right to be tried by a Magistrate, instead of by a Panchayat, the right to be tried by a Magistrate must be made when he appears in answer to a summons ; and it cannot be made at any later stage. (*Agarwala, J.*) GONI MAHTON *v.* EMPEROR. 193 I C. 491 = 13 R.P. 614 = 42 Cr.L J. 434 = 7 B.R. 606 = 1940 P W.N. 973 = A.I.R. 1941 Pat. 169.

——**S.** 76—Scope—If mandatory—Discretion of Panchayat to accept or ignore compromise. *See* CR. P. CODE, S. 345 (6). 1940 P.W N. 973 = A.I.R. 1941 Pat. 169.

BOARD OF REVENUE. *See also* BIHAR AND ORISSA BOARD OF REVENUE ACT (I OF 1913).

——*Jurisdiction—Scope of.*

The Board of Revenue is not a Court of first instance but a Court of appeal and revision. Consequently, it should be approached only when it is desired to have an order passed by the Court of first instance set aside either in appeal or in revision. (*Sathe, J.M.*) ALLIANCE BANK OF SIMLA, LTD. *v.* SARDAR IQBAL SINGH. 1941 O.A. (Supp) 610 = 1941 R.D. 677 = 1941 A.W.R. (Rev.) 670.

BOMBAY ACTS, Etc.

Abkari Act (V of 1878).
City Municipal Act (III of 1888).
City Police Act (IV of 1902)
Civil Courts Act (XIV of 1869).
District Local Boards Act (VI of 1923).
District Municipal Act (III of 1901).
District Police Act (IV of 1890).
Hereditary Offices (Watan) Act (III of 1874).
High Court Criminal Circulars (1934).
High Court Rules (Appellate Side) (1936).
High Court (Insolvency) Rules.
High Court (Original Side) Rules (1936).
Jail Manual.
Land Revenue Code (V of 1879).
Local Boards Act. *See* District Local Boards Act.
Markets and Fairs Act (IV of 1862).
Municipal Boroughs Act (XVIII of 1925)
Native Share and Stock Brokers Association Rules (1939).
Prevention of Adulteration Act (V of 1925).
Salt Act (II of 1890).
Shops and Establishments Act (XXIV of 1939).
Toddy Tapping Rules (1928).
Village Panchayats Act (IX of 1920).

BOMBAY ABKARI ACT (V OF 1878), S 4—*Scope and effect of—Powers of Provincial Government and of Collector in regard to grant of licences for tapping and drawing toddy from trees.*

S. 4 of the Bombay Abkari Act relates only to control in reference to establishment and not to the power to grant licences for tapping and drawing toddy from toddy-producing trees ; such power is controlled only by the rules made under the Act. It cannot therefore be contended that S. 4 makes the Provincial Government

the supreme authority in relation to the granting of such licences and that by virtue of the section the Collector is bound to obey the orders of the Provincial Government with reference to the granting of such licenses. Ss. 4 to 8 relate only to the appointment of officers and to control in reference to establishment and to nothing else. The Provincial Government is the ultimate authority in regard to import, export and transport by virtue of the provisions of Ss. 9 to 13 of the Act and not by virtue of S. 4 at all. It is further plain from Ss. 35 and 35-A that the powers of Abkari officers can be controlled only by rules made under these sections and not by any orders issued under S. 4. No orders can be issued under S. 4, overriding the rules. (*Blackwell, J.*) RATAN SHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. 43 Bom. L R. 896.

——**S. 7, (as amended by Act VI of 1940)**—Applicability and scope—Notification prohibiting possession of intoxicants issued under old Act—Decision of High Court declaring same *ultra vires*—Subsequent amending Act validating Rules and Notifications under original Act—If validates or revives Notification declared *ultra vires*—Statute—Retrospective operation—Rule. *See* 1940 Dig., Col. 117. EMPEROR *v.* SAVER MANUAL DANTES. I.L.R. (1940) Bom. 777 = 191 I.C. 85 = 42 Cr.L J. 74.

——**S. 14 (1)**—*Duty of Collector under to issue licences to tap toddy—Toddy Tapping Rules, Rr. 2 and 9 to 13.*

The use of the word "may" in R. 2 of the Bombay Toddy Tapping Rules of 1928, which under S. 64 of the Abkari Act have the force of law, does not indicate that the Collector has an absolute discretion to grant or refuse a licence. The word "may" in R. 2 is merely used with the object of enumerating the purposes for which tapping licences can be issued, namely, by supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be issued for any other purposes. It does not mean that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes. Having regard to the use of the word "shall" in Rr. 9 to 13 of the Rules, it must be held that no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by S. 14 (1) of the Act read in conjunction with the rules. (*Blackwell, J.*) RATANSHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. 43 Bom.L.R. 896.

—— **S. 14 (1)**—*Scope—If controlled by S. 4—Collector—Discretion of to grant or refuse licence—Duty to grant licence when application complies with requirements of rules.*

By virtue of S. 14 (1) of the Bombay Abkari Act there is an implied power conferred upon the Collector to grant licences for tapping and drawing toddy from toddy-producing trees. S. 14 read in conjunction with the rules under the Act for the tapping of toddy contemplates that such licences shall be granted in accordance with the rules to enable the duties imposed to be levied. The implied power conferred upon the Collector under S. 14 (1) to grant or refuse a licence is limited by the rules. He would, for example, have power to refuse a licence if the application were not in the form prescribed by R. 4 of the Rules for tapping. But, if the requirements of the rules are complied with, there is a statutory duty imposed upon the Collector to grant a licence and this statutory duty is not affected by anything contained in S. 4 of the Act. There is no justification for holding that the Collector under S. 14 (1) has an absolute discre-

BOMBAY ABKARI ACT (1878), S. 14-B.

tion to grant or refuse a licence. (*Blackwell, J.*) RATANSHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. **43 Bom.L.R. 896.**

——**S. 14-B (2)**—*Construction and scope—Notification prohibiting possession by any person in Sind of charas—If* ultra vires.

The words "any person or class of persons" in S. 14-B (2) of the Bombay Abkari Act cannot be construed as meaning by the public generally. They mean only any specified person or any specified class of persons. The primary purpose of the Abkari Act is to secure revenue combined, indeed, with the regulation and control of the trade in drinks and drugs; but the power to control and regulate, though it might be made to serve the cause of social betterment, does not include the power to abolish the trade altogether. Hence, a notification by the Government of the Province of Sind, purporting to be made under S. 14-B (2) of the Act, prohibiting the possession by any person within the Province of Sind of charas, is *ultra vires*. (*Davis, C. J. and Weston, J.*) EMPEROR *v.* DHOLARAM HOLARAM.

I.L.R. (1941) Kar. 431 = A.I.R. 1941 Sind 221.

——**S. 30**—*Construction and scope—If empowers or regulates grant of tapping licences.*

S. 30 of the Bombay Abkari Act is not the section under which licences to tap and draw toddy are granted. They are granted under S. 14. The meaning of S. 30 is that such licences, if granted, shall be granted on payment of such fees, and subject to such restrictions and conditions and shall be in such form as the Provincial Government may direct in rules and orders which are not to be inconsistent with Act. (*Blackwell, J.*) RATANSHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. **43 Bom L.R. 896.**

——**Ss. 35 and 35-A**—*Rules under—Effect of on power to grant licences—Order under S. 4—If can override rules.*

Ss. 35 and 35-A of the Bombay Abkari Act make it plain that the powers of Abkari officers can be controlled only by rules made under these sections and not by orders issued under S. 4. Rules under S. 35 are, subject to the power given by the proviso, subject to previous publication, and even in the case of the proviso rules must be made and not merely orders issued. It is clear that orders cannot be issued under S. 4 overriding the rules. (*Blackwell, J.*) RATANSHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. **43 Bom.L.R. 896.**

——**S. 45 (c)**—Abkari license—Sale of liquor—Servant of licensee canvassing orders for liquor—Liquor measured and bottled at licensed premises and taken by servant and delivered at purchaser's house—If sale in contravention of clause prohibiting sale at any place except licensed premises—Offence—Sale of Goods Act, Ss. 21 and 23. *See* SALE OF GOODS ACT, SS. 21 AND 23. **43 Bom.L.R. 95.**

——**S. 60**—*Construction—Discretion and duty of Commissioner.*

S. 60 of the Bombay Abkari Act cannot be read as giving the Commissioner of Excise an absolute unfettered discretion to grant or refuse a licence. The section means that the Commissioner in the case of an appeal is substituted for the Collector, and the Commissioner is then charged with the duty of considering the application for the licence in the light of the Act and the rules made thereunder in exactly the same way as the Collector is charged. To hold otherwise would be to give the go-by to the Act and the rules. (*Blackwell, J.*) RATANSHAW NUSSERWANJI *v.* GEOFFREY WILLIAM MCELHINNY. **43 Bom.L.R. 896.**

BOMBAY CITY POLICE ACT (1902), S. 27

BOMBAY CITY MUNICIPAL ACT (III OF 1888), S. 3 (m)—"*Receives the rent*"—*Meaning of—Person parting with right to receive rent of premises—If owner—Liability to conviction under Ss.* 257 (1) *and* 375.

The expression "receives the rent" in S. 3 (*m*) of the City of Bombay Municipal Act, is not used in technical sense. The Court has to see whether the person charged with an offence under the Act is one who receives the rent of the premises. If he is not entitled to receive the rent at all and does in fact not receive it, he cannot be said to be an owner. An owner who has parted with the right to receive the rent, and cannot recover it, is not an owner within the meaning of the Act and cannot be convicted under Ss. 257 (1) and 375 of the Act. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* NOOR MAHOMED JANMAHOMED.

196 I C. 95 = 42 Cr.L.J. 811 = 14 R.B 99 = 43 Bom.L.R. 598 = A.I.R. 1941 Bom. 304.

——**Ss. 257 (1) and 375**—"Owner"—Meaning of—Person parting with right to collect rent—Liability to conviction. *See* BOMBAY CITY MUNICIPALITIES ACT, S. 3 (M). **43 Bom.L.R. 598.**

BOMBAY CITY POLICE ACT (IV OF 1902), S. 9 (1) (a)—*Scope—Agent of society for prevention of cruelty to animals—Appointment in* 1934 *as Additional Police Officer by Commissioner of Police—Duration of—Subsequent vesting of power of appointment in Local Government and re-vesting in Commissioner—Arrest by such Police Officer without warrant in* 1940—*Legality.*

Where an agent of the society for the prevention of cruelty to animals was appointed in 1934 as an additional Police Officer for the purposes, *inter alia*, of S. 3 of the Prevention of Cruelty to Animals Act by the Commissioner of Police, who at the time was empowered under S. 9 (1) of the City of Bombay Police Act, to make such appointment, and no time for the duration of the appointment is specified, the appointment would continue during the life of the agent or until the appointment is revoked by competent authority. The fact that subsequently in 1938 the power of appointing additional Police Officers was taken away from the Commissioner and vested in the Local Government, the Local Government again delegating the power to the Commissioner in 1938, would not cause the original appointment to lapse or make it invalid. Since the agent was an additional Police Officer for the purposes of S. 3 of the Prevention of Cruelty to Animals Act, he continued to be so, notwithstanding the fact that at one period of his appointment the Commissioner of Police ceased to have power to appoint additional Police Officer; and if he arrests an offender under S. 3 of the Prevention of Cruelty to Animals Act witnout warrant in 1940, such arrest is legal, because under S. 33 (1) of the City of Bombay Police Act, he could arrest without warrant. (*Beaumont, C. J. and Sen, J.*) EMPEROR *v.* DHULA JETHA. **43 Bom.L.R. 958.**

——**S. 27, (as amended in 1938)**—*Order of externment—Revision—Jurisdiction of High Court—Commissioner of Police—If "Court"—Cr.P. Code, S.* 439.

The Commissioner of Police, Bombay, acting under S. 27 of the City of Bombay Police Act of 1902 as amended in 1938 and making an order of externment under S. 27 (1) (*a*) of the Act, acts as an executive officer and is not a Court subordinate to the High Court. A revision application to the High Court direct against such an order does not lie and the High Court has no jurisdiction to interfere with the order in revision. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* ALLADATTA. **196 I.C. 537 = 14 R.B. 133 = 43 Bom.L.R. 702 = A.I.R. 1941 Bom. 334.**

BOMBAY CITY POLICE ACT (1902), S. 27.

——**S. 27 (2-A), (as amended in 1936)**—*Construction—"Convicted more than twice"—Conviction on several counts at joint trial in respect of same transactions—If single conviction or separate convictions for purposes of S. 27 (2-A).*

There is no justification for holding that the convictions referred to in S. 27 (2-A) of the City of Bombay Police Act, as amended in 1936, must be convictions arising in the course of separate transactions, or convictions passed on separate dates; where offences under Ss. 457 and 380, I. P. Code, are committed in the course of the same transaction, a conviction at a joint trial for these two offences, must be taken to be not one conviction but two convictions for the purpose of S. 27 (2-A) of the City of Bombay Police Act. It must, however, be said that the Legislature did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of S. 27 (2-A); the obvious intent of the section seems to be that a man is not to be externed under it unless on more than two occasions he has shown that he does not intend to live within the law. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* CHHOTALAL.

43 Bom.L.R. 834 = A.I.R. 1941 Bom. 367.

——**S. 27 (2-A)**—*Construction—"Has been convicted more than twice"—Meaning of.*

S. 27 (2-A) of the City of Bombay Police Act cannot be construed as meaning that where there are two or more convictions for offences committed in the course of the same transaction, they cannot be treated as more than one conviction for the purpose of S. 27 (2-A). If in fact there are more than two convictions for separate offences, the case falls under S. 27 (2-A), though it would normally be harsh to make an order of externment when all the offences have been in fact committed at one and the same time and as part of the same transaction, if the commissioner has nothing else to go upon. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL. **196 I.C. 442 = 14 R.B. 129 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310**

——**S. 27 (2-A)**—*Order of Commissioner under—Grounds for—If acts judicially or in administrative capacity.*

In deciding whether to make an externment order in a case falling within S. 27 (2-A) of the City of Bombay Police Act, the Commissioner of Police is acting in an administrative capacity and not in a judicial capacity. He may know a great deal more about the person to be externed than the Court which convicted him knew. The Commissioner is not bound only by the evidence given in Court, and may consider himself justified in making the order of externment in the public interest, although the actual offences of which the accused person has been convicted were not of a serious character. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL CHHAGANLAL. **196 I.C. 442 = 14 R.B. 129 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310.**

——**S. 27 (2-A)**—*Scope—Conviction under Bombay Children Act of 1924—If can be made basis of externment order.*

A conviction under the Bombay Children Act of 1924 as it stood before it was amended in 1936, constitutes technically a conviction on which an externment order under S. 27 (2-A) of the City of Bombay Police Act may be based. But to make such an order, taking into account a conviction under the Children Act of 1924, is opposed to modern views and is in defiance of the spirit of the Bombay Children Act as amended in 1936. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* CHHOTALAL. **43 Bom.L.R. 834 = A.I.R. 1941 Bom. 367.**

BOM. DT. LOCAL BOARDS ACT (1923), S. 42.

——**S. 128**—*Enquiry under—Scope of—Matters to be considered by Court.*

All that the Court can do in a case under S. 128 of the City of Bombay Police Act is to consider whether the order of the Commissioner of Police was legal; and if it was whether it has been broken, and, if so, what is the proper punishment. It is not open to the Court to consider the reasons which induced the Commissioner of Police to make the order. Although it is competent for the Court on a charge being preferred under S. 128 against a man who has been externed and has disobeyed the order of externment to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of S. 27 (2-A) of the Act, it is not legitimate for the Court in awarding sentence to take into consideration the number of previous convictions (*i.e.*, those justifying the deportation order) and the importance or the gravity of the offence in respect of each such convictions as disclosed by the quantum of punishment which the Court may have awarded in the case. (*Beaumont C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL CHHAGANLAL. **196 I.C. 442 = 14 R.B. 129 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310.**

——**S. 128**—*Sentence—Mitigation—Grounds—Accused guilty of breach of order only once—If ground for light sentence.*

It must be remembered that an order of externment under S. 27 (2-A) is made in the public interest, and it is serious offence to ignore that order. Though the Court in determining the sentence under S. 128 of the Act is entitled to take into account whether it is only a first offence or whether the accused has returned in breach of the order more than once wrongfully, the mere fact that the order has only been ignored once, is not a good reason for imposing a light sentence. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL CHHAGANLAL. **196 I.C. 442 = 14 R.B. 129 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310.**

——**S. 128**—*Sentence—Reason for accused to break order of externment and return to Bombay.*

In imposing sentence on a conviction under S. 128 of the City of Bombay Police Act on a charge of breach of an order of externment under S. 27 (2-A), the reason which may have prompted the accused to return to Bombay in breach of the order, is a factor which may be taken into account. If the accused proves conclusively that he had some reason unconnected with any criminal intent, that is a matter which may be taken into consideration in mitigation of the offence. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL CHHAGANLAL.

196 I.C. 442 = 14 R.B. 129 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310.

BOMBAY CIVIL COURTS ACT (XIV OF 1869), S. 32—Applicability—Suit against Governor-General—Claim in respect of contractual obligation of Government Railway—Cognizability by Small Causes Court—Jurisdiction of Judicial Commissioner's Court of Sind. *See* SIND COURTS ACT, S. 37.

I.L.R. (1941) Kar. 238.

BOMBAY DISTRICT LOCAL BOARDS ACT (VI OF 1923), S. 42—Applicability—Suit by Local Board—Compliance with S. 42 (2). *See* 1940 Dig., Col. 119. BHUMBHO METHARAM *v.* DISTRICT LOCAL BOARD, HYDERABAD. **191 I.C. 768 = 13 R.S. 170.**

——**S. 42 (2)**—Scope—Executed and executory contracts—Destruction—Omission to comply with requirements—Effect—English common law rule—Exceptions—Application of. *See* 1940 Dig., Col. 119. BHUMBHO

BOM. DT. LOCAL BOARDS ACT (1923), S. 136.

METHARAM *v.* DISTRICT LOCAL BOARD, HYDERABAD. **191 I.C. 768=13 R.S. 170.**

——**S. 136 (2),(as amended in 1935)**—*Applicability*—"*Anything done or purporting to have been in pursuance of this Act*", *etc.*—*Meaning of*—*Sub-overseer and member of Local Board*—*Latter also chairman of Works Committee*—*Obtaining payment by submission of false bill in name of bogus contractor*—*If protected.*

Where an act alleged to be criminal is done by a public servant in his official capacity, that is, if it is an act which it is his duty to do as such public servant under the law governing the case, he is protected, although, by reason of the fact that he has done the act fraudulently or dishonestly or in any other manner contrary to law, he may have committed a criminal offence. On the other hand, if the offence charged involves an act or acts which the accused is not required to do and which are outside his official duties, the liability to prosecution is unfettered. If the official capacity of the accused is involved in the very act complained of, then the prosecution cannot be launched without compliance with the requirements of the statute. The accused, *V* and *S* who were respectively the sub-overseer of a District Local Board, and the elected member of the Board and also Chairman of the Works Committee were charged with cheating and falsificatios of accounts and abetment thereof under Ss. 420 and 477-A read with S. 114, I. P. Code, on the ground that they had dishonestly taken false measurements of certain works of repairs on a road under their 'charge and fraudulently obtained from the President of the Local Board a sum of money by tendering a bill with a measurement sheet containing the false measurements attached to it duly signed by the first accused and counter-signed by the second accused. The accused pleaded S. 136 (2) of the Bombay Local Boards Act, as amended in 1935, and S. 197, Cr. P. Code in bar of the prosecution. It was found that the 1st accused, as sub-overseer, was bound to supervise the works, take measurements and enter them in a measurement book and to report to the Board through the Works Coml mittee of which the 2nd accused was the Chairman, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The overseer was obliged to sign the bill submitted by the contractor in authentication of the measurements given in it and the charges made. The work in question was entrusted to a contractor by the Board and the contractor had preferred a bill under his signature for the amount stated therein. The bill was signed by accused 1, and counter-signed also by accused 2, as Chairman of the Works Committee. The signing of the bill and attaching a measurement sheet thereto and submitting the bill for payment was part of the official duty of the overseer. The act of counter-signing the bill in authentication of the measurement and therefore the charges made was part of the official duty of accused 2 as Chairman. The bill was eventually sanctioned and paid by the Board on account of the authentication thereof; and the money was in fact obtained on the guarantee provided by the counter-signature and the accompaniment to the bill consisting of the measurements of the actual work done, for which the bill was preferred. It was found that the contractor who submitted the bill was a bogus contractor, that the measurements mentioned in the bill and noted in the measurement sheet attached to the bill were false and that the two accused had combined to draw the amount dishonestly from the Board.

Held, (1) that assuming that there had been fraudulent and dishonest entry in the bill and its accompaniment, the accused were certainly "purporting to act," though not actually acting "in pursuance of the Act," within the meaning of S. 136 (2) of the Bombay Local Boards Act, and the act complained was therefore protected by S. 136 (2); (2) that the 2nd accused was also entitled to protection under S. 197, Cr. P. Code, as he was a statutory public servant according to S. 135 of the Bombay Local Boards Act, and the act complained of was done or purported to be done by him in the exercise of his official duty. As a member, he was not removable without the sanction of the Local Government under S. 31 of the Act, and sanction of the Government was therefore necessary under S. 197, Cr.P. Code, in the case of the 2nd accused. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* VISHNU TATYABA.
I.L.R. (1941) Bom. 191=193 I.C. 229=13 R.B. 323=42 Bom L.R. 1193=42 Cr.L.J. 441=A.I.R. 1941 Bom. 85.

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), S. 46—Employee under Municipality—Dismissal—When wrongful—Suit for damages—Cause of action—Essentials to be proved. *See* 1940 Dig., Col. 120. GOKAK MUNICIPALITY *v.* RAJARAM SHRIDHAR.
I.L.R. (1941) Bom. 123=191 I.C. 749=13 R.B 195.

——**S. 48**—Construction — Bye-laws—Essentials—Necessity for resolution of Municipality after sanction of Commissioner. *See* 1940 Dig., Col. 120. EMPEROR *v.* SHIRINBAI SORABJI. **192 I.C 816=13 R.B. 299=42 Cr. L.J. 331=A.I.R. 1941 Bom. 66.**

——**S. 59 (x-a)**—Construction—"May"—Meaning of—Terminal tax—Power to impose—Specific legislation by local legislature—If necessary. *See* 1940 Dig., Col. 120. NAROTTAMDAS HARJIVANDAS & CO. *v.* BULSAR TOWN MUNICIPALITY. **192 I.C. 635=I.L.R. (1941) Bom. 97=13 R.B. 268=A.I.R. 1941 Bom. 11.**

——**S. 86**—Revision—Order in appeal by Magistrate—If open to revision—*Persona designata. See* C. P. CODE, S. 115. **43 Bom.L.R. 333.**

BOMBAY DISTRICT POLICE ACT (IV OF 1890), S. 61 D—*Applicability*—*Duty of Magistrate*—*Magistrate merely referring to previous convictions*—*Offences neither specified nor convictions proved*—*Conviction*—*Sustainability.*

It is particularly necessary that when there is a penal statute with sections of wide scope such as S. 61-D of the Bombay District Police Act, those sections, when they are applied by a Magistrate, should be carefully applied and the Magistrate should be careful that all conditions necessary for their application are satisfied before they are applied. Previous convictions, for theft or for house-breaking, may be sufficient evidence of bad character, when such evidence is admissible, to sustain the charge that the accused are "reputed thieves." Where the Magistrate merely refers to the previous convictions which are not proved and the offences for those convictions are not specified, a conviction under S. 61-D cannot be sustained. (*Davis, C.J.*) ROCHI BHOJOMAL *v.* EMPEROR. **I.L.R. (1941) Kar. 189=192 I.C. 203=13 R.S. 190=42 Cr.L.J. 256=A.I.R. 1941 Sind 16.**

——**S. 61-D**—*Convictions*—*Requisites for*—*Person found in suspicious circumstances*—*Liability to conviction.*

To sustain a conviction under S. 61-D of the Bombay District Police Act, three conditions are required: (1) lying or loitering in any street or yard or other place, (2) being a reputed thief, and (3) inability to give a satis-

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factory account of himself. There is nothing in the section which punishes a man for being found under suspicious circumstances. (*Davis, C.J.*) HAROON AHMED *v.* EMPEROR. **I.L.R. (1941) Kar. 322 = 197 I.C. 69 = A.I.R 1941 Sind 208.**

——**S. 61-D**—"*Reputed thief*"—*Meaning of.*

It cannot be said that a man is a ruputed thief merely because he has been found at night in the company of another whose reputation as a thief has been proved by previous convictions. The words "reputed thief" in S. 61-D of the Bombay District Police Act are used deliberately and have the ordinary meaning that attaches grammatically to those words. (*Davis, C.J.*) HAROON AHMED *v.* EMPEROR. **I.L.R. (1941) Kar 322 = 197 I.C. 69 = A.I R 1941 Sind 208.**

BOMBAY HEREDITARY OFFICES (WATAN) ACT (III OF 1874), S. 5—Watan property—Liability in the hands of son for father's debts—C. P. Code, S. 53. *See* C. P. CODE, S. 53. **43 Bom.L.R. 232.**

——**S. 13**—*Applicability—Conditions—Protection—When available.*

The protection afforded by S. 13 of the Bombay Watan Act does not arise unless it is established that the Watan lands in question had been assigned as remuneration for services under S. 23 of the Act. (*Beaumont, C.J. and Sen, J.*) RAMABAI SHRINIVAS *v.* GOVERNMENT OF BOMBAY. **194 I.C. 431 = 13 R.B. 371 = 43 Bom.L.R. 232 = A.I.R. 1941 Bom. 144.**

BOMBAY HIGH COURT CRIMINAL CIRCULAR No. 160-A (1934)—"*Papers exhibited in the proceeding*"—*Meaning of.*

Quaere:—Whether the expression "papers exhibited in the proceeding" in Bombay High Court Criminal Circular No. 160-A, framed under S. 554, Cr. P. Code, in 1934, covers the whole record or is confined to papers which are exhibited in the evidence of witnesses so as not to include copies of depositions or orders of the Court? (*Beaumont, C.J. and Sen, J.*) PARASHURAM DETARAM *v.* HUGH GOLDING COCKE.

43 Bom L.R. 961.

——**No. 160-A (1934)**—Scope—If exclusive—Power of Court to allow inspection of record—If taken away. *See* CR. P. CODE, SS. 548 AND 554.

43 Bom L.R. 961.

BOMBAY HIGH COURT RULES (Appellate Side) R. 130—*Applicability—Appeal—Preliminary objection as to sufficiency of Court-fee—Order for payment of additional Court-fee within fixed time—Non-payment—Dismissal of appeal—Costs—Power to award—Scale of fees.*

Where at the hearing of an appeal, the respondent raises a preliminary objection as to the sufficiency of the Court-fee paid on the memorandum of appeal, and the Court, upholding the objection, directs the appellant to pay additional Court-fee within a time fixed, but the appellant fails to comply with that order, the Court in making an order rejecting the appeal, can order the appellant to pay the respondent costs of the hearing of the preliminary objection notwithstanding that the memorandum of appeal is ultimately rejected. R. 130 of the Appellate Side Rules of the Bombay High Court should be applied to the case and advocate's fee should be taxed under that rule. (*Beaumont, C.J. and Sen, J.*) KASHI RAM SENU *v.* RANGLAL MOTILAI SHET.

I.L.R. (1941) Bom. 477 = 195 I C. 894 = 14 R.B. 84 = 43 Bom L R. 475 = A.I.R. 1941 Bom. 242.

——**(Appellate Side, 1936), Appendix E**—*Appeal—Attorney instructing advocate of original side in appeal—Costs of—Taxation—Rule.*

BOM. HIGH COURT RULES (O.S.), R. 534.

An attorney may instruct a counsel on the original side to appear on the appellate side of the High Court and the rules allow him to do so. The attorney is therefore entitled to be paid and must have his costs taxed. The costs of the attorney are to be taxed in such a case on the scale allowed by Appendix E to the Appellate Side Rules by analogy in that appendix. (*Beaumont, C.J. and Sen, J.*) DOSSABHOY JAMSESTJI *v.* EDULJI SORABJI. **195 I.C. 387 = 14 R B. 33 = 43 Bom L R. 336 = A I.R. 1941 Bom. 192.**

——**(Insovency) R. 52 B (2)**—Affidavit in opposition to insolvency notice—If to be filed by debtor personally—Affidavit by constituted attorney—Sufficiency. *See* 1940 Dig., Col. 122. MORARJEE GOKULDAS & CO. *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. **I.L.R. (1941) Bom. 89 = 13 R.B. 282 = 192 I.C. 698 = A.I.R 1941 Bom. 37.**

——**R. 52 B (2)**—Set off—Validity—Insolvency notice by several judgment-creditors—Set off available against one only—If effective answer to notice. *See* 1940 Dig., Col. 122. MORARJEE GOKULDAS & CO. *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. **I.L.R. (1941) Bom. 89 = 13 R B. 282 = 192 I.C. 698 = A.I.R. 1941 Bom. 37.**

BOMBAY HIGH COURT RULES (Original Side) (1936), R. 138—Scope and effect of—Reply to counter-claim—Duty to put in written statement in reply. *See* 1940 Dig., Col. 122. BAI DAYAMBAI *v.* MAHOMED ALLI EBRAHIMJI. **191 I.C. 463 = 13 R B. 185.**

——**R. 534**—*Discretion of Judge—Taxation under rule—If conclusive as to liability of client to pay amount fixed—R.* 895.

The taxation of a bill of costs under R. 534 of the Bombay High Court Rules does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under R. 895 after taxation has taken place. The power of a Judge to direct taxation under R. 534 is discretionary. When an application is made *ex parte* for a common form order of taxation, the Court may direct the solicitor to issue a summons and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employment of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. (*Beaumont, C.J. and Kania, J.*) CHITNIS AND KANGA *v.* WAMAN RAO. **I.L.R. (1941) Bom. 223 = 193 I C. 449 = 13 R.B. 322 = 43 Bom L R. 76 = A I.R 1941 Bom. 99.**

——**R. 534**—*Mofussil work—Taxation of bill of costs on original side—Power of Taxing Master.*

The Taxing Master of the High Court has power under R 534 of the Bombay High Court Rules to tax an attorney's bill on the original side in respect of work done in the mofussil. (*Beaumont, C.J, and Kania, J.*) CHITNIS AND KANGA *v.* WAMAN RAO.

I.L.R. (1941) Bom 223 = 193 I C. 449 = 13 R.B. 322 = 43 Bom.L.R. 76 = A I R. 1941 Bom. 99.

——**R. 534**—*Power of Taxing Master under—Costs incurred on appellate side—If can be taxed—Attorney's bills—Discretion of Judge to direct taxation.*

An order for taxation on the original side cannot be made under R. 534 of the Rules of the Bombay High Court in respect of costs incurred on the appellate side of the High Court. Under that rule a Judge has discretion to direct attorney's bills to be taxed in any case

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(except the Appellate Side), and where a bill is taxed, the attorney can apply by summary process for payment under R. 895. (*Beaumont, C.J. and Kania, J.*) CHITNIS AND KANGA *v.* WAMAN RAO.

I.L.R. (1941) Bom. 223 = 193 I.C. 449 = 13 R.B. 322 = 43 Bom.L.R. 76 = A.I.R. 1941 Bom. 99.

——**R. 534**—Scope—Attorney and client—Agreement to pay costs on original side scale in appellate side matter—Remedy of attorney—Order for taxation—Jurisdiction to make—Suit for costs. *See* 1940 Dig., Col. 123. SMETHAM BYRNE AND LAMBERT *v.* DARASHAW. **191 I.C. 596 = 13 R.D. 186.**

——**R. 563**—*Discretion of master — "Matter"—Meaning of—Chamber summons adjourned into Court—If Court matter.*

Wadia, J.—R. 563 of the Bombay High Court Rules gives a wide discretion to the taxing master to take various factors into consideration in respect of suits as well as matters, and it cannot be held that the word "matter" in the rule should be construed as referring only to appeals, arbitrations, accounts and motions, being the four matters expressly mentioned in item 14 of the Table of Fees. A chamber summons adjourned into Court cannot be described merely as an interlocutory application or as a chamber matter. It becomes really a Court matter. (*Beaumont, C.J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD.

43 Bom.L.R. 655.

——**R. 567**—*Matter originating in chambers and adjourned into Court—Refresher fee—Power to allow—Taxing master not asked to allow additional brief fee—Power of Court to increase.*

R. 567 of the Rules of the Bombay High Court in terms only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than one day, and there is no express power to allow refreshers on an adjourned summons. Counsel's fees are no doubt disbursements, but a refresher fee in a matter other than a suit or appeal cannot be regarded as a reasonable disbursement within the meaning of item 60 of the Table of Fees in the Rules. It is, however, open to the taxing master in his discretion to allow an additional brief fee, if he thinks that for some reason or another the solicitor had not been able to calculate, and had not in fact correctly calculated the length of time the case was likely to last. But where the taxing master was not asked to increase the brief fee having regard to the unexpected length of time the case had taken, the Court cannot increase the fee or ask the taxing master to do so by sending the case back to him. (*Beaumont, C.J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD.

43 Bom.L.R. 655.

——**R. 895**—Scope—Liability to pay amount taxed under R. 534—If can be disputed. *See* BOMBAY HIGH COURT RULES (ORIGINAL SIDE), R. 534.

43 Bom L.R. 76.

——**Table of Fees to be taken by Attorney, Item 14**—*Chamber summons adjourned for hearing into Court—"Instructions for brief"—Jurisdiction of master to allow fees for—"Final trial"—Meaning of.*

There is no sufficient reason for confining the words "final trial" in item 14 of the "Table of Fees to be taken by the Attorneys" in the rules of the High Court of Bombay to the final trial of a suit. A matter which originates in Chambers and is then adjourned to be heard in Court would fall within the item, if there is a final trial or hearing. The wording of the item does not draw a distinction between chamber matters and matters heard in Court. The essential thing is that there should be a final trial. There is therefore no sufficient reason for confining item 14 either to suits or to matters heard in Court. The taxing master has jurisdiction to allow an amount for "Instructions for brief" in a matter arising on a chamber summons which is adjourned to be heard in Court. (*Beaumont, C.J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD.

BOM. LAND REV. CODE (1879).

43 Bom.L.R. 655.

——**Table of Fees to be taken by Attorneys, Item 14**—*Discretion of taxing master as to quantum—Interference by Court—Grounds—"Instructions for brief"—Meaning of.*

The Court normally does not interfere with the discretion of the taxing master as to the quantum of fees allowed for "instructions for brief" under item 14 of the Table of Fees to be taken by the Attorneys in the Rules of the Bombay High Court, unless he has misdirected himself. If the taxing master fixes a high amount by taking into account the length of time occupied by the hearing, he misdirects himself. "Instructions for brief" do not mean the same thing as "Instructions for Counsel." Instruction given, probably orally, to counsel in the course of the hearing cannot be included in "instruction for brief." (*Beaumont, C.J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD.

43 Bom.L.R. 655.

——**Table of Fees to be taken by Attorneys, Items 40 and 41**—*Construction — Allowance of Rs. 15 for 1st hour of each day—If justified—Midday adjournment—If to be included in calculating hours of attendance.*

In the Rules of the Bombay High Court, Table of Fees to be taken by the Attorneys, the meaning of items 40 and 41 is perfectly plain. All that the taxing master has to do is to reckon the number of hours of attendance, irrespective of whether they took place on the same day, or in the same week or in the same month. Having completed the first hour for which a sum of Rs. 15 is allowed under item 40, all subsequent hours are allowed at the rate of Rs. 10. There is not the slighest justification for saying that a sum of Rs. 15 is to be allowed for the first hour each day of the hearing. Further in counting the hours of attendance, the midday adjournment of Court is not to be included. An attorney cannot be entitled to be paid for attendance in Court when the Court is not sitting. (*Beaumont. C. J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD.

43 Bom.L.R. 655.

——**Table of Fees to be taken by Attorneys, Item 60**—"Reasonable disbursements"—Refresher fee to counsel in chamber summons adjourned to Court—If permissible. *See* BOMBAY HIGH COURT RULES (ORIGINAL SIDE), R. 567. **43 Bom.L.R. 655.**

BOMBAY JAIL MANUAL—*Force of—Courts if bound by rules in.*

The courts are concerned with the provisions of the Cr.P. Code, in giving directions as to how sentences of imprisonment are to run and not with the provisions of the Bombay Jail Manual. (*Davies. C.J. and Lobo, J.*) EMPEROR *v.* FAZUL KHUSH MAHOMED.

I.L.R. 1941 Kar. 63 = 196 I C. 891 = A.I.R. 1941 Sind 190.

BOMBAY LAND REVENUE CODE (V OF 1879)—*Sale under—Effect of—If different from sale by Civil Court—Award against manager of joint Hindu family in respect of family debts—Sale under Land Revenue Code—What passes.*

A sale under the Bombay Land Revenue Code in execution of an award under the Bombay Co-operative Societies Act has the same effect as a sale by a Civil Court. Where an award is made against the managee

BOM. LAND REV. CODE (1879), S. 37.

of a joint Hindu family as such in respect of a debt borrowed by him from a co-operative society in his capacity as manager and the entire family property is sold in execution under the Land Revenue Code the interests of all the members of the family pass by the sale as in the case of a sale by a Civil Court. (*Broom field and Divatia, JJ.*) MULGUND CO-OPERATIVE CREDIT SOCIETY *v.* SHIVLINGAPPA ISHWARAPPA.

43 Bom.L.R. 807 = A.I.R. 1941 Bom. 385.

——**S. 37**—*Construction*—"*Except in so far as any right of such person may be established*"—*If refer only to "lands" or to all previous expressions.*

The words "except in so far as any rights of such persons may be established" in S. 37 of the Bombay Land Revenue Code, govern all the previous expressions in the section and not merely "lands". (*Wadia and Divatia, JJ.*) NARHARSINGJI ISHVARSINGJI *v.* SECRETARY OF STATE. **I.L.R. (1941) Bom. 226 = 195 I.C. 640 = 14 R.B. 49 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161.**

——**S. 37**—*Construction*—"*Which are not the property of individuals*" — *Meaning*—*If refer only to "lands".*

The words "which are not the property of the individuals, etc.," in S.37 of the Bombay Land Revenue Code cannot be interpreted as referring only to all lands wherever situated" and as having no reference to all the previous expressions. That would be an erroneous construction. The words "which are not the property of individuals," correctly construed, would apply to roads, bridges, beds of the sea, lakes, tanks, etc. The legislature could not have intended that only lands are capable of being owned by individuals and not roads, bridges, ditches, nallas, lakes, tanks, canals, etc. (*Wadia and Divatia, JJ.*) NARHARSINGJI ISHVARSINGJI *v.* SECRETARY OF STATE.

I.L.R. (1941) Bom. 226 = 195 I.C. 640 = 14 R.B. 49 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161.

——**S. 37**—*Construction—Which are not the property of individuals, etc.—If apply to "all public roads lanes" etc.—Private ownership on highway or public road.*

There is no warrant or basis for holding that the words "which are not the property of individuals," etc., in S. 37 of the Bombay Land Revenue Code do not apply to the opening words of the section, namely, "all public roads, lanes and paths." Such a construction is based on the erroneous view that there cannot be any public right over private property, and on the basis that roads, etc., which are used by the public must be taken to be Government property. The existence of a highway or a public road is not inconsistent with the ownership of a private person in the soil. (*Wadia and Divatia, JJ.*) NARHARSINGJI ISHVARSINGJI *v.* SECRETARY OF STATE. **I.L.R. (1941) Bom. 226 = 195 I.C. 640 = 14 R.B. 49 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161.**

——**S. 37**—Scope and effect of—Private ownership in soil of highway or public road—If barred or taken away. *See* HIGHWAY—PUBLIC ROAD.

I.L.R. (1941) Bom. 226 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161,

——**S. 65**—Applicability to alienated land. *See* 1940 Dig., Col. 124. BAI KABA *v.* RAMNIKLAL SUNDERLAL.

191 I.C. 145.

——**S. 65**—Scope—Permanent tenant under S. 83—User of land for non-agricultural purposes—Permission of Collector—Necessity for. *See* 1940 Dig., Col. 124. BAI KABA *v.* RAMNIKLAL SUNDERLAL.

191 I.C. 145.

BOM. MUN. BOROUGHS ACT (1925), S. 110.

——**S. 83**—Applicability—Dewasthan Inam land—Presumption of permanent tenancy—If arises. *See* 1940 Dig., Col. 124. INJAL DEVI *v.* BHUJYA AVAJI.

I.L.R. (1941) Bom. 119 = 13 R.B. 261 = 192 I.C. 581 = A.I.R. 1941 Bom. 29.

——**S. 83**—Presumption under—Conditions. *See* 1940 Dig., Col. 125. SHANKARRAO DAGADUJIRAO *v.* SAMBHU. **I.L.R. (1941) Bom. 107 = 73 C.L.J. 612 = I.L.R. (1940) Kar. (P.C.) 380 = 43 Bom.L.R. 1 = (1941) 1 M.L.J 427 (P.C.).**

BOMBAY MARKETS AND FAIRS ACT (IV OF 1862), S. 1—Scope—If conflicts with S. 139, Bombay District Municipal Act—Establishment of cattle market on private land within municipality without sanction of District Magistrate—Offence. *See* 1940 Dig., Col. 126. EMPEROR *v.* NAJMUDDIN IBRAHIM SAHIB.

191 I.C. 121 = 13 R.B. 155 = 42 Cr. L.J. 84.

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 3 (20)—"*Tax*"—"*Fee*"—*Levy, whether tax or fee—Test—Object of levy—Relevancy as a guide.*

A "tax" and "fee", when imposed by the legislature or local bodies are both burdens or charges upon persons and property and the object of both is to raise money for a public purpose or to serve some public object. The object for which a fee or tax is levied by a public body would not serve necessarily as a guide for saying whether an imposition is a "fee" or a "tax". The object is not the determining factor in observing the formalities for the levy. (*Wassoodew, J.*) SORABJI HORMASJI *v.* BROACH BOROUGH MUNICIPALITY.

195 I.C. 754 = 14 R.B. 76 = 43 Bom L.R. 533 = A.I.R. 1941 Bom. 268.

——**S. 90(1)**—*License fee—Power to charge—No by-law requiring license for trade—Levy of license fee—Legality.*

Under S. 90 (1) of the Bombay Municipal Boroughs Act, the question of charging fees in respect of a license must arise only when a license is granted and a license could only be granted if the law requires a license to by granted. Where there is no section in the Act or any by law requiring a licence in certain trades, the Municipality can frame the necessary by-law requiring any trade to be carried on under a license and may by rule prescribe license fees. But when no bye-law has been framed requiring a particular trade to be carried under any license, the Municipality cannot enact a rule prescribing a license fee in respect of such trade and charge license fees in respect of the same. If it levies the levy is illegal. (*Wassoodew, J.*) SORABJI HORMASJI *v.* BROACH BOROUGH MUNICIPALITY.

195 I.C. 754 = 14 R.B. 76 = 43 Bom.L.R. 533 = A.I.R. 1941 Bom. 268.

——**Ss. 105 and 203**—Construction and scope—Distress for taxes—Limitation—Suit under S. 203 barred by time—If bars remedy by distress. *See* 1940 Dig., Col. 127. SURAT BOROUGH MUNICIPALITY *v.* SARIFA.

I.L.R. (1940) Bom. 830 = 192 I.C. 719 = 13 R.B. 286 = A.I.R. 1941 Bom. 53.

——**S. 110**—*Appeal—Scope—Assessment—If can be questioned.*

In an appeal under S. 110 of the Bombay Municipal Boroughs Act the question of the assessment itself can be challenged. (*Wadia and Macklin, JJ.*) MUNICIPAL BOROUGH OF AHMEDABAD *v.* ARYODAYA GINNING AND MANUFACTURING CO., LTD.

43 Bom.L.R. 816 = A.I.R. 1941 Bom. 361.

——**S. 110**—*Magistrate acting under—Position and powers of—Power to take evidence or additional evidence.*

BOM. MUN BOROUGHS ACT (1925), S 111.

A Magistrate acting under S. 110 of the Bombay Municipal Boroughs Act and hearing an appeal is an ordinary Court and not a *persona designata* and has power to take evidence and to allow additional evidence, oral and documentary, to be led before him, though the section does not specifically confer such power on him. (*Wadia and Macklin, JJ.*) MUNICIPAL BOROUGH OF AHMEDABAD *v.* ARYODAYA GINNING AND MANUFACTURINC CO., LTD. **43 Bom.L.R. 816 = A.I.R 1941 Bom. 361.**

——**S. 111**—*Construction*—"*Decision upon any appeal*"—*Meaning*—*Interlocutory order*—*Revision.*

There is no reason why the words "decision upon any appeal" in S. 111 of the Bombay Municipal Boroughs Act should be interpreted differently from the words "case decided" in S. 115, C. P. Code. There is nothing in the language of S. 111 of the former Act which necessarily implies that the decision of the appeal referred to in that section means the final decision. Interlocutory orders passed by a Magistrate under S. 110 of the Act can therefore be revised under S. 111. (*Wadia and Macklin, JJ.*) MUNICIPAL BOROUGH OF AHMEDABAD *v.* ARYODAYA GINNING AND MANUFACTURING CO., LTD. **43 Bom L R. 816 = A.I.R. 1941 Bom. 361.**

——**S. 123 (5)**—*Burden of proof.*

Having regard to the terms of S. 105 of the Evidence Act, the burden is upon an accused who relies upon the permission given to him by S. 123 (5) of the Bombay Municipal Boroughs Act to prove that he comes within the terms of that sub-section, *i.e.*, that the building is not inconsistent with any provision of the Act or any by-law, and is thereby relieved of the liability which is otherwise upon him under S. 123 (7). The fact that the exception is included in the body of the statute itself does not shift the onus on to the prosecution. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* DAHYABHAI SAUCHAND. **195 I.C. 825 = 14 R.B. 82 = 42 Cr.L.J. 783 = 43 Bom.L.R. 519 = A.I.R. 1941 Bom. 273.**

——**S. 123 (5)**—*Burden of proof—Duty of accused relying on S.* 123 (5)—*Rule.*

In order to bring himself within the provisions of S. 123 (5) of the Bombay Municipal Boroughs Act, an accused person has the burden on him to prove that his work was not inconsistent with any of the provisions of the Act or by-laws. But that presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or by-laws. It is obvious that an accused person cannot go through every section of Act and every bye-law and prove affirmatively that he has not committed any breach of that section or that by-law. The true view is that as soon as the Municipality has notice that the accused is going to rely on S. 123 (5), it must allege what provisions of the Act or by-law the accused has broken according to it, which disentitles him to rely on S. 123 (5). When that allegation is made, the burden is on the accused to prove that he has not committed the breach of that Act or by-law alleged. Unless the Municipality alleges a breach of some specific provision of the Act or by-law, there is no issue upon which any question of burden of proof can arise. (*Beaumont, C. J. and Sen, J.*) EMPEROR *v* BHIKHABHAI MOTIRAM. **43 Bom.L R. 877.**

——**S. 152 (1) (a)**—Construction—Setting up stall—What amounts to—Lorry on wheels with goods for sale. *See* 1940 Dig., Col. 128. EMPEROR *v.* HASAM MAMAD. **13 R B. 190 = 191 I.C. 465 = 42 Cr.L.J. 164.**

——**S. 152 (1) (b)**—"Any other thing"—Meaning of —Hand cart with merchandise left standing in street—If covered by S. 152 (1) (*b*). *See* 1940 Dig., Col. 128.

BOMBAY SALT ACT (1890), S. 3, (o).

EMPEROR *v.* HASAM MAMAD. **13 R.B. 190 = 191 I.C. 465 = 42 Cr L.J. 164.**

——**S. 159**—*Ingredients of offence—Conviction—Essentials to be proved—Secretary of mill—Liability of.*

In a prosecution under S. 159 of the Municipal Boroughs Act, it has got to be proved, firstly, that the accused is a person who has the building or land under his control; secondly, that he allowed the offensive liquid or other matter to run upon any street, land or space; and thirdly, that the liquid or matter was or was likely to become offensive. In the absence of definite proof and finding on these points, the Secretary of a mill cannot be convicted under S. 159. The mere fact that the accused denies that he is the Secretary and that the Magistrate holds that he is, would not be sufficient to record a conviction. It has to be proved by evidence that the Secretary is a person who has the building or land of the mill under his control. There is no presumption that the Secretary as such is in control of the premises so as to render him liable under S. 159. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* CHAMPAKLAL CHUNILAL. **194 I.C. 345 = 13 R.B. 370 = 42 Cr.L.J. 571 = 43 Bom.L R. 110 = A.I.R. 1941 Bom. 156.**

BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES (1939), R. 16—*Construction and scope—If creates right in legal representative of deceased member.*

The wording of R. 12 of the Bombay Native Share and Stock Brokers' Association Rules is clearly permissive, and the nomination referred to in the rule has, under R. 16, to be considered by a ballot. It is only a recommendation and does not create any right. (*Kania, J.*) FRAMROZ DADABHOY MADAN, *In re.* **43 Bom.L.R. 943.**

——**Rr. 36 (h) and 38**—*Construction—Right of membership of association—If property—Probate duty—If leviable.*

No probate duty is payable in respect of a membership card of the Bombay Native Share and Stock Brokers' Association. In view of the clear and unambiguous words of Rr. 36 (*h*) and 38 of the Rules of the Association, it must be held that the right of membership is not property which passes on succession or can be dealt with by will as the property of the deceased. It is a personal right which comes to an end on the death of the holder of the card, and is not property on which probate duty can be levied. (*Kania, J.*) FRAMROZ DADABHOY MADAN, *In re.* **43 Bom.L.R. 943.**

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925), S. 13—Scope—Charge under S. 4 (1) (*b*) and (*c*)—Particulars—Summons—Form and contents of—Essentials. *See* 1940 Dig., Col. 129. EMPEROR *v.* SHAMLAL JAMNADAS. **192 I.C. 277 = 13 R.B. 252 = 42 Cr.L.J. 271 = A.I.R. 1941 Bom. 19.**

BOMBAY SALT ACT (II OF 1890), S. 3 (o)—*Construction and scope—Removal or possession of contraband salt from custom station by cartman engaged by another—Liability of cartman—Ss.* 38 (1) *and* 47 (*a*).

S. 3 (*o*) of the Salt Act cannot be read as imposing vicarious liability upon the master or principal without destroying or in any way affecting the direct liability of the servant or agent who is actually in possession of or removes salt. The real effect of S. 3 (*o*) is that where it is proved that the person in possession of or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master and principal to the exclusion of the liability of the servant or agent. Here where a person hires cart belonging to another to

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convey contraband salt from a custom station, the cartman cannot be convicted under Ss. 38 (1) or 49 (*a*) of the Act. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* LAXMAN KRISHNA. **43 Bom L.R. 869.**

——**S. 47 (a) and (c)**—*Applicability and construction—Possession of contraband salt—When offence—Removes or transports—Meaning of.*

S. 47 (*c*) of the Bombay Salt Act deals with possession of contraband salt, and to constitute an offence under the sub-section, knowledge or belief that it is contraband salt is necessary. But under S. 47 (*a*) it is an offence merely to manufacture, remove or transport salt, not merely contraband salt. The word, "removes" and "transports" are used in S. 47 (*a*) interchangeably, and there is no justification for the view that "removal" refers only to salt removed from the salt works of Government under S. 28 of the Act. (*Beaumont, C. J. and Sen, J.*) EMPEROR *v.* LAXMAN KRISHNA.
43 Bom L.R. 869.

BOMBAY SHOPS AND ESTABLISHMENTS ACT (XXIV OF 1939)—*Rules under, R.* 12 (10)—*Scope—"Employer"—Owner keeping shop himself without employing any one—Omission to maintain visit book—Offence.*

R. 12 of the Rules made under the Bombay Shops and Establishments Act is mainly enacted for the benefit of employees, and some of the sub-rules thereof would not apply if there are no employees in a shop. Under R. 12 (10) every employer, including the owner of a shop kept and conducted by himself without employing any one, has to maintain a visit book. And though the maintenance of a visit book is not of much consequence in the case of a shop where no persons are employed, the owner, if he does not maintain a visit book, is guilty of a technical breach of R. 12 (10). (*Beaumont, C J. and Sen, J.*) EMPEROR *v.* MAHOMED KASSAM PANWALLA. **43 Bom.L.R. 952**

——**S. 2 (5) and (6)**—Scope—If to be read together—"Employer"—"Establishment, etc."—Shop kept and conducted by owner himself—Owner employing no one in shop—If employer. *See* BOMBAY SHOPS AND ESTABLISHMENTS ACT, SS. 5 AND 30
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——**S 4 (1) (a)**—*Owner of shop—If person occupying position of management.*

The owner of a shop who keeps his shop himself cannot be said to be a person occupying a position of management within the meaning of S. 4 (1) (*a*) of the Bombay Shops and Establishments Act. (*Beaumont C.J. and Sen, J.*) EMPEROR *v.* MAHOMED KASSAM PANWALLA. **43 Bom.L.R. 952.**

——**Ss. 5 and 30**—*Applicability—One-man shop conducted by owner himself—"Employer"—Owner of shop conducting and keeping without employing any one—Liability for contravention of S. 5—S. 2 (5) and (6).*

S. 5 of the Bombay Shops and Establishments Act, is not inapplicable to a one-man shop, *i.e.*, a shop kept and conducted by the owner himself without employing any one. The mere fact that he does not employ any one in his shop does not exclude from the term "employer", in S. 30 of the Act, so as to exempt him from liability for contravention of S. 5 of the Act. There is nothing in S. 5 whatever to suggest that it does not apply to a one-man shop. The prohibition enacted therein includes any shop. Reading the definition of "employer" in S. 2 (5) together with sub-Cl. (6) of S. 2, "employer" means a person having charge of or owning the business of a shop. To hold that it is implicit in the word "employer" that somebody should be employed is to disregard the definition contained in the Act; and

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there is no justification for restricting the meaning which the Legislature has seen fit to give the word "employer" for the purposes of the Act, it being open to the Legislature to make its own dictionary for the purpose of any particular Act, although the meaning may not be the one normally attached to the word in the English language. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* MAHOMED KASSAM PANWALLA. **43 Bom.L.R. 952.**

——**S. 30**—"Employer"—Owner keeping and conducting shop himself without employing any one—Liability of. *See* BOMBAY SHOPS AND ESTABLISHMENTS ACT, SS 5 AND 30. **43 Bom L.R. 952.**

BOMBAY TODDY TAPPING RULES (1928), Rr. 2 and 9 to 13—Construction and scope—"May" and "shall"—Effect of—Discretion of Collector to grant or refuse tapping licence—If exists. *See* BOMBAY ABKARI ACT, S. 14 (1).
43 Bom.L.R. 896.

BOMBAY VILLAGE PANCHAYATS ACT (IX OF 1920), S. 27—*Right to collect taxes from occupants of sites in village market—Contract of lease—If* ultra vires—*Suit to recover money due under—Maintainability—Contract Act, S.* 65.

A village panchayat is incompetent to farm out the right which it has under the Bombay Village Panchayats Act to collect taxes or dues from persons who occupy sites in the village market. An agreement leasing the right to collect these dues is therefore *ultra vires* and void. But a village panchayat is entitled to recover the money due to it under such an agreement in a suit under S. 65 of the Contract Act. (*Broomfield and Divatia, JJ.*) GOVIND KESHAV *v.* YESHWANT PANDHARINATH. **43 Bom L.R. 800 = A.I.R. 1941 Bom. 378.**

BOUNDARIES—Fixation of—Tidal and navigable river given as boundary—Boundary line—Where to be fixed—Rule. *See* 1940 Dig., Col. 133. NAROTTAMDAS HARJIVANDAS & CO. *v.* BULSAR TOWN MUNICIPALITY. **I.L.R. (1941) Bom. 97 = 192 I.C 635 = 13 R B. 268 = A.I.R. 1941 Bom. 11.**

BUDDHIST LAW (Burmese)—*Administration of estate of deceased spouse—Proper person to administer.*

It may be laid down as a general rule that the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of whole of the estate at the time of death of the other spouse and is in most cases entitled to the whole or a large part of it. Though it cannot be laid down as an absolute rule that in no circumstances should letters of administration be granted to any other person, it would require very special reasons to justify such a grant. (*Mosely and Sharpe, JJ.*) U TUN YIN *v.* U BA HAN.
194 I C 439 = 13 R.R. 309 = A.I.R. 1941 Rang. 133.

——**(Burmese)**—*Adoption—Act of shinbyuing—If necessarily shows relationship of parent and child.*

The act of shinbyuing does not necessarily show that this work of merit is performed specifically because of the relationship of parent and child, in the absence of evidence as to any declaration by the parents either in the invitation to friends or at the ceremony that the person shinbyued was their son or their keittima son. (*Mya Bu and Mosely, JJ.*) U MAUNG GYI *v.* MAUNG SHWE THEE. **196 I.C. 144 = 14 R.R. 71 = A.I.R. 1941 Rang. 183.**

——**(Burmese)** — *Adoption — Apatitha form—Apatitha child living apart from parents—Right to inherit—Proof of joint living—Necessity.*

An apatitha child who lives apart from his or her parents is not entitled on the surviving parent's death to inherit. Merely because the circumstances of the case point to a separation having been more desirable the

proof of joint living cannot be dispensed with in seeking to establish a claim to inheritance on the ground of apatitha adoption. (*Roberts, C.J. and Dunkley, J.*) MA TIN AYE *v.* KHIN KHIN GYE.
A.I.R. 1941 Rang. 265.

——(Burmese)—*Adoption—Buddhist monk—If can adopt.*

A Buddhist monk cannot validly adopt. A Pongyi being bound by the *Vinaya*, cannot adopt. (*Dunkley and Blagden, JJ.*) MA KYIN SEIN *v.* MAUNG KYIN HTAIK. **1940 Rang L.R. 783=193 I.C. 507=13 R R. 251=A.I R. 1941 Rang. 87.**

——(Burmese)—*Adoption—Keittima form—Proof of—Formal ceremony if necessary—Conduct of publicity and notoriety.*

In the case of a keittima adoption a formal ceremony of adoption is not necessary. Whether there is or is not a ceremony of adoption, there must be proof of publicity ; if the ceremony of adoption is public then publicity may be established by proof of that fact alone; but if it be private, then there must be proof of publicity and notoriety in addition in order to establish the existence of the relationship. When a person alleging a keittima adoption relies for proof of the factum of adoption on a course of conduct which is said to be inconsistent with any other supposition, then adequate proof of the publicity and notoriety of the relationship must be insisted upon. In the case of a keittima adoption when no specific occasion is appealed to, the evidence of isolated private conversations with a number of persons in which the adoptive parent is alleged to have made remarks indicating that she had adopted a certain child is not sufficient to establish publicity or notoriety so as to establish relationship of parent and child. In such case the notoriety or publicity must be established by the evidence of opinion expressed by conduct of persons having special means of knowledge. If a person puts himself or herself outside the reach of the public so as to be unable to give the status of an adopted child by according publicity to the new relationship, the only way which is left is the method of a public ceremony. The publicity of which proof is required must be publicity of the fact that the adoptive parent intended the child to inherit his or her property. (*Roberts, C.J. and Dunkley, J.*) MA TIN AYE *v.* DHIN KHIN GYI.
A.I.R. 1941 Rang. 265.

——(Burmese)—*Adoption—Relationship between adoptive parent and adopted boy—Relationship—Severance—Unilateral Act—Sufficiency—Acquiescence of the boy—Effect.*

The relationship between an adoptive parent and his adoptive child cannot be terminated by the unilateral act of the parent. He cannot disinherit his adoptive child. The relationship can be severed by the act or acts of the parent in which the child, having reached the age of discretion, has by his conduct acquiesced. The conduct may be such as to raise a presumption that the boy intends to break off the relationship and in such case, he forfeits his right of inheritance. Where the boy was trained by persons other than the father and later on lived apart from the father, and did not claim a share when the father re-married and paid the natural daughter in satisfaction of her claims and he attended the father's funeral merely as a guest and did not take part in the ceremonies, the circumstances were held enough to raise a presumption or inference that the relationship was severed. (*Dunkley and Blagden, JJ.*) MA KYIN SEIN *v.* MAUNG KYIN HTAIK.
1940 Rang L.R. 783=193 I C. 507=13 R.R. 251=A,I.R. 1941 Rang. 87.

——(Burmese)—*Adoption—Repute—Nature of evidence admissible.*

To establish an adoption by repute, evidence to the effect that the adoptee was known in the village as the son of his alleged adoptive parents is inadmissible as being hearsay. The evidence of repute which is allowed by the Evidence Act must satifsy the requirements of S. 32 (5) and (6) and S. 50 of the Act. Such evidence must be expressed by the conduct of the person expressing the opinion as to the relationship, who has special knowledge of the existence of the relationship. (*Mya Bu and Mosely, JJ.*) U MAUNG GYI *v.* MAUNG SHWE THEE. **196 I.C. 144=14 R.R. 71=A.I.R. 1941 Rang. 183.**

——(Burmese) — *Co-owners—Parent's property—Children if hold it as co-owners—Absence of partition—Presumption of co-ownership.*

The fact that the property belonged originally to their parents does not in itself prove that the children hold it as co-owners, but co-ownership may be presumed from the fact that after the death of the parents there was no partition of the estate among the children. (*Mackney, J.*) MAUNG PO HLAING *v.* PO NYI. **195 I C. 234=14 R.R. 34=A I.R 1941 Rang. 111.**

——(Burmese)—*Ecclesiastical law—Death of owner of poggalika property—Effect.*

If the owner of poggalika property dies without making a valid transfer of it during his life time, it becomes on his death, sanghika property. (*Roberts, C. J. and Dunkley, J.*) U ZAWTIPALA *v.* U THATDAMA. **1941 Rang L.R. 204=194 I.C. 597=14 R.R 1=A I.R. 1941 Rang. 159.**

——*Ecclesiastical law—Election of presiding monk of Sanghika kyaungdaik—Validity.*

Where the majority of the Sangha desired that a monk should be elected presiding monk of Sanghika kyaungdaik and expressed their will at a meeting, then it must be held that he was validly elected. (*Roberts, C.J. and Dunkley, J.*) U ZAWTIPALA *v.* U THATDAMA. **1941 Rang.L.R. 204=194 I.C. 597=14 R.R 1=A.I.R. 1941 Rang. 159.**

——(Burmese)—Eindaunggyi couple — Atetpa property—If becomes joint property—Right, if any acquired by either spouse. *See* 1940 Dig., Col. 134. U SAN YI *v.* MAUNG PO YI. **192 I.C. 425=13 R.R. 177.**

——(Burmese)—Eindaunggyi couple—Death of both without issue within a week of each other—Rights of atet children—Doctrine of common disaster—Applicability. *See* 1940 Dig., Col. 134. U SAN YI *v.* MAUNG PO YI. **192 I.C. 425=13 R.R. 177.**

——(Burmese)—*Inheritance — Manukye, Book X, S. 8—Construction—Rights of children of first marriage on death of their mother.*

Where the provisions of the Manukye are clear they must be applied. There is a special provision in S. 8 of Book X for the inherited *lettetpwa* of the deceased parent, but there is no special provision for the inherited *lettetpwa* of the surviving parent, and consequently it is plain as a matter of construction, that the inherited *lettetpwa* of the surviving parent is included in the general term 'property acquired during the coverture of his mother'. Such inherited property is joint property of the couple. The words used in the above phrase are sufficiently wide to include not only *hnapazon* property acquired by the joint exertions of the couple but also property acquired during coverture by either of them by inheritance from their parents or relations, and the phrase is certainly not restricted to *hnapazon* property only. Hence on the death of a remarried mother without leaving any issue by the second marriage, her children by the first marriage are entitled to a one-sixth

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share in the joint property whether *hnapazon* or inherited property, of their mother and step-father. (*Roberts, C. J. and Dunkley, J.*) U HLA PE *v.* MA HLA KHIN.
1941 Rang L.R. 440 = A I.R. 1941 Rang. 229.

——(**Burmese**)—*Keittima adoption—Enjoyment of profits—Performance of funeral rites—Inference of parent and child relationship if justified.*

The fact that the alleged adoptee was allowed to work the land of his alleged adoptive parents and enjoyed the profits out of which he maintained the old couple is quite insufficient to show that there was relationship of parent and child between his alleged adoptive parents and him. Nor does the performance of the funeral rites of the alleged adoptive parents by the alleged adoptee necessarily show that he is the nearest heir. (*Mya Bu and Mosely, JJ.*) U MAUNG GYI *v.* MAUNG SHWE THEE. **196 I C. 144 = 14 R.R. 71 = A.I.R. 1941 Rang. 183.**

——(**Burmese**)—Keittima *adoption—Proof of—Evidence of notoriety and publicity when relevant—Nature of admissible evidence regarding conduct.*

It is true that publicity must be given to the relationship in the case of *keittima* adoption. But where a formal ceremony of giving and taking in *keittima* adoption is shown to have taken place in the presence of credible witnesses who were summoned in order to secure publicity and notoriety to the factum of adoption proof of adoption is complete. It is not open for an adoptive parent who repents of his choice to disinherit a *keittima* adopted child, or when such a child has died, to defeat the grandchild's claim on his estate by conduct which shows a desire to defeat it. If the formal giving and taking be done privately, publicity must afterwards be given to the fact. But where the ceremony itself is public, the fact of its having been so, ensures at once and for all times the degree of notoriety requisite for the establishment of the relationship. A reputation can only be established by admissible evidence and S. 50, Evidence Act, excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child. The opinion of any one who has special means of knowledge as to the existence of the relationship of one person to another is a relevant fact, if that opinion is expressed by conduct. Evidence may therefore be given as to the behaviour of the parties between whom the relationship is alleged to exist towards each other and as to the treatment accorded to them by others. Witnesses cannot be allowed to speak as to current gossip in the neighbourhood of the existence of a relationship or of the absence of any relationship at all. The Court will consider the evidence of those who had opportunities of seeing the treatment accorded to the adopted child by the parents and others and come to a conclusion as to existence or non-existence of the relationship. Once there is evidence which is conclusive in establishing the fact of a public adoption by means of a formal ceremony, no necessity exists of further evidence on the point, and no amount of negative evidence pointing to the lack of such relationship by reason of subsequent conduct can affect the conclusion unless, indeed, it is directed toward showing the breaking of the adoptive tie. (*Roberts, C. J. and Dunkley, J.*) MA NYUN YIN *v.* MA KYIN.
1941 Rang.L.R. 445 = A.I.R. 1941 Raug. 276.

——(**Burmese**)—*Manukye Bk. X, S. 28—Applicability of rule in—Wife's vested interest in payin property—Wording of S. 28, if restrictive in its operation.*

A daughter-in-law could not be deprived by the rule in *Manukye* Book X, S. 28 of her vested interest in the *payin* property of her husband, to which vested interest

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the law of inheritance could have no application. All property acquired by either or both spouses before or during marriage pass into common enjoyment and both spouses have a vested interest in all such property. The wording of S. 28 of Book X of the *Manukye* does not appear to restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. (*Mya Bu and Dunkley, JJ.*) MA AYE TIN *v.* DAW THANT. **1940 Rang.L.R. 831 = 194 I.C. 313 = 13 R.R. 297 = A.I.R. 1941 Rang. 99.**

——(**Burmese**) — Marriage—Denial of—Burden of proof. *See* 1940 Dig., Col. 135. MAUNG MAUNG *v.* MA SEIN KYI. **192 I.C. 49 = 13 R.R. 163.**

——(**Burmese**)— *Marriage— Divorce— Procedure and remedy open.*

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retain the hnapazon property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he only has one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him." Nor can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. (*Roberts, C.J. and Mosely, J.*) U SIN *v.* MA MA LAY. **1941 Rang. L.R. 14 = 194 I.C. 482 = 13 R.R 311 = A.I.R. 1941 Rang. 118.**

——(**Burmese**)—Marriage—Essentials to be proved to raise *prima facie* presumption. *See* 1940 Dig., Col. 135. MAUNG MAUNG *v.* MA SEIN KYI. **192 I.C. 49 = 13 R.R. 163.**

——(**Burmese**)—Marriage — Evidence of—Reputation of marriage—How to be established—S. 50, Evidence Act, if affected by S. 110, Cr. P. Code. *See* 1940 Dig., Col. 135. MAUNG MAUNG *v.* MA SEIN KYI. **192 I.C. 49 = 13 R.R. 163.**

——(**Burmese**)—*Orasa—Attainment of status of—Test.*

One of the tests of attainment of *orasa* status is the competence to undertake the responsibilities of the deceased parent. When the question is what amount of help must be given, it must be decided with reference to each case on the basis of what help was asked for or might reasonably be required. If a son is ready and willing to help in the acquisition of family property though not required to do so, or if he complies with requests to do so within the limits of his ability and in good faith, he shows the degree of competence required.

Per *Mya Bu, J.*—For an *orasa* to qualify for his special rights joint living with the surviving parent and active assistance in his or her duties is not necessary under present day conditions.

Per *Ba U, J.*—Helping parents in the acquisition of properties is not one of the requisites for the status of an *orasa* child but what is essential is that the eldest born child should be competent to shoulder the burdens and responsibilities of the parent of the same sex on the death of the said parent. (*Roberts, C.J., Mya Bu,*

BUDDHIST LAW—(Burmese).

Mosely, Ba U and Dunkley, JJ.) DAW E *v.* MAUNG AUNG THEIN. **1941 Rang. L.R. 665 (F.B.)**

——**(Burmese)** — *Partition—Suit for — Proper prayer.*

In the suit to partition an estate, the whole of that estate ought to be included in the prayer for partition in whosesoever hands it may be. (*Mackney, J.*) MAUNG PO HLAING *v.* PO NYI. **195 I.C. 234 = 14 R R. 34 = A I.R. 1941 Rang. 111.**

——**(Burmese)**—*Succession— Husband and wife dying within a fortnight of one another—Property inherited by husband from collateral—Shares.*

In cases where husband and wife die within a short time of one another, where property has been inherited during marriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as *payin* property, or as inherited *letletpwa* in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party. (*Mya Bu and Mosely, JJ.*) MA PWA SHIN *v.* MA GALE. **1940 Rang L.R. 753 = 194 I.C. 201 = 13 R R. 284 = A.I R. 1941 Rang. 106.**

——**(Chinese)**—*Adoption—Proof of*

Amongst the Chinese there is nothing which corresponds to appatittha adoption as known amongt Burmese Buddhists and therefore if a child had been adopted at all it would be either adoption with a view to inherit or no adoption at all, that is to say, proof of adoption amongst the Chinese would connote the right to inherit. Therefore there must be proof not only that the child was brought up in the family but that it was brought up with a view to inherit. (*Roberts, C.J. and Dunkley, J.*) MA AYE MYA *v.* CHEW CHENG GUAT.

A I.R. 1941 Rang. 334.

BUNDELKAND LAND ALIENATION ACT (II OF 1903), S. 14 and Court-Fees Act, Sch. II, Art 17 (6)—*Dismissal of application under S. 14 to convert sale into mortgage—If a decree—Appeal—Court-fee payable.*

An order of dismissal of an application under S. 14 of the Bundelkand Land Alienation Act to convert a sale into a mortgage has the force of a decree though not in the form of a decree. In an appeal against such an order, the subject matter is not capable of being estimated at a money value and hence it falls under Art. 17 (6) of Sch. II to the Court-Fees Act. (*Harper, S.M. and Sathe, J.M.*) SHAMBHU NATH *v.* HAR PRASAD.

1941 R D 682 = 1941 O.A. (Supp) 612 = 1941 A.W.R. (Rev.) 672.

BURDEN OF PROOF. *See* PRACTICE. *Burden of proof.*

BURMA ACT (XVIII OF 1939) AND Railways Act (IX of 1890), S 112 —*Offence under S. 112, Railways Act by boy of 13—Sentence of whipping in default of payment of fine—Legality—Effect of Act XVIII of 1939 on S 17 (1) of the Young Offenders Act (Burma Act III of 1930).*

Where a boy of thirteen is found guilty of an offence under S. 112 of the Railways Act, it is only a substantive sentence of whipping that could be awarded and not a sentence of whipping in default of payment of fine. Burma Act XVIII of 1939 which amends S. 112 of the Railways Act is vague and general and it must be read as enacting only that a substantive sentence of whipping may be imposed where the person convicted is unable to pay a fine. It follows thas S. 17 of the Young Offenders Act must be taken as having been modified by Burma Act XVIII of 1939 and can no longer affect the punishment to be awarded for offences by Juveniles under S. 16 against S. 112 of the Railways Act. (*Mosely, J.*) THE KING *v.* MAUNG TIN SHWE.

1941 Rang. L R. 234 = 195 I.C. 4 = 14 R R. 19 = 42 Cr.L.J. 641 = A I.R. 1941 Rang. 181.

BURMA (FRON. DT.) CR. JUSTICE REG. (1925), Sch.

BURMA CARRIAGE OF GOODS BY SEA ACT (1925), Sch., Arts. 2 and 3 —Act and Schedule incorporated in contract to carry goods by sea—Damage to goods by negligence—Cause of auction on contract or tort—Limitation. *See* 1940 Dig., Col. 138. BILASROY *v.* SCINDIA STEAM NAVIGATION CO., LTD.

192 I C 283 = 13 R.R. 171.

BURMA COURTS (AMENDMENT) ACT (IV OF 1932), S. 2 (1)—*Creation of new Court—Execution in respect of decree passed by District Court—Forum.*

The creation of the Assistant District Court by the Burma Courts (Amendment) Act (1932), S. 2 (1) did not extinguish the jurisdiction of the District Court to execute its own decrees under S. 38, C. P. Code, where the amount did not exceed the pecuniary limit of the jurisdiction of the Assistant District Court. (*Mya Bu and Mosely, JJ.*) SUBRAMANIAN CHETTIAR *v.* L. N. CHETTYAR FIRM. **1940 Rang L.R. 725 = 193 I.C. 318 = 13 R.R. 244 = A.I.R. 1941 Rang. 56.**

BURMA COURTS MANUAL, Para. 102—*Discretion of District Magistrate under—Exercise of—Principles.*

The instruction in the Burma Courts Manual (Para. 102) which is based on the provisions of S. 17 (1), Cr. P. Code, no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. (*Dunkley, J.*) KING *v.* MAUNG PO THAING.

1941 Rang. L.R. 82 = 194 I.C. 370 = 13 R R. 306 = 42 Cr L.J. 573 = A.I R. 1941 Rang 114.

——**Para. 104-A**—*Burma Court Manual—Scope of —Departure from directions in, if gives a right of appeal—Applicability of Para. 104-A.*

The Burma Courts Manual has not the force of law but is a mere collection of directions given by the High Court to its subordinates. A departure by a Court from a course it prescribes does not of itself give an unsuccessful litigant a right of appeal. Para. 104-A only applies to documents the translation of which is disputed, and has no application where the parties agree to a translation, or, if the Court were willing to shoulder the resulting burden, dispense with one altogether. A party who does not challenge the translation submitted by the other party in the trial Court cannot challenge it in appeal. Nor can the appellate Court *suo motu* take the point as to the invalidity of the translation by reason of para. 104-A where the appellant has himself by his conduct waived it. (*Blagden, J.*) BHAWANI SANKAR JAISI *v.* GANGA PRASAD.

A.I.R. 1941 Rang. 244.

BURMA (FRONTIER DISTRICTS) CRIMINAL JUSTICE REGULATION (I OF 1925) Sch., Cl.(ii) —Transfer of cases—Powers of High Court—Cr. P. Code, S. 526. *See* 1939 Dig., Col. 107. MAUNG BA KU *v.* THE KING. **192 I C. 250 = 13 R.R. 175 = 42 Cr.L.J. 261 = A I.R. 1941 Rang. 31.**

BURMA DEFENCE ACT (BURMA ACT OF 1940), S. 18—*Order fixing maximum prices—If could be validated under S. 18.*

A price control order provided as follows: "Except as provided in the annexed schedule and in subsequent amendments thereto, no wholesale or retail dealer in medicines, medical drugs, medical preparations and medical supplies shall sell such articles within the limits of the City of Rangoon at prices more than $12\frac{1}{2}$ per cent., *i.e.*, 2 annas in the rupee above the net wholesale or retail prices respectively charged by him on 1st September, 1939."

Held, that all that it had been sought to fix was the maximum price at which a particular dealer may sell the commodity. The Controller of Prices had no authority to do this under the Ordinance dated 4th September, 1939 and hence the order could not be said to be validated under S. 18, Defence of Burma Act, 1940. (*Roberts, C.J.*) S. K. ROY *v.* THE KING.

1941 Rang.L.R. 26 = 192 I.C. 770 = 42 Cr.L J. 335 = 13 R.R. 235 = A.I.R. 1941 Rang. 1.

BURMA DEFENCE RULES—*Control of Prices Order*, (1940), *Para.* 6—*Liability of master for acts of servants.*

Ordinarily a person should not be held liable for a criminal act of another. No person can be charged with the commission of an offence unless a particular intent or knowledge or *mens rea*—is found to be present; but in cases where a particular intent or state of mind is not of the essence of an offence, the person can be held liable for the act or omission of another. But the Defence of Burma Act is a piece of emergency legislation and is designed and intended, among others, to prevent profiteering so as to ensure the proper working of the normal economic life of the people. The act will entirely fail in its object if a master is not held liable for the act of his servant or a partner for the act of his copartner. Because of this, para.6 of the Control of Prices Order, 1940, has been enacted. Looked at from this point of view, it will be found that there is nothing inconsistent between this paragraph and S. 2 (1), Cl. 3 (2) the Defence of Burma Act. (*Ba U, J.*) ISMAIL MAHOMED HAJEE *v.* THE KING.

1941 Rang.L.R. 536 = A.I.R. 1941 Rang. 349.

——Rr. 2 (9) and 130—*Public servant within the meaning of—Head clerk of controller of prices—Competency to file complaint.*

A head clerk of a Government office is a person who occupies a position to which certain duties of a public character are attached or a person who occupies a place in the administration of Government. He is accordingly a 'public servant' within the terms of the definition in S. 21, I. P. Code. Hence the head clerk of the office of the controller of prices whose duties are immediately auxiliary to those of the controller, to whom the Government has delegated part of its functions is a public servant competent to lay a complaint in respect of an offence under Defence of Burma Rules. (*Ba U, J.*) ISMAIL MAHOMED HAJEE *v.* THE KING.

1941 Rang.L.R. 536 = A.I.R. 1941 Rang. 349.

BURMA GENERAL CLAUSES ACT (1898), S. 24—*Enactment—Ordinance, if an.*

An Ordinance is not an enactment and an Ordinance which has expired, is not an enactment which is repealed. (*Roberts, C.J.*) S. K. ROY *v.* THE KING.

1941 Rang.L.R. 26 = 192 I.C. 770 = 42 Cr.L.J. 335 = 13 R.R. 235 = A.I.R. 1941 Rang. 1.

——S. 5—Effect of repeal of Habitual Offenders Restriction Act by Burma Act I of 1936. *See* HABITUAL OFFENDERS RESTRICTION ACT, S. 18 (2) AND BURMA AOT I OF 1936 AND BURMA GENERAL CLAUSES ACT.

1941 Rang.L.R. 239.

BURMA INCOME-TAX ACT (1922), S. 10.

BURMA INCOME TAX ACT (XI OF 1922), S. 4 (2)—*Remittance of foreign profits—What is—Money belonging to customer sent from foreign branch to branch in Burma under instructions of customer—If taxable as remittance of foreign profits.*

There is a presumption that when money is remitted from a foreign country, where the assessee carries on business, the remittance is made out of profits. In order that the presumption may be applicable, the remittance must, of course, be a remittance by the assessee of money belonging to the assessee. The assessee, a Hindu undivided family, was carrying on a banking and money-lending business with branches at *MY* and *N* in Burma, and at *T* in the Federated Malay States. One *M* had a current account with the *T* branch of the assessee, which was in a credit in a considerable sum. On 15—10—1937, *M* instructed the *T* branch to send a sum of Rs. 10,000 by banker's draft to their branch at *N* in Burma, the amount to be placed to her (*M's*) credit in a new account to be opened at *N* and the cost of the draft to be debited to her account at *T*. Her instructions were duly carried out. A draft for the sum of Rs. 10,000 on a Bank at Rangoon was purchased and this was paid by the Bank to the *N* branch to the credit of *M*. The Income-tax authorities taxed this amount to income-tax in Burma on the ground that it represented a remittance of foreign profits to the assessee under S. 4 (2) of the Burma Income-tax Act.

Held, that the money sent clearly was the money of *M* and not the money of the assessee, and the remittance was made by *M* and not by the assessee, and the remittance was therefore not a remittance to the assessee of foreign profits taxable under S. 4 (2) of the Act. (*Roberts, C. J., Dunkley and Sharpe, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* A. K. A. R. FAMILY.

1941 Rang L.R. 520 = 196 I.C. 589 = 14 R.R. 90 = (1941) I.T.R 347 = A.I R. 1941 Rang. 263.

——S. 10 (2) (ix)—*Income tax Rr. 25 and 36—Interpretation of—Life assurance company with head office in British India and branch in Burma—Computation of income—Proportion of Burma premia to world premia—If to be taken into account—Interim bonus paid to policy holder—If deductible.*

Rr. 25 and 36 of the Income-tax Rules should not be taken as having any further effect than that they provide a somewhat arbitrary, though convenient, method of ascertaining the total profits or gains in respect of Life Assurance business. They cannot exclude the operation of unequivocal directions in the Act. It is for the Income tax Commissioner to ascertain the proportion which one part of a business bears to whole as well as to ascertain its total income, and he is not bound, in ascertaining such proportion, to have recourse to the Rules which deal only with the computation of total income. The principles underlying the Act must be carefully borne in mind in the interpretation of the Rules. The assessee, an Insurance Company carrying on life insurance business, had its Head Office in Lahore in British India and a local agency in Rangoon in Burma. For the assessment of the year 1937-1939, in respect of the Burma branch's income the Income-tax authorities calculated the income, profits and gains of the company under Rules 25 and 36 of the Burma Income-tax Rules on the proportion of the Burma premia to the world premia received in the previous year 1936—1937. They also included the sums paid to policyholders by way of interim bonus in the total divisible surplus. The assessee claimed that the income, profits and gains of the company should be computed on the proportion of the said premia received during the

BURMA INCOME-TAX ACT (1922), S. 24.

quadrennial valuation period ended 30th April, 1936, and the sums paid to the policyholders should be deducted from the divisible profits.

Held, (1) that the Income-tax authorities were right in including the sums paid to policy-holders by way of interim bonus in the total divisible surplus for the quadrennium ended 30th April, 1936, as they did not constitute expenditure incurred for earning the profits of the company within the meaning of S. 10 (2) (*ix*) of the Burma Income-tax Act;

(2) (per *Roberts, C.J. and Dunkely, J., Sharpe, J*, contra). that the Income tax authorities were right to computing the income, profits and gains of the assessee for the Burma assessment in 1937—1938 on the proportion of the Burma premia to the world premia received in the previous year 1936—1937. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* LAKSHMI INSURANCE CO., LTD. RANGOON. **1941 I.T.R. 516= A.I.R. 1941 Rang. 212 (F.B.).**

——S. 24 (1)—*Loss — Setting off—Time for—Assessee compelled to take over land and house of debtor in satisfaction of loan transaction—Sale of land and houses in parts in different years—Loss in whole transaction claimed after sale of last part—Permissibility.*

The assessee, a Hindu undivided family carrying on a banking and money-lending business, took over in 1928-1929, about 63 acres of land and a house in settlement of a debt of Rs. 9,000 due to them from a debtor. The land and the house were sold at different times in parts at the best price available at the time of the respective sales. The last sale was of the house in 1937-1938, and the account kept by the assessee of these sales showed, when all the property had been sold, a loss on the whole transaction of Rs. 5,137-8-0. In that year the assessee made a claim to deduct as trading loss the total loss of the whole transaction, namely, the sum of Rs. 5,137 8-0. The Income-tax authorities disallowed the claim holding that in each year in which a sale of a part of the property took place the assessee ought to have made an estimate of his loss on that particular sale, and ought to have claimed the loss estimated to have been incurred on that particular sale in the accounting year in which it took place.

Held, that the contention of the Income-tax department was untenable, and that the assessee was clearly entitled to deduct the amount as a trading loss, for he could not know until the transaction had been completed what his loss was where only a part of the property had been sold, whilst the rest remained in the hands of the assessee, and might result in a profit or might result in a loss, and the whole transaction was not yet complete, no assessment could be made. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* A. K. A. R FAMILY.

1941 Rang. L.R. 520 = 196 I.C 589 = 14 R.R. 90 = (1941) I.T.R. 347 = A.I.R. 1941 Rang 263.

BURMA LAND AND REVENUE ACT (II OF 1876), Ss. 46 and 47 and Burma Co operative Societies Act (1927), S. 51—Conditions under which Ss. 46 and 47 of the Land and Revenue Act are available—Sale to realise sum due from member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act. *See* 1940 Dig., Col. 141. MAUNG MYA DIN *v.* K.P.A.P. CHETTYAR FIRM.

191 I.C. 176.

——Ss. 55 and 56—Bar of jurisdiction of Civil Court —Question as to existence of legal authority for the Revenue Officer to act. *See* 1940 Dig., Col. 141. MAUNG MYA DIN *v.* K.P.A.P. CHETTYAR FIRM.

191 I.C. 176.

BURMA TENANCY ACT (1939), S. 25.

BURMA LAWS ACT (XIII OF 1898), S. 13—*Chinese Buddhist—If can make a will.*

Inheritance to the estate of a Chinaman who is domiciled in Burma and is a Buddhist, is governed by the Buddhist law of Burma. Though a will is not recognised under Buddhist law, a custom or usage varying this strict rule has been recognized by judicial decisions. Hence it must be taken that a Chinese Buddhist can make a will. (*Roberts, C.J. and Dunkley, J.*) YUP SOON E. *v.* SAW BOON KYAUNG.

1941 Rang.L.R. 285 = 196 I.C 636 = 14 R.R. 96 = A.I.R 1941 Rang. 241.

——S. 13 and Succession Act (1925), S. 37—Indian or Burmese Christians—S. 13 of the Burma Laws Act, if applies—Illegitimate and adopted children, if can come in under S. 37 of Succession Act. *See* 1940 Dig., Col. 142. CYRIL *v.* D' ATTAIDES.

192 I.C. 690 = 13 R.R. 189 = A.I.R. 1941 Rang. 33.

——S. 13 (1) and (3) — *Applicability — Wife's claim for maintenance coupled with the child's claim for maintenance.*

A wife's claim for maintenance is a question regarding marriage and when parties are Buddhists the Buddhist law must form the rule of decision by reason of S. 13 (1) of the Burma Laws Act. But where there is also a claim by the child against his father sub-S. (1) of S. 13 has no application; and according to sub-S. (3), if there is no statutory law dealing with the matter the decision must be in accordance with justice, equity and good conscience. Hence its remedy is under S. 488, Cr. P. Code, only, for even under the common law of England a child cannot bring an action against its parents for maintenance. (*Dunkley and Blagden, JJ.*) THA MYA *v.* MA KIN PU. **1940 Rang L R 807 = 193 I C. 836 = 13 R.R. 266 = A.I.R. 1941 Rang. 81.**

——S. 13 (1)—*Scope of—Inheritance to estate of Chinese Buddhist of Burma—Law applicable—Applicability of Chinese customary law—Onus.*

According to S. 13 (1) of Burma Laws Act, inheritance to the estate of a Chainaman who is domiciled in Burma and is a Buddhist is governed by the Buddhist Law of Burma. The burden of proving any special custom or usage, like the Chinese customary law, which is opposed to the ordinary rules of the Burmese Buddhist law of inheritance is on the person asserting that variation. (*Mya Bu and Mosely, JJ.*) YIN WIN I IN *v.* MA KYIN SEIN. **1940 Rang.L.R. 685 = 194 I C. 323 = 13 R.R. 304 = A.I.R. 1941 Rang. 66.**

BURMA MUNICIPAL ACT (III OF 1898, as amended by Acr V of 1933), S. 79 (5)—*Competency of reference—Question of fact as to communication of notice.*

The question whether the Municipal Sub Committee's decision was duly communicated to the assessee or not is a question of fact which may affect the maintainability of the appeal but does not affect the liability to or the principle of assessment, and consequently does not fall within the purview of S. 79 (5). (*Roberts, C.J., Dunkley and Shaw, JJ.*) DAWSONS BANK, LTD *v.* MUNICIPAL COMMITTEE, KYAIKLAT.

A.I.R. 1941 Rang. 339 (S.B,).

BURMA TENANCY ACT (X OF 1939), S. 25—*Application under, made after prescribed period—Procedure to be followed.*

An application under S. 25 does not cease to be an application because it is presented to the Court after the time allowed by law. In such a case the Court must receive it and dismiss it on the ground that it is barred by time. (*Roberts, C.J. and Dunkley, J.*) U BA SAN

BURMA TENANCY ACT (1939), S 40.

v. U YA. 195 I.C. 551=14 R.R. 45= A.I.R 1941 Rang 199.

——S. 40—*Bar of civil suit—Dispute as to compensation between two tenants.*

The matters the determination of which is expressly entrusted to Revenue Officers by the Burma Tenancy Act are set out in Ch. III, IV and V of the Act. None of these provisions applies to a suit by tenant evicted under the orders of the Revenue Officer against another at whose instance he was evicted for compensation for cultivation expenses incurred prior to eviction. Hence the jurisdiction of the Civil Court is not barred from entertaining such a suit. (*Ba U, J.*) U. SHWE YON *v*, MAUNG E. 1941 Rang L.R 385= A.I,R 1941 Rang. 268.

BURMA TENANCY ORDINANCE (1940). Ss. 6 (3) and 9—*Final order under S.* 6 (3)—*Right of appeal under S.* 9 *not exercised—Application for writ of* certiorari, *if lies.*

Where a petitioner for a writ of *certiorari* has another certain and sufficient remedy open to him he is not entitled to the benefit of the extraordinary remedy by writ. Consequently where after the passing of the final order under S. 6 (3) the right of appeal provided by S. 9 is not exercised, an application to the High Court for a writ of *certiorari* does not lie. (*Roberts, C. J and Dunkley, J.*) U BA SAN *v.* U VA. 195 I.C. 551= 14 R.R. 45 = A I.R. 1941 Rang. 199.

BURMA YOUNG OFFENDRRS ACT (Burma Act III of 1930). S. 17 (1)—If affected by Burma Act XVIII of 1939. *See* BURMA ACT XVIII OF 1939 AND RAILWAYS ACT, S. 112. 1941 Rang.L.R. 234.

CALCUTTA HIGH COURT RULES AND ORDERS (ORIGINAL SIDE), Ch. XXVI, R. 89—*Application for further time made after expiry of* 14 *days—If competent.*

An application for further time for making a motion under Rule 89 of Ch. XXVI of the Rules and Orders of the Calcutta High Court for variation and discharge of the report by the Official Referee may be made even after the expiry of fourteen days from the date of the filing of the report (*McNair, J.*) RANENDRA NATH DATTA *v* MANIK LAL MITRA.

I.L.R. (1940) 2 Cal. 511 = A I.R. 1941 Cal. 118.

——**Ch. XXVI R. 89**—*Notice of motion—Service on all parties—Necessity for.*

Notice of motion under R. 89 of Ch. XXVI of the Calcutta High Court Rules and Orders for variation and discharge of the report by the Official Referee must be served on all the parties affected thereby, whether or not they have taken any part in the reference. (*McNair, J.*) RANENDRA NATH DATTA *v.* MANIK LAL MITRA. I.L R (1940) 2 Cal. 511= A I R 1941 Cal. 118.

——**Original Side Rules, Ch. XXXI**—Not applicable to applications for review under Bengal Money Lenders Act. *See* BENGAL MONEY LENDERS ACT, SS 2 (22) AND 36. 45 C W.N. 859.

——**(Original Side) Chap. XXXV A. R. 44 and (Appellate Side), Part I, Chap. III, R. 3**—*Applicability—Application for transfer under S.* 8, *Para.* (2) *of Divorce Act.*

It is doubtful whether an application for transfer made to the High Court under paragraph (2) of S. 8 of the Divorce Act is covered by R. 44, Chap. 35-A of the Original Sides Rules or by R. 3, Chap. III of Part I of the Appellate Side Rules. (*Mukherjea and Roxburgh, J.*) MALATI *v.* SURENDRA NATH. 45 C.W.N. 916.

CALCUTTA MUNICIPAL ACT (III OF 1899), S. 4)—*'Private street'—Meaning of.*

CALCUTTA MUNICIPAL ACT (1899), S. 492.

The definition of "private street" in S. 3 (54) of the Calcutta Municipal Act is not very clear, but, if it be compared with the definition of "public street" in S. 3 (57) of the Act, it would appear to have been the intention of Legislature that it should refer to some space between neighbouring buildings, which has been left not merely for the purpose of detaching one set of premises from another, but for securing access to the premises situated thereon not to the public at large, but to a limited section of the public who may have occasion to go to the premises situated on the space in question. "It includes any passage securing access to four or more premises" and by implication it may be taken that t would not include a passage which secures access to a smaller number of premises. (*Edgley, J.*) HIRENDRA NATH *v.* CORPORATION OF CALCUTTA.

I.L.R (1941) 1 Cal 435 = 196 I.C. 832= 45 C.W.N. 413 = A.I.R. 1941 Cal. 386.

——**Ss. 17 and 19**—Corporation sanctioning building plan in violation of rules—Right of neighbouring owner to apply for mandamus—No objection raised by immediate neighbour. *See* SPECIFIC RELIEF ACT, S. 45. 45 C.W.N. 413.

——**S. 18**—*Remedy under—If bars right to apply for mandamus.*

The right given to Government to interfere under S. 18 of the Calcutta Municipal Act, and the implied right of the public or the individual to move the Government in some way or another, is not such an alternative remedy as will deprive the individual of the right to apply for mandamus. (*Ameer Ali, J.*) SM. LAKSHMIMONI DASSI, *In re.*

I L R (1941) 1 Cal. 16 = 196 I.C 452= 45 C.W.N 401 = A.I.R. 1941 Cal. 391.

——**Ss. 46 and 47**—*Decision of High Court—Appeal—Letters Patent, Cl.* 15.

The High Court dealing with an application made under S. 46 of the Calcutta Municipal Act functions, in effect, as a special tribunal, and no appeal lies from its decision to any other tribunal. The decision given by the Judge constituting a special tribunal does not amount to a judgment within the meaning of Cl. 15 of the Letters Patent. (*Derbyshire, C.J. and Costello, J.*) DHIRENDRA KUMAR *v.* A. LATIFF. 45 C W.N. 181.

——**Ss. 175, 177 and Sch. VI, Rr. 2 5 and 7**—*Company engaged in manufacture and sale of goods having registered office and also retail shops within municipal boundaries—Liability to take out both personal and local license.*

Where a company engaged in the manufacture and sale of goods has within the municipal boundaries of Calcutta its registered office and also its retail shops through which it sells its goods to the public, it is liable not only to take out and pay for the personal license in respect of its registered office but also liable to take out and pay for a proper local license in respect of each one of its retail shops. (*Derbyshire, C.J. and Bartley, J.*) BATA SHOE CO., LTD. *v.* CORPORATION OF CALCUTTA. 45 C.W.N. 847.

——**Ss. 492 and 179**—*Conviction of owner of market for not taking out license—Legality—Amount of rubbish removed not determined by Corporation.*

A conviction of the owner or occupier of a market under Ss. 492 and 179 of the Calcutta Municipal Act for not taking out a license cannot be sustained when there has not been a determination of the average quantity of the rubbish removed by the corporation and the fee payable for the license. Under S. 179 the owner of the market is to take out a license and pay the fee. Obviously

CALCUTTA MUNICIPAL ACT (1923), S. 27.

a person cannot take out a licence until he pays the fee and he cannot pay the fee unless the fee is determined. It is clear from this section that the fee to be paid will depend upon the determination by the Corporation of the amount of offensive matter and rubbish removed daily by the Corporation. (*Sen, J.*) JITENDRA *v.* CORPORATION OF CALCUTTA.

I.L.R. (1941) 1 Cal. 322 = 196 I.C. 539 = 45 C.W.N. 306 = A.I.R. 1941 Cal. 560.

——**(III OF 1923) S. 27**—Appointment of more than one election agent—Validity—Rejection of nomination papers. *See* 1940 Dig., Col. 144. MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **193 I.C. 833 = 13 R.C. 466 = A.I.R 1941 Cal. 130.**

——**S. 46**—Election petition—Returning Officer—If necessary party. *See* 1940 Dig., Col. 145. MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **193 I.C. 833 = 13 R.C. 466 = A.I.R. 1941 Cal. 130.**

——**S. 46** — Plural Councillor constituency — Petition challenging election of one councillor—Other councillors if necessary parties. *See* 1940 Dig., Col. 145. GIRISH CHANDRA GHOSH *v.* SUDHIR CHANRA RAY. **193 I.C. 752 = 13 R.C. 450 = 45 C.W.N. 188 = A.I.R. 1941 Cal. 133.**

——**Ss. 46 and 47**—Recount and scrutiny—Order for—Power of Court. *See* 1940 Dig., Col. 145. SHARAFUDDIN AMMED *v.* SHAMSUL HUQ.

193 I.C. 773 = 18 R.C. 469 = A.I.R. 1941 Cal. 147.

——**Ss. 46 and 47**—Rejection of nomination papers—Decision of Returning Officer—If can be questioned. *See* 1940 Dig., Col. 145. MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **193 I.C. 833 = 13 R.C. 466 = A.I.R 1941 Cal 130.**

——**S. 135**—*Application for separate assessment of outhouse—Duty of executive officer—Power to impose condition on applicant.*

The corporation by its executive officer has a duty to perform under S. 135 of the Calcutta Municipal Act. When an application for separate assessment of an out house appurtenant to a building is made under that section, it is his duty to consider the application, to apply his mind to it, and to decide whether, in his discretion, the outhouse should be separately assessed and treated as a separate building. He cannot refuse to consider the application until the amount of the consolidated rate which is then in arrears in respect of the premises is paid in full. He is not entitled to impose this condition as the duty imposed upon him under the section is not subject to any such condition. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* SAMARENDRA JIT SHAW. **I.L.R (1941) 2 Cal. 30 = A.I.R. 1941 Cal. 719.**

——**Ss. 135 and 149**—*Application made for separate assessment of outhouse—Applicant, if escapes liability to pay consolidated rate thereafter.*

A person who has made an application under S. 135 of the Calcutta Municipal Act for separate assessment of an outhouse appurtenant to his building, cannot escape liability to pay the amount of the consolidated rate for the period subsequent to his application, although the corporation keeps the application in abeyance without disposing it off. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* SAMARENDRA JIT SHAW.

I.L.R. (1941) 2 Cal. 30 = A.I.R 1941 Cal. 719.

——**S. 135**—*Premises consisting of storeyed house and outhouses—Out houses alone occupied—Corporation failing to consider owner's application for separate assessment—If can claim consolidated rates from him.*

CALCUTTA MUNICIPAL ACT (1923), S. 406.

The suit premises consisting of a two-storeyed house and a number of outhouses were at one time let out on lease at Rs. 500 a month, but the tenant left the premises so far back as the year 1928, after giving notice to the Corporation, and since then no part of the house was occupied; though from time to time two of the outhouses used as garages had been occupied. The tenant, after waiting for over a year gave up his tenancy in March, 1929 and obtained a considerable remission of rent from the defendant. In spite of this state of affairs, demands for the full owner's and occupier's rates were made by the Corporation upon the defendant, who was the owner of the premises. During the correspondence which went on between the defendant and the Corporation till 1937 the defendant repeatedly requested the Corporation to assess the outhouses separately from the main building but every time the Corporation ignoring the provisions of S. 135 refused to consider the defendant's case which was fully covered by the aforesaid provisions on the ground that there was not a case of sale or partition nor any cause for revaluation. In 1937 the Corporation sued the defendant claiming Rs. 2,092-14 3 on account of consolidated rates due in respect of the premises, a declaration of first charge on the premises and a decree according to Form No. 5-A of App. D to Sch. I, C. P. Code.

Held, that strictly under the provisions of the law the Corporation was entitled to the reliefs claimed. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* NANDALAL CHOWDHURY. **A.I.R. 1941 Cal 602.**

——**Ss. 149 and 135**—Application made for separate assessment of outhouse—Applicant, if escapes liability to pay consolidated rate thereafter. *See* CALCUTTA MUNICIPAL ACT, SS. 135 AND 149.

I.L.R. (1941) 2 Cal. 30.

——**(as applied to Howrah). S. 300**—*Service of notice—Premises owned by company—Notice addressed to managing agents—If proper.*

Where certain premises are owned and occupied by a company, the managing director of the managing agents of the company can hardly be said to be in occupation of the premises or the owner, and it is doubtful whether the managing agents can be said to be either the owners or the occupiers of the premises. Therefore, a notice relating to those premises under S. 300 of the Calcutta Municipal Act, (as applied to Howrah) to the managing agents is not addressed to the proper persons. It should be served on the company. (*Derbyshire, C. J. and Bartley, J.*) N. N. BOSE *v.* MANAGER, KEDAR NATH JUTE MANUFACTURING CO., LTD. **196 I.C 559 = 1941 Comp. C. 283 = 45 C W N 925 = A.I.R. 1941 Cal. 550.**

——**Ss 386 (1) (b) and 488**—*Prosecution under—Proof required.*

In a prosecution under Ss. 386 (1) (*b*) and 488, of the Calcutta Municipal Act, the first thing the prosecution has to prove is that the Chief Executive Officer of the Corporation had formed the opinion that the purpose for which the premises in question were used was dangerous to health or likely to create a nuisance. (*Henderson, J.*) ATUL CHANDRA BHANDARI *v.* CORPORATION OF CALCUTTA. **I.L.R. (1941) 2 Cal. 308.**

——**S. 406**—*Conviction under—Legality—Saponification value of mustard oil exceeding limit fixed by Government notification—If sufficient.*

The mere fact that the saponification value of the mustard oil was found on analysis to be in excess of the outside limit fixed by the Government notification cannot support a conviction under S. 406 of the Calcutta Municipal Act, specially in view of the fact that it appears that the saponification value of mustard

oi varies to some extent according to the kind of the mustard seed and the place where it is grown. (*Bartley and Akram, JJ.*) BALLAVDAS ISWARDAS *v.* SANITARY INSPECTOR, HOWRAH MUNICIPALITY.
45 C W.N. 661.

——**Ss. 406 and 488**—*Conviction under—Proof required.*

In order to convict a person for sale of adulterated food under S. 406 of the Calcutta Municipal Act, it must be proved that on account of his action the quality or strength or value of the food was reduced or lowered or injuriously affected to the prejudice of the consumer. See S. 3 (2) of the Act. (*Bartley and Akram, JJ.*) BALLAVDAS ISWARDAS *v.* SANITARY INSPECTOR. HOWRAH MUNICIPALITY. **45 C.W.N. 661.**

——**(as applied to Howrah), S. 488/300**—Prosecution under—Limitation. *See* CALCUTTA MUNICIPAL ACT (AS APPLIED TO HOWRAH), S. 534.
45 C W.N. 925.

——**S. 492**—*Pleader paying licence fee after 1st July of current year—Continuing offence.*

Where a pleader pays the licence fee for the current Muncipal year after the 1st July, 1936, he is guilty of an offence by practising on and after 1st July. The offence continues up to the date on which the licence fee is paid and also up to the date of the expiry of the current year for which the licence is required to be taken out by the Act. (*Panckridge, J.*) JATINDRA MOHAN BANERJEE *v.* CORPORATION OF CALCUTTA. **194 I.C. 374 = 13 R.C. 501 = A.I.R. 1941 Cal. 13.**

——**S. 523**—"*Apportionment*"—*Dispute as to—If includes case where one of two parties claims entire compensation.*

A dispute between two parties one of whom claims a share in the amount of compensation and the other claims the whole, is a dispute as to the apportionment of compensation within the meaning of S. 523 of the Calcutta Municipal Act. (*Lodge and Akram, JJ.*) COOVERJI MANICKJI *v.* SUKUMARI DASI.
I.L.R. (1941) 1 Cal. 182 = 195 I.C. 677 = 14 R.C. 120 = 45 C.W.N. 79 = A.I.R. 1941 Cal. 326.

——**Ss. 523 and 525**—*Relative scope—Dispute as to amount of compensation or its apportionment—Right of suit.*

S. 523 of the Calcutta Municipal Act provides a machinery for the settlement of disputes as to the amount of compensation to be paid and as to its apportionment and ousts the jurisdiction of the ordinary Courts to determine such disputes. S. 525 of the Act does not apply to cases governed by S. 523 and an aggrieved person has, therefore, no right of suit under that section. Nor is there a right independent of S. 523 and similar to that recognised in S. 31 of the Land Acquisition Act. (*Lodge and Akram, JJ.*) COOVERJI MANICKJI *v.* SUKUMARI DASI. **I.L.R. (1941) 1 Cal. 182 = 195 I.C. 677 = 14 R.C. 120 = 45 C W N. 79 = A.I.R. 1941 Cal. 326.**

——**S. 523**—*Scope—If limited to disputes arising before payment.*

S. 523 of the Calcutta Municipal Act is not limited to disputes arising before payment of the compensation by the Corporation. (*Lodge and Akram, JJ.*) COOVERJI MANICKJI *v.* SUKUMARI DASI.
I L.R. (1941) 1 Cal. 182 = 195 I C. 677 = 14 R.C. 120 = 45 C.W.N. 79 = A.I.R. 1941 Cal. 326.

——**S. 534 (1)**—*Limitation—Duty of Magistrate.*

Under S. 534 (1) of the Calcutta Municipal Act, a complaint in respect of an offence under S. 386 (1) (*b*) read with S. 488 of the Act must be made within three months of the date on which the existence of the offence is first brought to the notice of the Chief Executive

Officer. It is the duty of the Magistrate to examine the question of limitation and satisfy himself that the prosecution is within time, although no question of limitation is raised at the trial. (*Henderson, J.*) ATUL CHANDRA BHANDARI *v.* CORPORATION OF CALCUTTA. **I.L.R. (1941) 2 Cal. 308.**

——**(as applied to Howrah), S. 534**—*Prosecution under S. 488/300—Limitation.*

Where the Municipality serves a notice on a person under S. 300 of the Calcutta Municipal Act. (as applied to Howrah), requiring him to remove a wall alleged to have been built across a public street, and then prosecutes him under S. 488 (1) (*c*) of that Act for failing to comply with that notice, the offence charged is not the building of the wall but the failure to comply with the notice requiring him to remove the wall. Under S. 534 of the Act, the prosecution should be instituted within three months from the expiry of the time specified in the notice for compliance therewith. (*Derbyshire, C.J. and Bartley, J.*) N. N. BOSE *v.* MANAGER, KEDAR NATH JUTE MANUFACTURING CO., LTD.
196 I.C. 559 = 1941 Comp. C. 283 = 45 C.W.N. 925 = A.I.R. 1941 Cal. 550.

——**S. 538**—Suit against Corporation for damages for nuisance—Limitation—Limitation Act, S. 23 and Art. 36. *See* 1940 Dig., Col. 148. S.A. BASIL *v.* CORPORATION OF CALCUTTA. **195 I C. 306 = 14 R.C. 67 = 45 C.W.N. 1008 = A.I.R. 1941 Cal. 207.**

——**Sch. II, Paras. 1 and 3**—Offence of personation—Candidate identifying person at or after delivery of ballot paper—If guilty. *See* 1940 Dig., Col. 148. GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA RAY.
193 I C. 752 = 13 R C. 450 = 45 C.W.N. 188 = A.I.R. 1941 Cal. 133.

——**Sch. XVII**—Building plan sanctioned in disregard of bye-laws—Right of adjacent owner to apply for mandamus. *See* SPECIFIC RELIEF ACT. S. 45.
45 C.W.N. 401.

——**Sch. XVII**—Building plan sanctioned in violation of regulations—Right of adjacent owner to apply for mandamus. *See* SPECIFIC RELIEF ACT, S. 45.
45 C.W.N. 408.

——**Sch. XVII, R. 32**—'*Space*'—*Meaning of.*

The term "space" in R. 32 of Sch. 17 to the Calcutta Municipal Act means not merely the space between two buildings at the ground level but means the space between every part of the building to the boundary line of the land or building immediately opposite such part. (*Edgley, J.*) HIRENDRA NATH *v.* CORPORATION OF CALCUTTA. **I.L.R. (1941) 1 Cal. 435 = 196 I.C. 832 = 45 C.W.N. 413 = A.I.R 1941 Cal. 386.**

——**Sch. XVII, Rr. 91 and 94**—*Intention of—Buildings erected before existing rules.*

The existing rules do not operate for the purpose of compelling the demolition of any masonry structure which was erected before they came into operation, and their general intention seems to be to ensure compliance with them as regards alterations of and additions to an existing building, while the original structure of such building may be left in tact. This is clearly the intention of R. 91 in respect of the space at the back of buildings, and the same intention underlies R. 94. (*Edgley, J.*) HIRENDRA NATH *v.* CORPORATION O CALCUTTA. **I L.R. (1941) 1 Cal. 435 = 196 I.C. 832 = 45 C W N. 413 = A.I.R. 1941 Cal. 386.**

——**Sch. XVII, R. 94**—*Relaxation of rules—Power of Corporation.*

CANADA SEDUCTION ACT (1922), S. 5.

Under R. 94 of Sch. 17 to the Calcutta Municipal Act, the power of the Corporation to relax the operation of the rules is severely restricted. If an addition is proposed to an existing building, any relaxation can only be allowed for the purpose of preventing the demolition of any material part of the existing building, which may have been constructed on the space which is required to be left open under the rules contained in Sch. 17. R. 94 was certainly not framed with the object of allowing additional encroachments on the minimum space which the Legislature considered necessary for the purpose of providing ventilation and sanitation. (*Edgley, J.*) HIRENDRA NATH *v.* CORPORATION OF CALCUTTA.
I.L.R. (1941) 1 Cal. 435 = 196 I.C. 832 = 45 C.W.N. 413 = A.I.R. 1941 Cal. 386.

CANADA SEDUCTION ACT (1922), S. 5—Right of action under—Conditions. *See* 1940 Dig., Col. 150. BROWNLEE *v.* VIVIAN MACMILLAN. **191 I.C. 433 = 13 R.P.C. 136 = 7 B R. 319 = 1941 O.L.R. 35.**

CANTONMENTS (HOUSE ACCOMMODATION) ACT (VI OF 1923), S. 29 (2) and Limitation Act, S. 5—*Appeal under Special Act—S. 5, Limitation Act, if applies.*

S. 5 of Limitation Act is not applicable to the case of appeals under the Cantonment (House Accommodation) Act, as the latter is a special Act. (*Baipai and Dar, JJ.*) CHHEDA LAL *v.* OFFICER COMMANDING.
I.L.R. (1941) All. 356 = 194 I.C. 404 = 13 R.A. 500 = 1941 A.L.J. 267 = 1941 A.L.W. 322 = 1941 O.W.N. 453 = 1941 O A. (Supp.) 195 = 1941 A.W.R. (H.C.) 122 = A.I.R. 1941 All. 207.

CATTLE TRESPASS—*Damage done by cattle of various persons—Allocation of extent of damage by each not possible—Damage to which plaintiff would be entitled.*

Where a plaintiff complains of damage to his crops by the cattle of different persons and there is nothing to show the extent of damage by each set of cattle, the plaintiff can only be awarded nominal damages. (*Agarwal, J.*) HAR KRISHNA LAL *v.* QURBAN ALI.
196 I.C. 685 = 14 R.O. 188 = 1941 O L.R. 730 = 1941 O.W.N. 1124 = 1941 O A. 832 = 1941 A.L.W. 948 = 1941 A.W.R. (Rev.) 938.

CAUSE OF ACTION. *See* PRACTICE—CAUSE OF ACTION.

CENSUS ACT (XXIV OF 1939), S. 11, Proviso—*Prosecution for giving false answer to census officer under Ss. 193 and 417. I. P. Code—Sanction of Provincial Government—If necessary.*

Having regard to the proviso to S. 11 of the census Act, a prosecution cannot be instituted under Ss. 193 and 417, I. P. Code, for giving a false answer to a question put by a census officer except with the previous sanction of the Provincial Government or of an authority authorised by them. (*Derbyshire, C. J. and Bartley, J.*) EMPEROR *v.* HARIDAS UKIL. **45 C W.N. 902 = 74 C L.J. 204 = A.I.R. 1941 Cal. 715.**

CENTRAL PROVINCES COURTS ACT (I OF 1917), S. 26, (Prior to amendment)—*Construction—Additional District Judge taking on file case which he ought not to have tried—If acts without jurisdiction—If a curable irregularity.*

Prior to its amendment, S. 26 of the Central Provinces Courts Act drew a distinction between 'jurisdiction' 'powers' and 'control'. The section makes the additional District Judge subject to the control of the District Judge but it does not take away or limit the 'jurisdiction' and 'powers' which earlier part of the section had already conferred upon them. Therefore if by some accident or mistake one of the Additional District Judges happens to take on file and try a case which, according to the distribution memorandum, he ought not to have tried, then he cannot be said to be acting without jurisdiction and in the absence of objection at the earliest stage, it will not be permitted to be raised at any later stage. The defect would be a curable irregularity. (*Stone, C.J. and Bose, J.*) MANIKSA *v.* ANNA. **1941 N.L.J. 625.**

C. P. DEBT CONCIL. ACT (1933), S. 8.

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), Ss. 2 (e) and 15—Debt—Personal debts of deceased coparcener of joint Hindu family—Surviving coparceners' liability—Issue of a certificate in respect of effect. *See* 1939 Dig., Col. 119. BAPU SAHEB *v.* BHAGIRATHISAO. **I.L.R. (1941) Nag. 334 = 194 I.C, 895 = 14 R.N. 27.**

——S. 2 (e)—*Interpretation—'Recoverable as an arrear of land revenue', meaning of—Arrears of Theka-Jama—If comes within purview of the Board.*

The words 'recoverable as an arrear of land revenue' in S. 2 (*e*) of the Debt Conciliation Act should be given their natural meaning, that is, to treat them as words of description. Looked at from this point of view, the definition means that if a debt could be recovered in conceivable circumstances as an arrear of land revenue, then it is excluded from the definition. Arrears of Theka-Jama are recoverable as arrears of land revenue and so the Debt Conciliation Officer has no power to include such Theka-Jama within the purview of his proceedings. (*Bose, J.*) HARCHARNLAL *v.* HIRDESINGH. **195 I.C. 522 = 14 R,N. 53 = 1941 N.L.J. 150 = A.I.R. 1941 Nag. 161.**

——S. 4—*Prescribed—Meaning of—Increase of pecuniary limit by notification—Legality—Rule and notification—Difference.*

The word 'prescribed' occurring in S. 4 of the C. P. Debt Conciliation Act can have only its defined meaning of 'prescribed by rules'. Hence where the pecuniary limit fixed in the Act is altered by means of a Government notification, and not by rule as required by the Act, there is no lawful alteration of the pecuniary limit. The difference between a notification and a rule is that a rule is not a rule until there has been prior publication which opens to the public the opportunity to object, whereas a notification can lie without any prior publication and no one has a chance to object before the notification becomes operative. (*Stone, C.J. and Bose, J.*) MANAGER, COURT OF WARDS *v.* SETH MOOLCHAND. **I.L.R. (1941) Nag. 279 = 1941 N.L.J. 351 = A.I.R. 1941 Nag. 226.**

——Ss. 7 and 8—*Absence of notice—Validity of subsequent proceedings.*

Where the notice required by S. 7 (2) of the Central Provinces Debt Conciliation Act is not issued, there is no proper or effective admission of the petition and hence all subsequent proceedings are not legal and valid. (*Stone, C J. and Bose, J.*) NAVROO *v.* ZILLIMAL. **1941 N.L.J. 220.**

——Ss. 8 and 9 A—*Absence of verification of statement—If a curable irregularity.*

It is not every irregularity in the statement that can be held to invalidate it and thus bring into operation the very harsh provisions of S. 8 (2). In each case it must be a question for decision whether the particular irregularity is so fatal as to go to root of the matter and make the statement in point of law no statement at all. S. 9-A is no doubt mandatory in its terms as to verification of statements. But the absence of verification is only an irregularity which is curable and not fatal. Where it has been allowed to get in without objection and been acted upon, it must be regarded as a proper statement.

C. P. DEBT CONCIL. ACT (1933), S. 8.

(*Bose, J.*) ABDUL MAJID KHAN *v.* DIGAMBAR JAIRAM. **I.L.R. (1941) Nag. 428 = 1941 N.L.J. 250 = A.I R. 1941 Nag. 249.**

——**Ss. 8 (2) and 16**—Debt declared discharged—Effect of outside the Province—Promissory note executed in Bombay—Declaration of discharge by C. P. Debt Conciliation Board—Suit on promissory note in Bombay—Maintainability—Jurisdiction—Contract—Suit—Law applicable. *See* 1940 Dig., Col. 152. SHANKAR VISHNU *v.* MANEKLAL HARIDAS. **I.L.R. (1940) Bom. 799 = 191 I.C. 653 = 13 R.B. 193**

——**S. 8 (2)**—*Debts declared discharged—How far binding on Civil Courts.*

The operation of S. 8 (2) of the C. P. Debt Conciliation Act is independent of the Board and is automatic. The Civil Court has in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic; if they were not present then no order of the Board purporting to discharge the debt for the reason given in S. 8 (2) is binding on a Civil Court. (*Bose, J.*) ABDUL MAJID KHAN *v.* DIGAMBAR JAIRAM. **I.L.R. (1941) Nag. 428 = 1941 N.L.J. 250 = A.I R. 1941 Nag. 249.**

——**Ss. 8 (2), 9 (1) and 9-A**—*Statement signed and filed by creditor's son—Sufficient compliance with requirements.*

A statement signed and filed by a creditor's son with his father's authority is a valid statement as required by S. 9 (1) of the Central Provinces Conciliation Act to be filed. When it is filed the debt to which statement refers cannot be declared to have been discharged under S. 8 (2). Any defect in procedure cannot affect the substance of a party's claim. (*Niyogi, J.*) NETRAM *v.* BHAGWAN. **1941 N.L.J. 151 = A.I R. 1941 Nag. 159.**

——**S. 9**—*Admission by debtor of agreement to pay sum due on bond—S. 9 does not operate.*

Where there is an admission by the debtor of an agreement to pay the sum due on a bond it is not necessary to prove the bond. Therefore S. 9 does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. (*Stone, C. J. and Vivian Bose, J.*) UDHAO NANAJI *v.* NARAYAN VITHOBA. **194 I.C. 120 = 13 R.N. 356 = 1941 N.L.J. 134 = A.I.R. 1941 Nag. 95.**

——**Ss. 13 and 12**—*Assignee of creditor—Right to recover instalments.*

In the absence of any specific provision in the C P. Debt Conciliation Act, excluding an assignee or legal representative of the creditor from the advantages of the procedure provided in sub-S. (1) of S. 13 of the Act, there is no reason for holding that the word 'creditor' in S. 13 is to be construed in the narrow sense of the definition contained in sub S. (2) (*d*), having regard to the proviso to that section or as being limited to an actual signatory to the agreement under S. 12 of the Act Hence it is open to an assignee of a creditor to apply for the recovery of arrears of instalments. (*Burton, F.C.*) GOPAL *v.* MADHAO. **1941 N.L.J. 317.**

——**S 15 (2) and Civil Procedure Code, S. 34**—*Scope of S. 15 (2) of Debt Conciliation Act—Principle in awarding costs.*

S. 15 (2) of the C. P. Debt Conciliation Act does not prevent the Court from allowing interest and the section is so framed as to enable the Court to allow interest should it think proper. On the other hand, it does not fetter the discretion which S. 34, C. P. Code, confers except as to rate. When exercising its discretion the Court should act in such a way as not to frustrate the general intention of the Debt Conciliation Act and should not give an unreasonable creditor an advantage over the reasonable one. (*Stone, C.J. and Bose, J.*) SETH SHEOLAL *v.* DADDIGSINGH. **1941 N.L.J. 591.**

C. P. LAND REVENUE ACT (1917), S. 39.

CENTRAL PROVINCES LAND ALIENATION ACT (II OF 1916), S. 9—*Mortgage prior to Act—Subsequent declaration of mortgagor to be a member of an aboriginal tribe—Mortgage, if affected.*

Where a mortgage was executed prior to the passing of the Central Provinces Land Alienation Act and subsequently it was notified under the Act that the tribe to which the mortgagor belonged was an aboriginal tribe, S. 9 of the Act could not affect the mortgage or any decree passed in respect of it because, it was not a mortgage made by a member of an aboriginal tribe after the commencement of the Act which alone are affected by the Act. The commencement of the Act in S. 9 refers to the date promulgated under S. 1 (3). (*Clarke, J.*) JANKILAL *v.* THE D.C., BILASPUR. **196 I.C. 360 = 14 R.N. 101 = 1941 N.L.J. 224 = A.I R. 1941 Nag. 163.**

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917)—Malguzar—Right to take water from jointly owned village tank. *See* 1940 Dig., Col. 155. RAMJI *v.* TANYABAPU. **I.L.R. (1941) Nag. 299.**

——**S. 2 (17) and Central Provinces Tenancy Act (1920), S. 49**—*Revival of* sir *right—Re-acquisition of a portion of proprietary right, if enough—Beneficial construction of S. 2 (17) of the C. P. Land Revenue Act and S. 49 of C.P. Tenancy Act.*

Each co-sharer has an undivided though defined interest in the whole. Each is possessed of 'proprietary right' in that sense, to the extent of his share. Hence, the moment that an ex-proprietary tenant acquires a portion of the 'proprietary right', whether to the same extent owned by him prior to the transfer by which he lost it or to any lesser extent, he re-gains his proprietary rights in the *sir* and the land thereupon ceases to be occupancy land. S. 2 (17) of the C P. Land Revenue Act and S. 49 of the C. P. Tenancy Act being intended for the benefit of the proprietor of *sir* land, any ambiguity should be resolved in their favour. (*Bose, J.*) KESHAORAO BAPUJI *v.* GANESHRAO SHAMRAO. **1941 N.L.J. 527 = A.I R. 1941 Nag. 351.**

——**S. 33**—*Legal decision by commissioner in appeal—Appeal to Financial Commissioner—If a third appeal.*

Where in the course of an appeal the Commissioner comes to a legal decision an appeal therefrom to the Financial Commissioner cannot be considered to be a third appeal, for the Commissioner's order is the first decision in proper form. (*Binney, F. C.*) SARDARMAL *v.* RAMKHILAWAN. **1941 N.L.J. 454.**

——**S. 33 (2) (c) (1)**—*Second appeal—Point not raised in trial Court—If can be raised.*

Under S. 33 (2) (*c*) (i) of the Central Provinces Land Revenue Act a second appeal is admissible in respect of any order on the ground that it is contrary to law. There is no prescription that the ground in question must have been raised in the original case or in the first appeal and in the absence of such a prohibition, a new ground raised in second appeal cannot be excluded merely because it was not pleaded previously. (*Burton, F.C.*) GHAISSO SAKHARAM *v.* DAYARAM. **1941 N.L.J. 233.**

——**Ss 39 and 148**—*Confirmation prior to expiry of 30 days after sale—If curable—Objection not raised—Power of Court to deal with.*

Where a sale is confirmed before the expiry of 30 days from date of sale, it is an illegality which cannot

C. P. LAND REVENUE ACT (1917), S. 39.

be cured merely by the absence of any objection or the subsequent expiry of 30 days. It must be dealt with under the powers conferred by S. 39 of Central Provinces Land Revenue Act. (*Burton, F. C.*) DAULAT DEOMAN *v.* RAMESHWAR DILSUKH MARWADI.
1941 N.L.J. 109.

——**S. 39 and Central Provinces Tenancy Act (1920), S. 107 (2)**—*Scope of revisional powers—Order of ejectment under S.* 24 (3), *Tenancy Act—If revisable.*

S. 39 of the C. P. Land Revenue Act gives the Deputy Commissioner power to revise the order of any Subordinate Revenue Officer and this power is not restricted to proceedings under the Land Revenue Act and can be used to revise all orders passed by Revenue Officers whether under the Land Revenue Act or not. The existence of an alternative remedy does not exclude revisional jurisdiction. It was held that an order of ejectment under S. 24 (3) of the Tenancy Act could be revised by virtue of the powers conferred by S. 39 of the Land Revenue Act read with S. 107 (1) of the Tenancy Act by the Deputy Commissioner. (*Binney, F.C.*) SHANKAR JAGANNATH *v.* SUNDRABAI KRISHNAJI. **1941 N.L J. 564.**

——**S** 45—Khasra and village administration paper—Contents of—Conflict between—Preference. *See* 1940 Dig., Col. 155. RAMJI *v.* TANYABAPU.
I.L.R. (1941) Nag. 299.

——**S. 47**—*Deity recorded as proprietor—Death of* sarberakar—*Effect—Procedure to be followed.*

Where a deity is recorded as the proprietor and the *sarberakar* dies though there is no change in the proprietary right, there is a change in the description of the proprietor and a subsidiary change of this nature must be recorded in the revenue records. It is in fact a transaction affecting proprietary rights within the meaning of S. 47, C. P. Land Revenue Act. Hence a claim to have succeeded a *sarberakar* must be considered by the Revenue Courts. (*Binney, F.C.*) GAJENDRA SINGH *v.* MAHANT RAM DAS. **1941 N.L.J. 548.**

—— **S. 67**—*Purchaser of portion of plot of* malik-makbuza—*Right to apportionment of revenue.*

Though a person may acquire the interest of a *malik makbuza* in a part of his plot, he does not thereby become a *malik-makbuza*. It is open to him to apply under S. 67 of the C. P. Land Revenue Act and until he is declared a *malik makbuza* of the definite area over which he has acquired proprietary right, the land revenue fixed at settlement continues to be a charge on the whole of the plot and there is no separate liability regarding each field. The Land Revenue Act contains no provision for apportionment of land revenue fixed at settlement. (*Binney, F.C.*) SETH RATANLAL HARLALJI *v.* PANNA LAL GUJAR. **1941 N.L.J. 553.**

——**S. 70**—Scope. *See* 1940 Dig., Col. 156. RAMJI *v.* TANYABAPU. **I.L.R. (1941) Nag. 299.**

——**S. 75**—*Applicability.*

S. 75 of the Central Provinces Land Revenue Act has reference only to those cases in which one person holds an estate or Mahal while another person is required to pay the land revenue thereof. (*Burton, F.C.*) KASHI PRASAD *v.* RAMJILAL. **1941 N.L.J. 239.**

——**S. 106**—*Scope and intention of.*

The intention of S. 106 of the Central Provinces Land Revenue Act is that if a claim which could have been inquired into or dealt with by the settlement officer in current settlement after the enactment of 1917, but was not so dealt with, the Deputy Commissioner should inquire into it or that if there were a claim in respect of which the settlement officer had not the opportunity to deal that is because a settlement had not occurred since the section was enacted, the Deputy Commissioner should inquire into it. If action has been taken under S. 75 it cannot be reopened during the currency of the settlement. (*Burton, F.C.*) KASHI PRASAD *v.* RAMJILAL. **1941 N.L.J. 239.**

C. P. LAND REVENUE ACT (1917), S. 187.

——**S. 109**—Succession to tenure of protected thekadar—Principle governing. *See* 1940 Dig., Col. 156. NARHARI *v.* MAHARANI.
I.L.R. (1941) Nag. 673.

——**Ss. 142 and 144**—*Deposit—Creditor, if can bid and claim set-off.*

There is no provision corresponding to O. 21, R. 72, C. P. Code, in the Central Provinces Land Revenue Act to enable the creditor to bid and claim to set off the amount due to him against the amount to be deposited by him. (*Burton, F. C.*) DAULAT DEOMAN *v.* RAMESHWAR DILSUKH MARWADI.
1941 N.L.J. 109.

——**Ss. 147 and 141 (3)**—*Postponement of sale—Absence of advertisement—Legality.*

Postponement of sale from time to time under S. 141 (3) of the C. P. Land Revenue Act is permitted in order to give an opportunity for higher bids, but the power of postponement is specifically restricted by S. 147, which must be considered to be mandatory. Where on the day fixed there were no bidders and it is adjourned to another day and again adjourned to a date a month hence owing to want of bidders, it is a case of postponement and not of continuing sale and if it is held without advertisement it is without jurisdiction. (*Binney, F.C.*) NARAYAN HARIHAR *a.* BULAKIDAS.
1941 N.L.J. 479.

——**S. 151**—*Sale under Land Revenue Act of exclusively held* sir—*Right to pre-emption.*

The co-sharers have no right under S. 151, C.P. Land Revenue Act, of pre emption in respect of sale under the Act of *sir* plots held in exclusive possession by the defaulter. (*Binney, F.C.*) SHALIGRAM *v* SHYAMLAL.
1941 N.L.J. 501.

——**S. 151**—*Scope and applicability—Sale by Collector under S.* 60, *Provincial Insolvency Act—If can be pre-empted.*

S. 151, Central Provinces Land Revenue Act, gives privileges to a certain class of persons and it must be construed strictly. It does not apply at all to sales made by Courts. A sale by the Collector in compliance with the statement forwarded to him under S 60 of Provincial Insolvency Act is not one to which S. 151 of the Central Provinces Land Revenue Act would apply. Hence pre-emption could not be allowed in respect of such a sale. (*Binney, F.C.*) RAMLAL *v.* GULAB CHAND. **1941 N L.J. 651.**

——**S. 173**—*Partition*—Malik-makbuza *plots, how to be distributed—Rights of proprietors of* mahal

The proprietors of a *mahal* have no right or interest in the *malik-makbuza* plots and hence cannot insist that these should be included in the partition. These plots should ordinarily be distributed among the pattis according to their position. (*Binney, F.C.*) DASHRATH GANPATI *v.* ASSARAM BAXI. **1941 N.L.J. 550.**

——**S. 187**—*Lambardar—Appointment—Value to be attached to wishes of co-sharers—Computation—Basis—Hereditary claims—When to count.*

It is intended that every co-sharer shall have a voice in the appointment of the lambardar which will carry weight according to the interest possessed by the co-sharer. Hereditary claims should obviously turn the balance where there is no great difference between the interests possessed by the candidates. (*Binney, F. C.*) SARDARMAL *v.* RAMKHILAWAN. **1941 N.L.J. 454.**

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——**S. 187**—Minor lambardar—Exercise of powers —Procedure. *See* 1940 Dig., Col. 157. BRIJ MOHAN SINGH *v.* TULSIRAM. **193 I.C. 75=13 R.N. 291.**

——**S. 187**—*Sadar lambardar—Selection—Interest of the candidates—Calculation.*

Where one of the candidates for the post of sadar lambardar possesses jointly with his deceased brother's widow a greater share than his competitor, he should be selected though the share in his own right may be less than that of his rival. (*Greenfield.*) CHANDIPRASAD *v.* KADHESHYAM. **1941 N.L.J. 174.**

——**S. 187 (3)**—Interpretation—'The duties of the office'. *See* 1940 Dig., Col. 157 BRIJ MOHAN SINGH *v.* TULSIRAM. **193 I.C. 75=13 R.N. 291.**

——**S. 187 (5)**—*Lambardari Rules—R.* 11 (2)—*Sadar lambardar—Selection—Considerations—Minority, if a disqualification.*

According to sub-R. (2) of R. 11 of the Lambardari Rules, regard should be had to the wishes of the lambardars and to the interests represented by them, in the matter of selection of a sadar lambardar. The wishes of the co-sharers as such are not relevant. Minority is not a disqualification for such appointment. (*Greenfield.*) BHAGWANSINGH *v.* ANTAR SINGH. **1941 N.L.J. 173.**

——**S. 188 and Central Provinces Tenancy Act (I of 1920), Ss. 2 (7) and 49**—*Lambardar—Right to recover rent—Ex-proprietary occupancy tenant.*

Stone, C.J., and Bose, J., contra.—An ex-proprietary occupancy tenant holds land of the lambardar if the transferring co-sharer had not acquired exclusive ownership over his *sir* land of which he became the tenant. The ownership of the land still remaining with the body of the proprietors of the village, the ex-proprietary tenant would be deemed to hold land of the proprietary body; but on the other hand if there was division of title so as to make the co sharer exclusive proprietor of the *sir* land appurtenant to his share he would on the transfer of his proprietary right, become the occupancy tenant of his transferee. The entire proprietary right in the land which before the transfer was *sir* and after it became an occupancy land would vest in the transferee and he alone would become the proprietor and landlord of it. The transferor to whom occupancy right accrues in pursuance of S. 49, C. P. Tenancy Act, must be deemed to be holding his land from the proprietor of the land, namely, the transferee, and would be liable to pay rent to him and to no one else. In such a case the lambardar cannot be deemed to be the landlord of either the *sir* land which has passed into the exclusive ownership of one of the co-sharers or of the ex-proprietary occupancy land when the exclusive owner of it disposes of his proprietary right in his exclusive *sir*. When however there is no partition involving division of title but only an arrangement for separate enjoyment and appropriation of profits, the lambardar would be bound to hand over the rent collected by him to the particular co-sharer entitled to it but since the lambardar does not cease to be a co-sharer in respect of land so exclusively held by the other, the tenant of that land will, in point of law, be deemed to be the tenant of the whole proprietary body. Consequently the lambardar as the agent of that body will, by virtue of S. 188 (2), C. P. Land Revenue Act, be entitled to recover the rent. (*Stone, C J., Grille, Niyogi, Gruer and Bose, JJ.*) GOPAL *v.* SHAMRAO.

I.L.R. (1941) Nag. 54=192 I C. 472= 13 R.N. 248=1941 N.L.J. 56= A.I.R. 1941 Nag 21 (F.B.).

——**S. 189**—Removal from office of persons mentioned in—Grounds. *See* 1940 Dig., Col. 158. BRIJ MOHAN SINGH *v.* TULSIRAM. **193 I.C. 75=13 R.N. 291.**

C. P. LOCAL SELF-GOV. ACT (1920), S. 73.

——**S. 192 (2)**—*Mukaddam—Calculation of remuneration of.*

Under S. 192 (2) of the C. P. Land Revenue Act the mukaddam is entitled to a percentage of the land revenue payable by the lambardar. The malik makbuza revenue is included in this unless there has been a notification under the proviso to S. 123 as to payment to Government direct. Proviso (ii) to S. 192 (1) does not qualify proviso (1) to S. 192 (2). It only specifies that the lambardar cannot recover anything from a malik makbuza. (*Binney, F.C.*) LOBHILAL CHUNNILAL *v.* JAIRAM. **1941 N.L.J. 607.**

——**S. 196**—*Remuneration of Kotwar—Land broken from waste.*

The Kotwar should get dues on land broken from waste since settlement. (*Binney, F.C.*) WAMAN PRASAD *v.* HARIDAS PANKA. **1941 N.L.J. 557.**

——**S. 203**—Sites in abadi—Power to distribute—Co-sharer, if can purchase. *See* 1940 Dig., Col. 158. NILKANTH *v.* VISHWANATH. **I.L.R. (1941) Nag. 571=192 I.C. 291=13 R.N. 231.**

——**S. 222**—*Scope and effect of—If bars plea in defence of possession—Rule of interpretation.*

S. 222 of the Central Provinces Land Revenue Act debars the claim to the demarcated waste lands after the expiry of three years from date of demarcation. But the failure of a party to lodge his claim within three years specified in S. 222 cannot deprive him of his right to defend his possession. S. 222 is capable of being viewed either as laying down a rule of limitation or prescription. In the former case failure to assert a claim within the time specified would only bar the remedy, while in the latter case, it would destroy the right. The one important condition for the application of the rule of prescription is that the claimant must be out of possession. The rule of prescription cannot operate against a person in possession. Hence the section cannot be interpreted as laying down a rule of prescription. (*Niyogi, J.*) PROVINCIAL GOVERNMENT, C. P. AND BERAR *v.* KESHRICHAND. **I.L.R. (1941) Nag. 538= 197 I.C. 33=1941 N L.J. 378= A.I.R. 1941 Nag 300.**

CENTRAL PROVINCES LOCAL FUND AUDIT ACT (1933), S. 14—*District Judge dealing with cases under the Act if acts as a Court—Application under S. 14—Appeal—Court-fee payable.*

From a reading of the various provisions of the C. P. Local Fund Audit Act it is clear that the District Judge is not intended to act as a Court but as a special tribunal. In an appeal arising out of an application under S. 14 of the Act, no court-fee is payable, for it does not come under any other clauses of the charging section of the Court-Fees Act (*i.e.*) S. 4. (*Bose, J.*) MORESHWAR *v.* COMMISSIONER, CHATTISGARH. **194 I.C. 731=14 R.N. 7=1941 N.L.J. 42= A.I.R. 1941 Nag. 129.**

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920) S. 73 (1)(2)—*Applicability—Suit for rent due by the Council in respect of school premises.*

S. 73 of the C. P. Local Self-Government Act does not apply to a suit for the recovery of rent which the Council failed to pay to the owner in respect of the school premises. The period of limitation will not be that which is provided by sub-S. (2) but the period provided by the ordinary law of limitation. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULAT RAO. **197 I.C. 76=1941 N.L.J. 371= A.I.R. 1941 Nag. 273.**

C. P. LOCAL SELF-GOV. ACT (1920), S. 75.

——**S. 75**—*Contract in breach of—If void.*

As the legislature has enacted that the breach of the provisions of S. 75 of the C. P. Local Self-Government Act shall be deemed to be an offence under I. P. Code, the provision of law is intended to protect the public and its breach is therefore impliedly prohibited and therefore illegal. A contract in breach of S. 75 is void. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76 = 1941 N L.J. 371 = A.I.R. 1941 Nag. 273.**

——**S. 75**—*Interpretation.*

S. 75 of the C. P. Local Self-Government Act does not necessarily mean that if a member, officer or servant of a committee is interested in a contract with the District Council he shall be deemed to have committed an offence. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76 = 1941 N.L J. 371 = A I R. 1941 Nag. 273.**

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934)—*Applicability—Onus—Money-lender, who is.*

The Central Provinces Money-Lenders Act only applies to money lenders and therefore before it can be applied it must be shown by the person seeking to apply it and take advantage of its provisions, that the plaintiff is a money-lender. The word 'regular' in the definition of a 'money-lender' shows that the plaintiff must have been in the habit of advancing loans to persons as a matter of regular business. An isolated act of money-lending does not constitute it a regular course of business. It is an act of business but not necessarily an act done in the regular course of business. (*Bose, J.*) SITARAM SHRAWAN *v.* BAJYA PARNYA. **195 I.C. 463 = 14 R.N. 49 = 1941 N.L.J. 194 = A I.R. 1941 Nag. 177.**

CENTRAL PROVINCES MOTOR VEHICLES TAXATION ACT (II OF 1922), S. 3 (1), Proviso—Effect of amendment—Tax in C. P. Municipalities Act, meaning of. *See* 1939 Dig., Col. 129. AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **I.L.R. (1941) Nag. 294.**

——**S. 85**—Rules framed under—Applicability—Application for refund of sums recovered as tax. *See* 1939 Dig., Col. 129. RAMLAL *v.* MUNICIPAL COMMITTEE, NAGPUR. **I.L.R. (1941) Nag. 471.**

——**(as applied to Berar), S. 179 (g)**—Rules under—R. 1—Words "plying for hire within limits of Amraoti Town Municipality"—Interpretation. *See* 1939 Dig., Col. 130. AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **I.L.R. (1941) Nag. 294.**

——**S. 203 (3)**—Usufructuary mortgage—Position of mortgagee—Suit to eject him and for possession—Limitation—If Art. 142 or 144 or 126 of the Limitation Act applies. *See* 1939 Dig., Col. 128. KUWARJI *v.* BHURELAL. **I.L.R. (1941) Nag. 337.**

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922) and Bye Laws—'Gross annual letting value'—Meaning of—If includes payments by tenants as taxes. *See* 1940 Dig., Col. 159. P. V. DIXIT *v.* MUNICIPAL COMMITTEE, NAGPUR. **I.L.R. (1941) Nag. 323 = 192 I.C. 762 = 13 R.N. 277.**

——Tax imposed by Municipal Committee, Nandura, on trade of ginning—Nature of. *See* 1940 Dig., Col. 160. ONKARSA *v.* MUNICIPAL COMMITTEE OF NANDURA. **193 I.C. 473 = 13 R.N. 327.**

——**Ss. 31 (2) and 23**—'To convene' in S. 31 (2), meaning of—Issue of notices signed by the Secretary—Presumption—Failure to convene by President—If curable by S. 23—Validity of meeting if affected. *See* 1940 Dig., Col. 160. ONKARSA *v.* MUNICIPAL COMMITTEE OF NANDURA. **193 I.C. 473 = 13 R.N. 327.**

C. P. MUNICIPALITIES ACT (1922), S. 97.

——**S. 66 (1)**—Assessment of conservancy cess and water rate—Land held on lease from Municipality—Gross letting value—If to be taken into account. *See* 1940 Dig., Col. 161. SUMATIBAI *v.* MUNICIPAL COMMITTEE, NAGPUR. **I.L.R. 1941 Nag. 330.**

——**S. 67 (7) and (8)**—Notification—Failure to mention sub-Cl. (7)—Failure to mention date from which tax was to come into effect—If affects validity of notification. *See* 1940 Dig., Col. 161. ONKARSA *v.* MUNICIPAL COMMITTEE OF NANDURA. **193 I.C. 473 = 13 R.N. 327.**

——**Ss. 71 and 76**—*Rr.* 1°, 20 *and* 21 *of rules made under for assessment and collection of bicycle tax—If* ultra vires.

The charge of 0-4-0 levied along with the recovery of cycle tax and in addition to it, is a tax and Rr. 20 and 21 framed by the Local Government in this behalf is *ultra vires* and inoperative. R. 19 is in direct contravention of S. 72 and it is therefore equally *ultra vires* and of no effect. (*Niyogi, J.*) VINAYAK *v.* MUNICIPAL COMMITTEE, AKOLA. **196 I.C. 578 = 14 R.N. 117 = 1941 N.L.J. 165 = A.I.R. 1941 Nag. 232.**

——**S. 83**—*Reference to High Court—Commissioner, if competent to make.*

A commissioner is competent to hear an appeal from a Deputy Commissioner and he must be deemed to have the same powers as are conferred on a Deputy Commissioner under S. 83 of the Central Provinces Municipalities Act. When a Deputy Commissioner is empowered by that section to make a reference to the High Court, a commissioner would be equally entitled to make a reference to the High Court. (*Niyogi, J.*) NAGPUR ELECTRIC LIGHT AND POWER CO., LTD. *v.* NAGPUR MUNICIPAL COMMITTEE. **I.L.R. (1941) Nag. 236 = 195 I.C. 147 = 14 R.N. 39 = 1941 N.L J. 137 = A.I R 1941 Nag. 137.**

——**Ss 97 and 98**—*Building bye-laws under, framed by Nagpur Civil Station Sub-Committee, bye-law* 10—*Sub Committee by resolution interpreting by law—Resolution if binding on subsequent meeting of Sub-Committee.*

The acts of one meeting are not absolutely binding on a subsequent meeting. A resolution by the Sub-Committee interpreting a bye-law in a particular way is not absolutely binding on the subsequent meetings of the Sub-Committee. (*Niyogi and Clarke, JJ.*) CAWASHAH BOMANJI *v.* PRAFULLA NATH. **A.I.R. 1941 Nag. 364.**

——**Ss. 97 and 98**—*Building bye-laws under, framed by Nagpur Civil Station Sub-Committee, bye-law* 10 *and bye-law* 10, *proviso* 1—*Construction of proviso* **1**—*Word "area" in proviso* 1—*Meaning—Resolution making bye-law* 10 (*a*) *and* (*b*) *applicable to bungalow area excepting basti area and new settlements and bye law* 10, *proviso* 1 *to settlements other than bungalow area—If* ultra vires.

Proviso 1 to bye-law 10 does not *proprio vigore* come into operation so as to make it obligatory on the Sub-Committee to grant permission to erect building on plots less than one acre, but it confers discretion on it to be exercised in each case on merits. The word 'area' in proviso 1 has reference to the plot and not to that part of the Civil Station which is popularly known as a 'bungalow area.' The plain meaning of proviso 1 is that if the committee decides to give permission to erect bungalows in plots less than one acre it should do so on the conditions laid down in that proviso, but it makes it clear that the committee has no power to permit a build-

C. P. MUNICIPALITIES ACT (1922), S. 133.

ing on any plot less than 50′ x 50′. The Civil Station Sub-Committee by a resolution declared generally that bye-law 10 (*a*) and (*b*) applied to the whole of the Civil Station area, that is bungalow area, excepting the basti area and new settlements and that proviso 1 to bye-law 10 would apply to the settlements other than the bungalow area.

Held, that in so far as the resolution was intended to be operative and not merely interpretive it was *ultra vires* and of no effect since its effect was to alter the bye-law. It was open to the Sub-Committee to frame a new bye-law on the lines of the resolution but that could be done only by the procedure prescribed in the C. P. Municipalities Act. (*Niyogi and Clarke, JJ.*) CAWASHAH BOMANJI *v.* PRAFULLA NATH.

A.I.R. 1941 Nag 364.

——**S. 133 (1) (c)**—*Licence—When necessary—Interpretation—Flour mill worked by electric motor*

Under S. 133 (1) (*c*) of the Central Provinces Municipalities Act, it is obviously not intended that any manufactory should require a licence whether offensive or unwholesome smells, noises or smoke arises from it or not. It cannot be said that no flour mill can be of a nature which requires a licence under this section, but this can be said that if a flour mill is to be licensable under this section it must be one from which offensive or unwholesome smells, noises or smoke arises. It was held that a flour mill worked by a small electric motor did not require licence. (*Clarke, J.*) MUNICIPAL COMMITTEE, BILASPUR *v.* WAMANRAO VINAYAKRAO.

1941 N.L.J 403=A.I.R. 1941 Nag. 292

——**Ss. 175 and 176**—*Rule-making powers of Government—Scope of—Sections, if permit taxation.*

S. 175 (1) of the Central Provinces Municipalities Act contains a limitation that the rules framed should be consistent with the Act. If rules framed under a statute are either in excess of or in contravention and inconsistent with the provisions of the statute, they must be regarded as *ultra vires* and ineffective. Neither S. 175 (1) nor S. 176 (1) of the Act confers on the Local Government expressly or by some necessary implication the power to impose pecuniary burdens for any public purpose. (*Niyogi, J.*) VINAYAK *v.* MUNICIPAL COMMITTEE AKOLA **196 I C. 578=14 R.N. 117=1941 N.L.J. 165=A.I.R. 1941 Nag 232.**

——**S. 179 (1) (b-1)**—*Bye-law under—Construction—Legality.*

A bye-law framed under Central Provinces Municipalities Act, S. 179 (1) (*b-1*) was as follows:—Buyers shall satisfy themselves as to the quality of any commodities before they are put to auction They shall not be allowed to cancel any purchase on the ground that they had not inspected the commodities or commodities were not up to sample. It was held that the bye-law in no way went against the general law of contract or the provisions of the Sale of Goods Act, but on the contrary emphasized them. Further, such a provision did not hamper trade, but on the contrary would help trade by introducing certainty into dealings and making people careful and avoiding subsequent futile disputes. (*Grille and Gruer, JJ.*) PROVINCIAL GOVERNMENT, C. P. *v.* NEMICHAND BEHARILAL. **I.L.R. (1941) Nag. 624=195 I C. 369=14 R.N. 51=42 Cr.L J. 732=1941 N L.J. 201=A.I R. 1941 Nag. 203.**

CENTRAL PROVINCES REDUCTION OF INTEREST ACT (XXXII OF 1936)—*Applicability—Loan, prior to the Act—Judgment in suit on the loan, after the withdrawal of the Act*

Where a loan was before the passing of the Reduction of Interest Act and the Act was withdrawn before the date of judgment in a suit on the loan, it was held that

C. P. TENANCY ACT (1898), S. 46.

the Act could not be applied to the case, and that when the prohibition contained in the Act was withdrawn the original rights of the parties revived and that Courts could not enforce prohibitions withdrawn and not in existence at the time of judgment. (*Bose, J.*) SITARAM SHRAWAN *v.* BAJYA PARNYA. **195 I.C. 463=14 R.N. 49=1941 N L J. 194=A.I R. 1941 Nag. 177.**

——**S. 3**—Applicability—Renewal in 1933 of bond executed in 1930. *See* 1940 Dig., Col 162. SHEOSHANKER SAHAI *v.* SURAJMAL. **193 I.C. 623=13 R.N. 341.**

——**S. 3**—*Duty of Court in administering the law.*

The Court would not be justified in adjudicating on the rights of the parties on a hypothetical case simply because that would be favourable to the class of persons for whose relief the special law was enacted. The Courts are bound to apply the law to the facts admitted or proved and not assume or invent facts to give the benefit of the law to one or the other party. Where the plaintiff claimed compound interest and the rate at which he could get compound interest under the law was also favourable to the debtor, the Court awarded the kind of interest asked for by the creditor. (*Niyogi, J.*) NARAYANDAS *v.* AMRUT WAMAN. **1941 N.L.J. 672.**

—— **S. 3**—*Mortgage in satisfaction of prior debts—Suit on—Reopening of old transactions, if permissible.*

Where a mortgage sued on was executed in satisfaction of certain prior debts evidenced by other deeds, the Court cannot go behind the suit mortgage and the C. P. Reduction of Interest Act could only be applied from the date of the debt in suit because that is the only liability now owing by the debtor to his creditors. (*Bose, J.*) PANDURANG *v.* RAM CHANDRA. **1941 N.L J 669.**

CENTRAL PROVINCES RELIEF OF INDEBTEDNESS ACT (XIV OF 1939)—Debt Relief Courts If 'Civil Courts.' *See* C.P. CODE, S. 9—CIVIL COURT. **1941 N.L.J 485.**

——**S. 6 (3)**—*Application under the Act by some only of defendants in mortgage suit—Stay as against them only—Legality.*

Where only some of the defendants in a mortgage suit apply under S. 6 of the C. P. Relief of Indebtedness Act and a notice is sent to the Civil Court under S. 6 (3) of the Act, inasmuch as the mortgage is one and indivisible, the proceedings have to be stayed as against all the defendants and not as against the particular applicant defendants only (*Clarke, J.*) KULESHWAR PRASAD *v.* DWARKANATH. **1941 N.L J. 391=A I.R. 1941 Nag. 268.**

——**S. 6 (3)**—Stay in pursuance of notice under—Remedy of aggrieved party. *See* C. P. CODE, S. 115 AND C. P. RELIEF OF INDEBTEDNESS ACT, S. 6 (3). **1941 N.L J. 391.**

——**S. 20**—District Court acting under—Power to make reference to High Court. *See* C. P. CODE, S. 113 AND O. 46, R. 1 AND C. P. RELIEF OF INDEBTEDNESS ACT, S. 20. **1941 N.L J. 485.**

——**S. 20**—*Order of District Court under—Revision by High Court—Competency.*

The High Court has no power to hear revision applications from decisions of the District Courts made under S. 20 of the C. P. Relief of Indebtedness Act. (*Stone, C.J. and Bose, J.*) HIRALAL ADKU *v.* PARASRAMSAO. **I.L.R. (1941) Nag. 581=1941 N L J. 480.**

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 46—Applicability — Lands ceasing to be agricultural and treated as non-agricultural. *See* 1940 Dig., Col. 163. PARMESHWAR PRASAD *v.* WALJI

C. P. TENANCY ACT (1920), S. 6.

CHHATRI. **196 I.C. 724 = 8 B.R. 89 = A.I.R. 1941 Pat. 352.**

——**(I OF 1920), S. 6**—*Application under on strength of registered transfer—Progress of proceedings—Subsequent dismissal for default of appearance—Second application on strength of delivery of possession under the original transfer—Maintainability.*

Where an application for pre-emption was made on the ground of a transfer under a registered deed and after its admission and progress of proceedings for some time, it was dismissed for default of appearance of parties and a fresh application was put in on the strength of delivery of possession under the original transfer, it was *held* that the second application was not maintainable and that the delivery of possession did not constitute a different transaction and a different cause of action for purposes of S. 6 of C. P. Tenancy Act. (*Burton, F. C.*) GANGADHAR *v.* PURUSHOTTAM. **1941 N.L.J. 175.**

——**(S.** —Transfer of occupancy holding—Liability for rent. *See* 1939 Dig., Col. 130. SHREE VITHAL BHAGWAN MANDIR *v.* NARAYAN RAO. **I.L.R. (1941) Nag. 369.**

——**S. 6 (6)**— *Amount fixed for pre-emption, not paid within time allowed—Effect—Filing of appeal—If extends time.*

The right of pre-emption is a very special right and the person who claims it must comply strictly with all the conditions imposed on him. Where under S. 6 (6) of the C. P. Tenancy Act the value has been fixed and directed to be deposited within a particular time and it is not paid, the right is lost. An appellate Court in an appeal against the order has power to stay execution of the order. But the Court must be asked to do it. The filing of an appeal will not by itself operate as a stay. (*Greenfield.*) SHESHRAO *v.* MORESHWAR. **1941 N.L.J. 50**

——**S. 9**—Nature and scope of the charge created by—Rights of subsequent mortgagees paying the rent due by the tenant. *See* 1940 Dig., Col. 163. SITARAM *v.* KRISHNA RAO **I.L.R. (1941) Nag 607.**

——**Ss. 12 and 13**—*Surrender to lambardar and sale by latter—Validity.*

Though the transaction of a surrender by the tenant to the lambardar and the sale by him to another in proprietary right take place within 3 days of each other, it cannot be held to be one transaction constituting a transfer of an occupancy right and could not be questioned. (*Binney, F.C.*) JANRAO BHAGWANTRAO *v.* PRAHLAD BAJIRAO. **1941 N.L J. 502.**

——**Ss. 12, 13 and 35**—*Surrender in favour of one, not a lambardar—Remedy of lambardar.*

Where there has been a transfer in violation of S. 12 of C. P. Tenancy Act, the proper course for the lambardar is to proceed before the Revenue authorities. If it is treated as if there has been no transfer, then the lambardar must determine the tenancy before seeking possession. (*Stone, C.J. and Niyogi, J.*) MAHOMED KHUDA BUX *v.* RAMCHANDRA RAO. **1941 N L J. 497 = A.I.R. 1941 Nag. 328**

——**S. 13**—*Lambardar failing to take action under—If can sue for joint possession.*

A lambardar who omitted to apply under S. 13, C. P. Tenancy Act, for possession of an occupancy holding surrendered by the tenant to his co-sharer can sue his co-sharer in the Civil Court for joint possession of the holding because when a lambardar sues his co-sharer in the Civil Court for joint possession of the holding he is so suing as co sharer, which he may do in spite of the fact that he could as lambardar sue to set aside the transfer under S. 13 of the Act and claim to be put into

C. P. TENANCY ACT (1920) S. 49.

exclusive possession of the whole holding on behalf of the proprietary body. (*Grille and Gruer, JJ.*) GANPATI *v.* SAKHARAM. **I L.R. (1941) Nag. 454 = 195 I.C. 869 = 14 R.N. 70 = 1941 N.L.J. 307 = A I.R. 1941 Nag. 221.**

——**Ss. 13 and 105 (c)**—*Sale of occupancy holding—Remedy—Jurisdiction of Civil Court.*

Where a transfer of an occupancy holding is valid as between parties thereto but voidable at the instance of the landlord on account of the provisions of S. 12, C.P. Tenancy Act, which prohibited such transfers, it could only be avoided by the lambardar applying under S. 13 of the Act to the Revenue Officer. No suit to avoid it could be maintained in the Civil Court. (*Niyogi, J.*) JAMNA PRASAD *v.* SINGHAI BANSIDHAR. **1941 N.L.J. 643.**

——**S. 13**—Scope of—Surrender obtained by co-sharer— Lambardar resorting to remedy under S. 13—Equitable relief to co-sharer. *See* 1940 Dig., Col. 165. LACHHMAN SINCH *v* MOTI SINGH. **I.L.R. (1941) Nag. 348 = 192 I.C. 6 = 13 R.N. 217.**

——**Ss 24, 30 and 32**—*Exercise of powers under S. 24—Caution to be observed—Failure to comply with Ss. 30 and 32—Effect.*

The powers of summary ejectment given to the Revenue Officer by S. 24 are drastic and have to be exercised strictly in accordance with the provisions of that section and the other provisions regulating ejectment. The ejectment is subject to the provisions in S. 30 as to payment of compensation. Ss. 30 and 32 are mandatory and if they are not complied with the ejectment is without jurisdiction and not according to law. (*Burton, F.C.*) GHAISSO SAKHARAM *v.* DAYARAM. **1941 N.L J. 233.**

——**Ss 30 and 32**—Failure to comply with—Effect. *See* C. P. TENANCY ACT, SS. 24, 30, 32. **1941 N.L.J. 233.**

——**S. 32**—*Construction—'Arrears and costs which have been ascertained in the proceedings'—If includes decretal amount.*

The words 'arrears and costs which have been ascertained in the proceedings' in S. 32 of the Central Provinces Tenancy Act do not include the decretal amount. It cannot therefore be set off against the amount of compensation. (*Binney, F.C.*) RAMLAL *v.* PADAMLAL. **1941 N.L.J. 237.**

——**S. 35**—*Abandonment—Meaning—Right of reversioners, when abandonment is by life holder of occupancy tenancy.*

The word 'abandonment' in S. 35 of the C. P. Tenancy Act is sued in the usual legal significance and not in any special sense. When a life holder of an occupancy tenancy abandons the holding, the next reversioner can on the death of the holder sue for a declaration that the tenancy was not extinguished by abandonment. (*Stone, C.J. and Bose, J.*) MURLIDHAR *v.* HAZARILAL. **1941 N.L.J. 612.**

——**Ss. 46, 47 and 48**—Transfer in contravention of S. 46 (3)—Effect—Landlord's remedy—Failure to avail remedy—Effect. *See* 1939 Dig., Col. 132. JABBARSHAH *v.* KANCHEDILAL. **I.L.R. (1941) Nag. 203.**

——**Ss. 49 and 37**—*Acquisition of both proprietary and cultivating rights—Right to transfer.*

Where the cultivating rights also have been given up along with the proprietary rights, a person acquiring both the rights in respect of a field can transfer the cultivating rights to any one he pleases or confirm the transfer of them if they had already been transferred. (*Stone, C.J. and Niyogi, J.*) BABULAL NANDRAM *v.* MANIKLAL BEHARILAL. **I.L.R. (1941) Nag. 124 =**

C. P. TENANCY ACT (1920). S. 89.

192 I.C. 826=13 R.N. 280=1941 N.L.J. 142= A I.R. 1941 Nag. 79.

——**S. 89**—Surrender—Registration if necessary for its validity. *See* 1939 Dig., Col. 132. KASHI PRASAD *v.* BED PRASAD. **I.L.R. (1941) Nag. 386.**

——**Sch. II, Art. 1**—*Abandonment by life tenant—Reversioner's right to sue for declaration—Starting point of limitation*

Art. 1 of Sch. II to the C. P. Tenancy Act corresponds in principle to Art. 142, Limitation Act and as such there can be no adverse possession against a person not entitled to immediate possession until his right to possession accrues. A reversioner's right to possession would accrue on the death of the widow and hence when there is an abandonment by a life tenant under S. 35 of the C. P. Tenancy Act, the starting point for limitation for a suit by him would be the death of the life holder. (*Stone, C.J. and Bose, J.*) MURLIDHAR *v.* HAZARILAL. **1941 N L.J 612.**

CENTRAL PROVINCES VILLAGE PANCHAYAT ACT (V OF 1920), Ss. 12 and 15—*Power of panchayats to control holding of markets and to levy fees.*

S. 12 of the Village Panchayat Act confers a discretionary power on panchayats to undertake the control and administration of certain matters specified in it. Though markets are not mentioned expressly, holding of markets being a measure of public utility would fall under head (1) of S. 12 (1) and a Village Panchayat has power to levy fees for sales in a market under S. 15 (1) (*c*), with the approval of the District Council. (*Niyogi, J.*) SETH CHAMPA LAL *v.* VILLAGE PANCHAYAT, SEMRI HARCHAND. **I.L.R. (1941) Nag 161=193 I.C. 609= 13 R.N. 340=1941 N L J. 49= A I.R. 1941 Nag. 128.**

CERTIORARI—Writ of. *See* PRACTICE—CERTIORARI.

CHARGE. *See* T. P. ACT, S. 100.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Applicability—Requirements—Dedication to idol—Nature of trust.*

S. 3 of the Charitable and Religious Trusts Act sets out what must be established in order to bring the matter within the purview of the Act. Put shortly there must be a trust. It must be either express or constructive. It must have been either created or it must be existing for a public purpose. And that public purpose must be of a charitable or a religious nature. Though the trust which arises in the case of a dedication to an idol is not the exact kind of trust which the English law contemplates, nevertheless they are trusts, though of a special and particular kind and they are the sort which the Charitable and Religious Trusts Act is intended to cover. (*Stone, C.J. and Bose, J.*) BYANKAT PAIKAJI *v.* RAM CHANDRA. **1941 N.L.J. 396=A.I.R. 1941 Nag. 317.**

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929)—*Child marriage—Application in administration suit for liberty to spend certain sum for marriage expenses of plaintiff below 16 years—Marriage to be performed in Bikanir but source of income in Calcutta—Application, if can be granted.*

In an administration suit an application was made for liberty to spend out of the estate certain sum to meet the marriage expenses of the plaintiff who was a minor and had not reached the age of 16. Both the bridegroom and the bride were domiciled in Bikanir and the marriage ceremony was to be performed in Bikanir. The source of income was however in Calcutta.

Held, that the application could not be granted as the Court should not facilitate conduct which the legislature in British India had made penal even if such marriage was not punishable according to law of Bikanir. (*Mc Nair, J.*) HANSRAJ BHUTERIA *v.* ASKARAN BHUTERIA. **194 I.C. 730=14 R.C. 9= A.I R. 1941 Cal 244.**

CHOTA NAGPUR ENCUM. EST. ACT (1876), S. 3.

——Effect on Hindu Law—Marriage contrary to Act—If a 'necessity' to justify alienation. *See* HINDU LAW—JOINT FAMILY—ALIENATION. **1941 N.L J. 282.**

——**S. 5**—Construction and scope—"Perform, conduct, or direct"—Meaning of—Parents of grown up bride taking part in kanyadan ceremony—If liable. *See* 1940 Dig., Col. 168. EMPEROR *v.* FULABHAI BHULABHAI. **42 Cr.L.J. 62.**

——**S. 10**—Scope—If mandatory—Non-compliance—If vitiates proceedings. *See* 1940 Dig., Col. 168. EMPEROR *v.* MAHOMED HASHIM. **191 I C. 123= 13 R S. 127=42 Cr.L J. 83.**

——**S. 10 (as amended by Act VII of 1938), and Cr P. Code, S. 537**—Preliminary enquiry not held—Trial and conviction, if vitiated—S. 537, if cures defect. *See* 1940 Dig., Col. 168. EMPEROR *v.* MEHTAR. **42 Cr.L.J. 37.**

CHIN HILLS REGULATION (1869), Ss. 4 (1) (4) and 34-A—*Offence of illicit manufacture and possession of spirit in Chin Hills— Accused not a 'chin' —Law applicable.*

Where a person who is not a 'chin' as defined in the Chin Hills Regulation is accused of the offence of illicit manufacture and possession of spirit, by virtue of Ss. 4 (1) (4) and 34-A. He is to be tried under the Excise Act and not under the Regulation. If it is found that the liquor was the product of the manufacture complained against, the accused need not be charged with and convicted of two offences, for the offence of manufacture necessarily includes possession of the article manufactured. It would be otherwise where the accused was not found manufacturing but only in possession of apparatus for manufacturing *plus* the article manufactured. (*Moseley, J.*) THE KING *v.* YOO NGOON.

1941 Rang L.R. 555=A I.R. 1941 Rang. 332.

——**Ss. 10 and 41**—*High Court—Powers of revision—Proper Court to revise.*

The High Court has no power to revise proceedings under the Chin Hills Regulation, whatever the nationality of the accused or the law under which he has been or should be tried. According to S. 10 of the Chin Hills Regulation, for the purposes of Cr. P. Code the Governor shall exercise the powers of the High Court and S. 41 provides for the delegation by the Governor of his powers. The Governor has by notification No. 633, dated 21st December, 1939, delegated his powers as a High Court to the Commissioner of Magwe Division and he alone can revise proceedings under the Regulation. (*Moseley, J.*) THE KING *v.* YOO NGOON.

1941 Rang.L.R. 555=A.I.R 1941 Rang. 332.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI OF 1876), S. 3—*Construction and scope—Alienation If includes devise by will—Execution of will by holder—If prohibited.*

The alienation referred to in S. 3 of the Chota Nagpur Encumbered Estates Act is an alienation *inter vivos*, and the prohibition against alienations in the section is directed against alienations *inter vivos* and not against a devise by the holder by will. The holder is not therefore incompetent to make a will by reason of the prohibition in S. 3 of the Act.

Manohar Lal, J.—The combined effect of Ss. 3 and 9 of the Act shows that the object of the Act is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land to speedily relieve the holder's estate from the burdens created on it by the

CHOTA NAGPUR ENCUM. EST. ACT (1876), S. 12.

holder. The Act does not make the manager, the holder of the estate, but merely prohibits the holder in his own interest from exercising the acts of ownership so that he may not interfere with the wide powers given to the manager to manage the estate. A will speaks from the death of the testator only and the mere execution of a will by the holder is not an alienation of property and in no way affects the possession of the estate by the manager. (*Harries, C.J. and Manohar Lall, J.*) MON MOHAN SINGH *v.* RAGHU NANDAN SINGH.

20 Pat. 280=194 I.C. 23=13 R.P. 666= 7 B.R. 703=A.I.R. 1941 Pat. 465.

——**S. 12**—"*Heir*"—*Meaning of.*

The word "heir" in S 12 of the Chota Nagpur Encumbered Estates Act is loosely used and may be taken to include a person who has a right to succeed in law to the holder. (*Harries. C.J. and Manohar Lall, J.*) MON MOHAN SINGH *v* RAGHU NANDAN SINGH.

20 Pat. 280=194 I.C. 23=13 R.P. 666= 7 B.R. 703=A.I.R. 1941 Pat. 465.

——**S. 21-B**—Construction and scope—Party to litigation represented by manager—Death of—Failure to implead heirs—Abatement—Presence of manager on record—If prevents abatement. *See* 1940 Dig., Col. 169. MAHOMED MURTAZA *v.* CYRIL INDERNATH.

22 Pat L.T. 457.

——**S. 208**—Applicability—Suit for rent—Non-joinder of some tenure holders—Decree—Nature of—Sale in execution—If affects shares of parties not impleaded in suit. *See* 1940 Dig., Col. 171. MAHOMED MURTAZA *v.* CYRIL INDERNATH. **22 Pat.L.T. 457.**

——**S. 211**—Scope—Transferee of holding—Failure to get recorded in landlord's sherista—Effect on suit under S. 211 (2)—If gives right to landlord to treat transferor tenant as representative of transferee. *See* 1940 Dig., Col. 171. MAHOMED MURTAZA *v.* CYRIL INDERNATH. **22 Pat.L.T. 457.**

CHOTA NAGPUR TENANCY ACT (VI OF 1908)

—Rent suit—Parties—Absence of proper parties—Effect on Revenue Court's jurisdiction—Revenue Officer can pass decree and order sale only when holding is properly represented. *See* 1940 Dig., Col. 169. LAL BALLABH NATH SAH DEQ *v.* HABIBUR RAHMAN.

191 I C 693=13 R.P. 345=7 B.R. 244.

——**S. 35, Proviso (v)**—"*Current prices*"—*Ascertainment of—Yearly averages.*

The words "current prices" are not defined in the Chota Nagpur Tenancy Act; the officers administering the Act are bound to take the average over a considerable period. It would have to be decided whether the price at the date of the institution or at the date of disposal was to be considered. It must have been the intention of the Legislature that as far as possible there should not be a great deal of difference in the relief admissible in cases otherwise similar. The best course is to take yearly averages. (*Middleton.*) KAMAKHYA NARAIN SINGH *v.* ANUP MODI. **1941 P.W N. 456= 7 B R. 798.**

——**Ss. 46 and 47**—Scope and effect—Mortgage of raiyat land in contravention of law—Validity—Subsequent change of land from raiyati to Chhaparbandi—If validates transaction. *See* 1940 Dig., Col. 170. MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS.

1940 P.W.N. 986.

——**Ss. 46 and 47**—*Scope—Under-raiyat—Right to claim benefit of Ss.* 46 *and* 47.

Ss. 46 and 47 of the Chota Nagpur Tenancy Act are intended to protect the rights of a raiyat only and not of an under-raiyat. A person who does not claim to hold land under a proprietor, tenure-holder, or a Mundari Khunt-Kattidar cannot be held to be raiyat, and cannot claim the benefit of Ss. 46 and 47 of the Act, though he is an under-raiyat. (*Harries, C. J. and Fazl Ali, J.*) RAMPRATAP MARWARI *v.* LACHMAN MISTRY.

194 I C. 441=13 R.P. 719=7 B.R. 772= 1941 P.W.N. 625=A.I.R. 1941 Pat. 485.

CHOTA NAGPUR TENANCY ACT (1908), S. 60.

——**S. 46 (4) (a), (as amended in 1938)**—*Scope—Retrospective operation—Transfer invalid under old law—If validated.*

S. 46 (4) (*a*) of the Chota Nagpur Tenancy Act has no retrospective operation. There is nothing in the language of the clause to justify such a view. Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the legislature to validate transfers which under the former law were invalid when they were made. (*Agarwala, J.*) DHANNA MUNDA *v.* KOSILA BANIAN. **193 I.C. 851= 13 R.P. 635=7 B.R. 624=A.I.R. 1941 Pat. 510.**

——**S. 46 (6)**—*Scope—Transfer in contravention of—Sanction of Deputy Commissioner obtained on false representation—Transferor challenging validity later—Estoppel.*

Where a raiyat makes a transfer in contravention of S. 46 (6) of the Chota Nagpur Tenancy Act, as it stood before its amendment in 1938 after taking the consent of the Deputy Commissioner on false representations, he is not estopped from afterwards challenging the validity of the transfer by showing that the transferee was not a person to whom a transfer of a part if could be validly made, more especially when the transferee was aware that he was not of that category of persons to whom a transfer could be sanctioned by the Deputy Commissioner. (*Agarwala, J.*) DHANNA MUNDA *v.* KOSILA BANIAN. **193 I.C. 851=13 R.P. 635=7 B.R. 624= A.I.R. 1941 Pat. 510.**

——**S. 48-A (2), (as amended in 1938)**—*Scope—Rent decree—Attachment and sale of crops on land of judgment-debtor—Objection on ground that crops were raised by under-tenants—Sustainability.*

S. 48-A (1) imposes a bar against execution of a rent decree by sale of the tenure itself, but sub-S. (2) of S. 48-A gives the landlord his remedy by the attachment and sale of the produce of the land comprised in the tenure. S. 48-A does not anywhere say that in order to be attached and sold the produce must be still in the possession of the judgment-debtor (tenure-holder) or that it should have been raised by himself. The intention of the legislature being to make the produce of the land liable to be proceeded against in the hands either of the judgment-debtor or of any transferee from him or his under-tenant. Where therefore a decree for rent in respect of a *bhumihara* tenure is sought to be executed under S. 48-A (2) by attachment and sale of the produce of the land comprised in the tenure, the fact that the crops standing on the land had been grown not by the *bhumihar* judgment-debtor but by some under-tenants is no bar to execution, and an objection raised to execution on that score ought to be disallowed. (*Rowland, J.*) RAMDAS SAHU *v.* KAPIL SAHU.

196 I.C. 86=14 R.P. 179=7 B.R 986= 22 Pat.L.T. 717.

——**S. 60**—*Scope and effect—Sale of holding—Purchaser—Liability for rent for period prior to sale.*

It is clear that by virtue of S. 60 of the Chota Nagpur Tenancy Act, liability for rent for a period prior to the date of sale cannot be imposed on the purchaser of the tenancy whatever may be the contents of the sale proclamation. (*Rowland, J.*) MIDNAPORE ZAMINDARY CO., LTD. *v.* CHINTAMONI MONDAL.

196 I.C. 38=14 R.P. 169=7 B.R. 989= A.I.R. 1941 Pat. 600.

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CHOTA NAGPUR TENANCY ACT (1908), S. 61.

——**S. 61**—*Applicability—Under-raiyat—Right to apply for commutation.*

S. 61 of the Chota Nagpur Tenancy Act is restricted to tenure holders or occupancy raiyats and it mentions specifically the rent of a tenure or a holding. The land cultivated by an under-raiyat is neither a tenure nor a holding. An under-raiyat with occupancy rights has not got all the rights of occupancy raiyats; and unless the under-raiyat can prove that a custom of commutation exists, he has no right to apply for commutation of his rent under S. 61 of the Act. (*Middleton.*) RANKI URAIN *v.* SIRAJUDDIN. **7 B.R. 929 = 1941 P W N. 430.**

——**(as amended in 1938), S. 63**—Applicability—Offence when committed. *See* 1940 Dig., Col. 170. ANGELO *v.* KANDAN MANJHI. **21 Pat.L.T. 1085.**

——**S. 63 (1) (a)**—Scope—Offence under—Trial—Procedure—Criminal Procedure Code—Applicability—Cr. P. Code, S 197. *See* 1940 Dig., Col. 170. ANGELO *v.* KANDAN MANJHI. **21 Pat.L.T. 1085.**

——**S. 77**—Pradhani—If service tenure. *See* 1940 Dig., Col. 170. JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **67 I.A. 290 = 73 C.L.J. 261.**

——**S. 84 (3)**—*Survey record of-rights—Entry in—Value of—Entry based on known patta—Effect.*

An entry in the survey record-of-rights in Chota Nagpur has a presumptive value under S. 84 (3) of the Chota Nagpur Tenancy Act and is entitled to great weight. But when the basis of the entry in the survey record is known to the Court, namely, that it is based on a *jagir patta*, the rights of the parties will be presumed to be governed by the terms of that document. (*Harries, C.J. and Manohar Lall, J.*) HARAKHNATH OHDAR *v.* GANPAT RAI. **22 Pat.L T. 829 = A.I.R. 1941 Pat 625.**

——**S. 186 (e)**—Pradhani—Sale o —If barred. *See* 1940 Dig., Col. 170. JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **67 I.A. 290 = 73 C.L.J. 261.**

——**Ss. 198 and 210, (2) (as amended)**—*Relative scope and application of—Decree for money—Execution against property other than tenure—Right of decree-holder—"Any immovable property"—Meaning of.*

Prima facie, the words "any other property," in S. 210 (2) of the Chota Nagpur Tenancy Act (as amended) must mean any property other than the tenure itself. One of the requisites of the application of the clause is that the decree must be a decree for arrears of rent due in respect of a tenure, that is to say, it must be a rent decree under the Act. Where the sum for which the decree has been passed is not recoverable as an arrear of rent, the decree has to be regarded as a decree for payment of money, which would be covered by S. 198 of the Act. That section contemplates that where a decree sought to be executed is a decree for money, application may be made for execution against any immovable property belonging to the debtor. The words "any immovable property" in this section are obviously wider than the words "any other property immovable" in S. 210 (2). But under S. 198, sanction of the Commissioner is necessary, and in the absence of such sanction the property cannot be sold. (*Fazl Ali and Shearer, JJ.*) LAL INDERJIT NATH *v.* PRATAP UDAI NATH. **1941 P W N. 553.**

——**Ss. 208 and 74-A, (as amended in 1920)**—Pradhan—Sale of tenure in execution of rent decree—Exemption. *See* 1940 Dig., Col. 171. JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **67 I.A 290 = 73 C.L.J 261.**

——**S. 208**—*Scope—Decree against some of several tenants—Sale of holding in execution—Validity.*

C. P. CODE (1908), S. 2.

S. 208 of the Chota Nagpur Tenancy Act does not authorise the sale of a holding in execution of a decree for rent obtained only against some of the tenants of the holding; an order directing the sale of the holding in execution of such a decree is void. Where a sale under S. 208 is without jurisdiction, it does not affect the interest of any of the judgment-debtors, even though the sale of their interest under S. 210 (*b*) might be valid. (*Agarwala, J.*) NEHAL KHAN *v.* FELU DOME. **194 I.C. 435 = 13 R.P. 721 = 7 B R. 770 = A.I.R. 1941 Pat. 490**

——**S. 210 (2)**—Applicability—Conditions—"Any other property"—Meaning of—Decree for money—Execution—Right to proceed against any property other than tenure. *See* CHOTA NAGPUR TENANCY ACT, SS. 198 AND 210 (2). **1941 P.W.N. 553.**

——**Ss. 213 and 258**—*Applicability—Void sale—Suit to declare nullity—If barred under S. 258.*

S. 213 of the Chota Nagpur Tenancy Act relates to an application to set aside an execution sale on the ground of material irregularity or fraud in publishing and conducting a sale. It does not apply where the sale is challenged on the ground that it is void for want of jurisdiction in the executing Court. No application at all is needed to set aside such a sale; and a suit to declare the sale void is not barred under S. 258 of the Act. (*Agarwala, J.*) NEHAL KHAN *v.* FELU DOME. **194 I.C. 435 = 13 R.P. 721 = 7 B R 770 = A I.R. 1941 Pat. 490.**

——**Ss. 217 and 218**—*Scope—Suit for arrears of rent—Decree by Deputy Commissioner—Revision—Competency.*

Where in a suit under the Chota Nagpur Tenancy Act, for arrears ot rent of agricultural land not exceeding Rs. 100, the Deputy Commissioner passes a decree holding that the rents are due, no appeal or revision is competent. The judgment of the Deputy Commissioner is final in a case to which S. 218 (2) does not apply. Even a revision which is otherwise provided by S. 217 of the Act is excluded by S. 218 (1) read with S. 139 (2). (*Middleton*) MADHIM GHASI *v.* NARKU SAHU. **8 B R. 48.**

CHOTA NAGPUR TENURE HOLDERS RENT ACCOUNT ACT (I OF 1929), S. 11 (a and (b)—Registration fee and maintenance fee—Calculation—Basis of—Whole rent or rent of separated portion only. *See* 1940 Dig., Col. 172. ISHWAR NATH ROY *v.* PERTAP UDAI NATH SAHA DEO. **192 I C. 56 = 13 R.P. 395 = 7 B.R. 315 = 22 Pat. L T. 573.**

—— **S. 11 (b)**—"Rent"—If means primary rent alone or includes cess. *See* 1940 Dig., Col. 172. ISHWAR NATH ROY *v.* PERTAP UDAI NATH SAHA DEO. **192 I.C. 56 = 13 R.P. 395 = 7 B.R. 315 = 22 Pat. L.T. 573.**

——**S. 11 (b)**—"Rent of the tenure"—Meaning—Rent of the whole tenure or rent of the separated part. *See* 1940 Dig, Col. 172. ISHWAR NATH ROY *v.* PERTAP UDAI NATH SAHA DEO **192 I C. 56 = 13 R.P. 395 = 7 B R. 315 = 22 Pat LT. 573.**

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—Decree—Alternative claims—Adjudication on a preliminary issue in respect of one. *See* 1940 Dig., Col. 173. SHRIDEO RAM JANKI *v.* NATHURAM. **I.L.R. (1941) Nag. 90 = 195 I.C. 91 = 14 R.N. 35 = A.I.R 1941 Nag. 84.**

——**S. 2 (2)**—Decree—Order adjudicating rights of parties under scheme framed under S. 92—Appeal *See* C. P. CODE. S. 47—APPEAL. **73 C.L.J. 532.**

——**S. 2 (2)**—Decree—Order dismissing suit as against some defendants for want of sanction of Pro-

C. P. CODE (1908), S. 2.

vincial Government—Nature of—Appeal. *See* C. P. CODE, S. 115. **1941 P.W.N. 25.**

——**S. 2 (2)**—*Decree—Order modifying scheme framed under S. 92.*

An order of District Judge modifying a scheme framed in a suit under S. 92, C. P. Code, on an application made in that suit is a decree. So also an order altering the scheme in a new suit under S. 92, C. P. Code. (*Mitter and Khundkar, JJ.*) SRIJIB NYAYATIRTHA *v.* DANDY SWAMI JAGANNATH ASRAM.
73 C.L.J. 532 = A.I.R. 1941 Cal. 618.

——**S. 2 (2)**—*Decree preliminary or final—Executability.*

Where in a suit for the recovery of money, the amount found due to the decree-holder is declared and it is also laid down in the decree in what manner that amount should be paid and there is nothing more left to be done in the suit, such a decree is not a preliminary decree but a final decree capable of execution. (*Thomas, C.J. and Agarwal, J.*) LAL BHAGWAT SINGH *v.* HARI KISHEN DAS. **1941 O A. 865 = 1941 A.W.R. (Rev.) 949 = 1941 O.W.N. 1138.**

——**Ss. 2 (2) and 96**—*Decision on preliminary issue holding pre-emption suit maintainable—If a decree and appealable—Test of appealability.*

Although a finding by the trial Court that the pre-emption of the entire pre-emptible property, namely, the zamindari rights as distinguished from the mortgagee rights, though it is part of the property conveyed under the sale deed, is permissible, is conclusive as regards that Court on the question whether the plaintiff could maintain the suit for partial pre-emption, it cannot be said that there is any formal expression of that adjudication. Hence it does not amount to a decree under S. 2 (2), C.P. Code, and is not appealable under S. 96. Where a preliminary point raised in defence in a suit may possibly be decided against the plaintiff and may terminate in dismissal of the suit on that point alone, the adjudication would no doubt amount to a formal expression conclusively determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication will come into existence as the adjudication does not amount to a decree as defined in S 2 (2) of C. P. Code. (*Thomas, C.J. and Ghulam Hasan, J.*) MATHURA PRASAD *v.* KANHAIYA LAL. **195 I.C. 615 = 14 R.O. 104 = 1941 R.D. 700 = 1941 O.L.R 598 = 1941 O W.N. 957 = 1941 A.W.R. (Rev.) 629 = 1941 O A. 658 = A.I.R. 1941 Oudh 590.**

——**S. 2 (2) and O. 7, R 11 (a)**—*Failure to furnish particulars—Order discharging defendants, if appealable.*

Where on the failure of the plaintiff to furnish certain necessary particulars, the defendants are discharged as they had no case to meet, the order is appealable either on the view that it amounts to a rejection of plaint or a dismissal of the suit. (*Bose, J.*) NAZIR ABBAS *v.* AZAM SHAH. **1941 N.L.J. 260 = A.I.R. 1941 Nag. 223.**

——**S. 2 (2) and O. 7, R. 11**—Rejection of appeal as time-barred—If a decree—Appealability. *See* 1940 Dig., Col. 173. GAJADHAR BHAGAT *v.* MOTI CHAND.
22 Pat.L.T. 549 = A.I.R. 1941 Pat. 108.

——**S. 2 (3) and O. 1, R. 10**—*Discharge of some of the defendants—Suit decreed against others—Grievance against order of discharge — Agitation — Proper remedy.*

Where some of the defendants are discharged on the ground of a want of cause of action against them and the suit is decreed as against the rest the correctness of the order of discharge could be questioned only in an

C. P. CODE (1908), S. 9.

appeal against that order in as much as it amounts to a decree. It could not be agitated in an appeal against the decree in the suit. (*Puranik, J.*) LALASA MOTISA *v.* BHAGWANT. **194 I.C. 37 = 13 R.N. 353 = 1941 N.L.J. 235 = A.I.R. 1941 Nag. 166.**

——**S. 2 (5)**—*Foreign Court—Courts in Berar, if.*

Per *Niyogi, J.*, dissenting.—Courts in Berar which have been established or continued by the authority of the Governor-General-in-Council are not foreign Courts within the meaning of S. 2 (5), C. P. Code. (*Stone, C.J., Grille, Niyogi, Gruer and Bose, JJ.*) JAGNI RAM *v.* GANPATI. **I.L.R. (1941) Nag. 1 = 1941 N.L.J. 1 = A.I.R. 1941 Nag. 36 (F.B.).**

——**S. 2 (11)**—Hindu son—If legal representative of father in respect of separate debt of father—Suit against son for father's separate debt—Decree against son as legal representative—If can be passed—S. 53—Effect of. *See* 1940 Dig., Col. 174. JAMBURAO SATAPPA *v.* ANNAPPA RAM CHANDRAPPA.
I.L.R. (1941) Bom. 177 = 192 I.C 198 = 1941 A.L.W. 34 = 1941 A.W.R. (Supp.) 4 = 1941 O.A. (Supp.) 61 = 13 R.B. 240 = A.I.R. 1941 Bom. 23 (F.B).

——**S. 2 (11)**—Legal representative—Decree against holder of impartible estate for compensation in lieu of specific performance—Death of the holder and devolution of estate on his son—Decree, if executable against him as legal representative. *See* 1940 Dig., Col. 174. RAO BHIMSINGH *v.* GANGARAM.
13 R.N. 334 = I.L.R. (1941) Nag 632 = 193 I C. 598.

——**S. 2 (11)**—Suit by Hindu widow to recover mortgage debt due to husband—Reversioners, if legal representatives. *See* C. P. CODE, O. 32, RR. 3 AND 9.
45 C.W.N. 105.

——**S. 2 (12)**—*Mesne profits—Basis of calculation—Suit for partition of putni taluk and khas lands held thereunder and for profits—Lands made khas with defendant's own money—Plaintiff's right to profits of such lands on basis of produce raised.*

Plaintiff sued the defendant for partition of certain joint properties and for his share of profits of those properties till the disposal of the suit. There were among the properties a putni taluk and certain plots of land held in *khas* by the putnidars. The plaintiff's case was that these lands were comprised in the holdings of tenants holding under the putnidars, but those holdings had been purchased with the income of the putni and so belonged to them in equal shares. The Court found that some of these lands were acquired by the defendant with his own money and not with joint money. The plaintiff claimed to have the profits of even these lands assessed on the basis of *khas* cultivation.

Held, that the plaintiff was entitled to profits calculated only on the basis of the cash rent and that would be payable by the subordinate tenants holding under the putni and not on the basis of the actual crops raised on those plots. (*Mitter and Akram, JJ.*) BENOY KRISHNA CHOUDHURY *v.* BHOLANATH CHOWDHURY. **45 C.W.N. 298.**

——**S. 8**—*Construction-"to any suit"—Meaning—If includes also decree in such suit.*

When S. 8, C. P. Code, says that "the provisions in the body of this Code shall not extend to any suit", it means that the provisions shall not also extend to any decree passed in any such suit. (*Dhavle and Chatterji, JJ.*) RANGANADHAM *v.* PONNA CHARAMMA.
7 Cut. L.T. 45.

——**S. 9**—*Civil Court—C. P. Debt Relief Courts.*

Whatever the doubts about the District Courts may be, the C. P. Debt Relief Courts are not Civil Courts,

C. P. CODE (1908), S. 9,

They are special tribunals created for the purpose of the Act. (*Stone, C.J. and Bose, J.*) DISTRICT JUDGE *v.* SETH SHRI KISANDAS.
I.L.R. (1941) Nag. 588 = 1941 N.L.J. 485.

——**S. 9**—Jurisdiction — Determining factor. *See* 1940 Dig., Col. 175. SHRINIWAS RAO *v.* SECRETARY OF STATE. **I.L.R. (1941) Nag. 107 = 191 I.C. 619 = 13 R.N. 199.**

——**S. 9 and Agra Tenancy Act, Ss. 85 and 120**—*Maintainability of suit in Civil Court—Fixed rate tenant building on agricultural land—Suit for mandatory and prohibitory injunction.*

Where a suit is brought against a fixed rate tenant for a mandatory and prohibitory injunction in respect of an unlawful construction of a building on the land, as the Revenue Court is not competent to entertain such a suit either under S. 85 or 120 of the Agra Tenancy Act, a suit would lie in a Civil Court under S. 9, C. P. Code, on the allegation of the invasion of the rights of the plaintiff landholder. (*Collister, Bajpai and Braund, JJ.*) SHANTI SARUP DAS *v.* ASHARFI SINGH.
I.L.R. (1941) All. 250 = 192 I.C. 496 = 13 R.A. 327 = 1941 O.A. (Supp.) 34 = 1941 A.L.W. 18 = 1941 A.W.R. (H.C.) 34 = 1941 O.W.N. 12 = 1941 A.W.R. (Rev.) 45 = 1940 A.L.J. 906 = A.I.R. 1941 All. 61 (F.B.).

——**S. 10**—*Applicability—Decision in subsequent suit not likely to affect decision in earlier suit—Stay of earlier suit—If con be ordered.*

A suit by a Hindu widow for division of occupancy holding cannot be stayed under S. 10, C. P. Code, by reason of a subsequently filed civil suit by her for a declaration that she is a member of joint Hindu family because the decision of the Civil Court in her favour cannot affect her rights in the occupancy holding. (*Shirreff, S.M. and Sathe, J.M.*) ASHARFA KUER *v.* BINDHYA CHAL CHAUBE.
1941 O.A. (Supp.) 605 (1) = 1941 R.D. 688 = 1941 A.W.R. (Rev.) 751.

——**S. 10**—Applicability—Suit by a debtor under S. 33 of the U. P. Agriculturists' Relief Act—Subsequent suit by mortgagee on mortgage—Latter suit if can be stayed. *See* 1940 Dig., Col. 176. BEHARI LAL *v.* DURGA. **16 Luck. 188.**

——**S. 10**—*Jurisdiction—Application for stay—Forum—Suit pending on Original Side of High Court—Application for stay pending disposal of suit in moffussal Court—If lies on appellate side.*

An application under S. 10, C. P. Code, asking the Court not to proceed with the trial of a suit should normally be made to the Court which is actually seized of the case. An application for stay of a suit pending on the Original Side of the High Court until the decision of a previously instituted suit in a moffussal Court has to be made on the Original Side to the Judge trying the suit and not on the Appellate Side of the High Court. (*Broomfield and Macklin, JJ.*) NAGAPPA CHANNAPPA *v.* RAMSING JESSASING.
I.L.R. (1941) Bom. 325 = 194 I.C. 510 = 13 R.B. 373 = 43 Bom.L.R. 236 = A.I.R. 1941 Bom. 160.

——**S. 10**—*Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court on ground of convenience—Power to issue.*

The power of the High Court on its original side to issue an injunction restraining the defendant in a suit before it from proceeding with a suit in another Court, is not restricted by the provisions of C. P. Code. It has jurisdiction to restrain a defendant from litigating in another Court on the ground of convenience. (*Lort Williams, J.*) NASKARPARHA JUTE MILLS CO., LTD. *v.* NIRMAL KUMAR JAIN.
I.L.R. (1941) 1 Cal. 373 = 196 I.C. 415 = 14 R.C. 231 = A.I.R. 1941 Cal. 434.

C. P. CODE (1908), S. 11.

——**Ss. 10 and 151**—*Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court—Power to grant.*

The High Court in its original jurisdiction has inherent power to grant an injunction restraining the defendant in a suit before it from proceeding with a previously instituted suit in another Court on grounds of convenience alone and in spite of the provisions of S. 10, C. P. Code. (*Lort Williams, J.*) BHAGAT SINGH BUGGA *v.* DEWAN JAGBIR SAWHNEY.
I.L.R. (1941) 1 Cal. 490 = A.I.R. 1941 Cal. 670.

——**S. 10**—Priority of suits—Test—One of the suits filed *in forma pauperis. See* 1940 Dig., Col. 176. RAISUDDIN *v.* BASTI SUGAR MILLS, LTD. **16 Luck. 184.**

——**S. 11.** *Res judicata.*

Adverse finding.
Applicability.
Co-defendants.
Competent Court.
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Constructive *res judicata.*
Directly and substantially in issue.
Distinction between *res judicata* **and estoppel.**
Erroneous decision.
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Rent suit.
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Revenue proceedings.
Scope.
Subject-matter different.
Expl. IV.
Expl. VI.

——**S. 11**—*Adverse finding—Defendant challenging such finding in appeal—Appeal allowed on another ground—Finding, if* res judicata.

Where an adverse finding is expressly challenged in appeal by the defendant, but the appellate Court allows the appeal on another ground and dismisses the suit in consequence, that finding will not stand as the dismissal of the suit involves a reversal of the judgment in which it is contained. But if it could be shown that in disposing of the appeal, the Court, while dismissing the suit on another ground still intended to maintain the finding of the lower Court against the defendant, the finding may operate as *res judicata*, notwithstanding the dismissal of the suit, as being embodied in a judgment which is subsisting and in force. (*Biswas, J.*) SARASHIBALA SEAL *v.* ATASI KANTA. **45 C.W.N. 220.**

——**S. 11**—Applicability—Cause of action—Suit for specific performance of contract of sale—Subsequent suit for possession—Bar. *See* C. P. CODE, SS. 16, 99 AND O. 2, RR. 2, 3 AND 4. **43 Bom.L.R. 293.**

——**S. 11**—*Applicability—Execution proceedings—Execution against surety "struck off" after enquiry into merits—Effect.*

C. P. CODE (1908), S. 11.

Though S. 11, C. P. Code, does not in terms apply to execution proceedings, the principle of *res judicata* applies. Where an execution application against a surety is enquired into and on its being found that he did not stand surety to the judgment-debtor, the application is dismissed and the proceedings 'struck off', there is an adjudication on the merits in respect of the surety's liability and hence it would operate as *res judicata* in subsequent execution proceedings against the surety. An order 'striking off' an execution application cannot be always regarded as legally ineffective. (*Bennett, J.*) RAM GOPAL *v.* BANSIDHAR.
1941 O.W.N. 1227 = 1941 A.W.R. (Rev.) 1053 = 1941 O.A. 931.

——**S. 11**—*Co-defendants—Conditions necessary.*

Per *Nasim Ali, J.*—The limits within which the doctrine of *res judicata* should be applied as between co-defendants are these:—(*a*) that the co-defendants were necessary or proper parties in the former suit; (*b*) that there was a conflict of interest between them; (*c*) that there was a necessity to decide that conflict in order to give the plaintiff appropriate relief; and (*d*) that there was a decision of the question between the co-defendants. (*Syed Nasim Ali and Pal, JJ.*) RADHARANI DASSI *v.* BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**S. 11**—*Co-defendants—Points for consideration.*

In order to see whether the doctrine of *res judicata* may be invoked in a subsequent suit by persons whose predecessors had been impleaded as co-defendants in a previous suit or who were themselves co-defendants in such previous suit, it is necessary to consider the following points: (1) What was the relief claimed by the plaintiff in the previous suit? (2) Were the co-defendants proper parties to the suit? (3) Was there a conflict of interest between them? (4) Was it necessary to decide that conflict in order to give the plaintiff the relief that he claimed? (5) Was the question in issue between the co-defendants actually dicided. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

——**S. 11**—Co-defendants—*Res judicata*—Conditions—Partition suit—Rule in—Defendant claiming share giving rise to conflict of interest—Court giving express decision as to share though decision not necessary for giving relief to plaintiff—*Res judicata. See* 1940 Dig., Col. 178. HARIHAR PRASAD SINGH *v.* NARSINGH PRASAD SINGH. **13 R.P. 471 = 192 I.C. 441 = 7 B.R. 402 = = 22 Pat.L.T. 553 = A.I.R. 1941 Pat. 83.**

——**S. 11**—*Co-defendants* — Res judicata — *Plea neither raised nor decided as between defendants—If* res judicata *in subsequent suit by one defendant against another.*

Where in a suit brought against *A* and *B* and another on the footing that *A* was principal or *B* was surety, the question as to which of the defendants was the principal and who was the surety was neither agitated between *A* and *B* nor decided, a plea by *A* in a subsequent suit, brought by *B* against him for contribution, that he (*A*) was not the principal, is not barred by *res judicata*. (*Faul Ali, J.*) LAKSHMANA SAHU *v.* SIMACHALA PATRA. **194 I.C. 739 = 14 R.P. 58 = 7 B.R. 817 = A.I.R. 1941 Pat. 211.**

——**S. 11**—*Competent Court.*

Where the earlier suit is decided by a Munsif and later on by the Additional Civil Judge, the later decision is not barred by *res judicata* because the former Court was not competent to try the subsequent suit. (*Yorke and Ghulam Hasan, JJ.*) MUNIA *v.* MANOHAR LAL.
194 I.C. 161 = 13 R.O. 558 = 1941 O.L.R. 428 = 1941 R.D. 359 = 1941 A.W.R. (Rev.) 395 = 1941 O.A. 422 = 1941 A.L.W. 492 = 1941 O.W.N. 648 = A.I.R. 1941 Oudh 429.

C. P. CODE (1908), S. 11.

——**S. 11**—*Competent Court—Adjudication by Court not having jurisdiction*—Res judicata.

No adjudication on a point with reference to which a Court has no jurisdiction can operate as *res judicata*. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

——**S. 11**—*Competent Court—Decision by District Judge on reference under S. 30, Land Acquisition Act, as to title to land acquired*—Res judicata.

A decision by a District Judge on a reference to him under S. 30 of the Land Acquisition Act on the question of title to the acquired land is a decision of a competent Court and operates as *res judicata* in a subsequent civil suit. *N's* holding was sold under S. 112 of the Madras Estates Land Act and purchased by the predecessor-in-title of *P*. Subsequently the Government acquired a part of the holding under the Land Acquisition Act. *N* and *P* both claimed the compensation money. On a reference to the District Judge, the latter decided that *P* was the owner of the holding and entitled to the compensation money. *N* was not present at the hearing of the enquiry. *N* afterwards filed a suit for a declaration that the sale for arrears of rent was null and void for want of notice to *N* as required by S. 112 of the Estates Land Act. *P* raised the plea of *res judicata*.

Held, that the decision of the District Judge on the reference under S. 30 of the Land Acquisition Act was a decision by a Court of competent jurisdiction and therefore operated as *res judicata*. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) NANJAPPA CHETTY *v.* PERUMAL CHETTIAR. **1941 M.W.N. 268 (2) = 53 L.W. 364 = (1941) 1 M.L.J. 408.**

——**S. 11**—Competent Court—Meaning—Competency of Court—Relevant point of time. *See* 1940 Dig., Col. 179. SAHIB NASIB KHAN *v.* QUTBUNNISSA.
I.L.R. (1940) All. 691 = 192 I.C. 589 = 13 R.A. 340 = A.I.R. 1941 All. 18.

——**S. 11**—*Competent Court—Pecuniary jurisdiction—General principles of* res judicata—*Applicability.*

Even if S. 11, C. P. Code, itself cannot be applied, according to its terms to a case of difference in the pecuniary value of the two suits at any rate the principle can be applied. It was held that the principle underlying the section could be applied where the first suit was for dissolution of a partnership on a tentative value of Rs. 5,500 and the second was for a claim valued at two lakhs itself to start with. (*Stone, C.J. and Clarke, J.*) MITHOOLAL *v.* BABU JAINARAYAN.
1941 N.L.J. 508 = A.I.R. 1941 Nag. 346.

——**S. 11**—*Competent Court—Sadr Munsarim—Question of claim to under-proprietary rights.*

A Sadr Munsarim with judicial powers is competent according to Gonda Settlement Report to decide claims as to under-proprietary rights. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRI DHAR. **192 I.C. 259 = 13 R.O. 338 = 1941 O.L.R. 93 = 1941 A.W.R. (Rev.) 19 = 1941 R.D. 6 = 1940 O.A. 1293 = 1940 O.W.N. 1344 = A.I.R. 1941 Oudh 189.**

——**S. 11**—Competent Court—Small Cause Court—Decision in rent suit that tenancy is governed by Transfer of Property Act—If bars claim in subsequent title suit that tenancy is governed by B. T. Act. *See* 1940 Dig., Col. 179. ANANTAMONI DASI *v.* BHOLA NATH.
195 I.C. 870 = 14 R.C. 146 = A.I.R. 1941 Cal. 104.

——**S. 11**—*Connected cases—Appeal in one only—Effect of.*

C. P. CODE (1908), S. 11.

Where a common judgment disposes of a suit by a creditor on a pronote and a suit by the debtor under S. 33 of the U.P. Agriculturists' Relief Act and the debtor is made liable for the same sum of money in both the suits, the debtor in the absence of an appeal in his own suit, cannot maintain an appeal against the judgment in the creditor's suit in which he was the defendant. (*Bajpai and Dar, JJ.*) MAHOMED MOHTASHIM *v.* JOTI PRASAD. **I.L.R. (1941) All. 360 = 194 I.C. 801 = 14 R.A. 7 = 1941 A.W.R. (Rev.) 306 = 1941 O.A. (Supp.) 237 = 1941 A.L.J. 246 = 1941 R.D 460 = 1941 A.L.W. 359 (2) = 1941 O.W.N. 502 = 1941 A.W.R. (H.C.) 128 = A.I.R. 1941 All. 277.**

——**S. 11**—*Connected cases—Common judgment—Appeal in one case*—Res judicata.

Where in respect of a number of connected cases a single common order is passed in one case only and there is not even any reference to the connected cases and an appeal is preferred against the order in that particular case, the proceedings are not quite regular. But there is nothing in them that can operate as *res judicata*. (*Shirreff, J.M.*) BIND BASNI PRASAD *v.* RAMPATI DEI. **1941 A.W.R. (Rev.) 562 = 1941 O.A. (Supp.) 493 = 1941 R.D. 530.**

——**S. 11**—*Connected cases—Common judgment—Appeal in one—Interference.*

Per *Harper, S.M.*—Where four cases under S. 44 of the Agra Tenancy Act were heard together and disposed of by a single judgment and an appeal was preferred in one only, it was *held* that though the reasons given by the lower Court were not very strong, as the matter had been given judicial discretion there was no sufficient reason to differentiate one case which came upon appeal from the rest. (*Harper, S.M. and Shirreff, J.M.*) DURGA CHARAN SINGH *v.* JAGAI. **1941 R.D. 586 = 1941 A.W.R. (Rev.) 579 = 1941 O.A. (Supp.) 537.**

——**S. 11**—*Constructive* res judicata—*Applicability of doctrine—Conditions.*

The rule of constructive *res judicata* can only apply to matters actually decided and to all matters which are necessarily deemed to have been decided by the judgment. But where the relief prayed for is not dependant on the adjudication of a particular matter in issue, by no conceivable reason can it be said that the matter must be deemed to have been also decided by the judgment. (*Venkataramana Rao, J.*) CHANDRAYYA *v.* CHINNAPPA REDDI. **1941 M.W.N. 489 = A.I.R. 1941 Mad. 753.**

——**S. 11**—*Directly and substantially in issue—Prior partition suit—Opposition by defendants on ground property was debuttar of which they were shebaits—Finding by Court in favour of defendants not disturbed in appeal—Subsequent suit for declaration of title to same property—Same defendants impleaded both in their personal capacity and as shebaits along with their tenant*—Res judicata.

The plaintiff sued for partition of certain plots of land against three defendants who opposed the suit on the ground that the properties were the *debuttar* properties of a deity of whom they were the shebaits. The Court found that all the plots except one were absolute *debuttar* property and dismissed the suit in respect of them inasmuch as the deity was not made a party. On appeal, the High Court did not disturb this finding but dealt with the other plot in suit. The plaintiff subsequently brought a suit for a declaration of his title to he same plots of land which were found to be *debuttar* in the earlier suit impleading the same defendants both in their personal capacity as well as in their capacity as shebaits of the deity along with their tenant.

Held, that the suit was barred by *res judicata* on the following grounds:—(*i*) The question whether the land sought to be partitioned in the earlier suit was *debuttar* or not was not one which was merely incidental. It was a vital question and it must be taken to be a question directly and substantially in issue inasmuch as if the property was *debuttar*, the suit for partition would necessarily fail. (*ii*) The suit for partition was not dismissed for defect of parties. The reason for the dismissal was the finding that the property was *debuttar* and the other finding that the suit was bad for defect of parties was merely a consequential one. (*iii*) The defendants, although they were impleaded only in their personal capacity in the partition suit, contested that suit as shebaits on behalf of the deity. They were, therefore, litigating under the same title in both the suits. The addition of the tenant of the defendants as a party made no difference as he was not asserting any independent title in himself. (*iv*) The decision of the Court in the earlier suit as regards the land which it held to be *debuttar* had not merged in the decision of the High Court. (*Sen, J.*) NABENDRA KISHORE ROY *v.* PURNASASHI CHAUDHURI. **45 C.W.N. 854.**

——**S. 11**—*Directly and substantially in issue—Subject-matter in prior proceeding not identical with subject-matter in later proceeding—Claim in respect of attached crops on land—Dismissal—Subsequent attachment of land itself—Claim to land—If barred by* res judicata.

An order on a claim petition in relation to attached crops standing on a plot of land cannot operate as *res judicata* in a subsequent claim petition in respect of the land itself when the land is attached by another decree-holder in execution of a decree against the same judgment-debtor; the subject-matter of the claim order in the prior claim which related to the crops is not identical with the subject-matter of the subsequent claim which relates to the land itself. (*King, J.*) PETHURAJU KONE *v.* MUTHUSWAMI AIYAR. **1941 M.W.N. 982 = (1941) 2 M.L.J. 784.**

——**S. 11**—*Doctrine of* res judicata *and of estoppel—Distinction between.*

Per *Pal, J.*—The doctrine of *res judicata* no doubt resembles the doctrine of estoppel in some respects; but the two are materially different. The doctrine of *res judicata* differs from 'estoppel' chiefly in not resulting from an act of party himself but from a decision of the Court. The plea of *res judicata* amounts to an assertion that the very legal rights of the parties are such as they have been determined to be by the judgment of a competent Court and no other Court should proceed to determine this again. That which has been delivered in judgment must be taken for established truth. In all probability it is true in fact; even if not, it is expedient that it should be held as true none the less. The operation of the doctrine is thus the transformation of a question of fact into a question of law. (*Syed Nasim Ali and Pal, JJ.*) SRIMATI RADHARANI DASSI *v.* SRIMATI BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**S. 11**—*Erroneous decision—Question of jurisdiction.*

An erroneous decision by a Court that it has no jurisdiction, is not a nullity which can be ignored or even impeached in a collateral decision. The rule of *res judicata* applies to such a decision. (*Tek Chand and Beckett, JJ.*) ANNU MAL HAR NARAIN *v.* BRIJ LAL. **196 I.C. 611 = 14 R.L. 164 = 43 P.L.R. 479 = A.I.R. 1941 Lah. 327.**

C. P. CODE (1908), S. 11.

——**S. 11**—*Execution proceedings—Constructive* res judicata—*Failure of judgment-debtor to raise objection as to absence of personal decree under O.* 34, *R* 6—*Estoppel.*

It is well established that the principle of constructive *res judicata* applies to execution proceedings. The failure of the judgment-debtor to object at the proper time to the proceedings for attachment and sale of his properties other than those mortgaged on the ground of the absence of a personal decree under O. 34. R. 6, C. P. Code, estops him from taking the objection at a later stage. (*Bhide, J.*) JOGINDRA SINGH *v.* SHIB NARAIN SINGH. **195 I.C. 288=14 R.L. 54= 43 P.L.R. 60=A.I.R. 1941 Lah. 171.**

——**S. 11**—*Execution proceedings—Constructive* res judicata—*Failure to object to maintainability of application or jurisdiction of executing Court—Disposal on footing that it is a proper application—Effect—Plea that later application is barred by limitation as former one was not accerding to law—Maintainability.*

If an execution application is not a proper application which can be entertained by the executing Court, an objection on that score must be raised then and there and in the proceedings on that application. When the parties proceed on the footing that the application was a good one and one which the executing Court had jurisdiction to entertain, and is disposed of by the Court, it must be held that the question of jurisdiction and maintainability of the application is by implication deemed to have been decided against the judgment-debtor. It is not open to him to raise this objection on a later occasion and to plead that a subsequent application for execution is barred by limitation as the former application was not in accordance with law. (*Fazl Ali and Shearer, JJ.*) HARBANS NARAYAN SINGH *v.* UMA SHANKAR PRASAD. **196 I.C. 621= 14 R.P. 215=8 B.R. 63=22 Pat.L.T. 809.**

——**S. 11**—Execution proceedings—Constructive *res judicata*—Plea of limitation. *See* 1940 Dig., Col. 181. BARKAT RAM *v.* BHAGWAN SINGH. **191 I.C. 612= 13 R.L. 307.**

——**S. 11**—*Execution proceedings—Orders in, when operates as* res judicata.

If there is a previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be reagitated at a subsequent stage of the execution. But before an order can operate as *res judicata*, it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground then there is no decision on the merits and when there is no decision on the merits, there is of course no *res judicata*. If it is ambiguous whether an order is on merits, then the ambiguity must be construed in favour of the person against whom the order is made. Hence an order "decree-holder absent. Application incorrect. He be awaited for 2nd November 1933," or a subsequent order "decree-holder absent. He has not yet turned up as yet though he was awaited till to-day. Application is therefore rejected with cost" will not operate as *res judicata*. (*Bose, J.*) NATHMAL *v.* BALKRISHNA. **194 I.C. 641=14 R.N. 4= 1941 N.L.J. 319=A.I.R. 1941 Nag. 152.**

——**S. 11**—*Execution proceedings—Order refusing relief to defendant on basis of pre-decree agreement—Failure to appeal—Effect—Right to claim relief in appeal from decree.*

Where no appeal is filed against an appealable order passed in execution of a decree, refusing relief to the judgment-debtor on the basis of an agreement between the parties, before decree in the suit, such order becomes final and conclusive, and no relief on that basis can be claimed or awarded to the defendant judgment-debtor in an appeal from the decree itself. (*Davis. C.J. and Weston, J.*) RAMA BROS. *v.* FORBES, FORBES CAMPBELL & CO., LTD. **I.L.R. (1941) Kar. 227= 195 I.C. 626=14 R.S. 40=A.I.R. 1941 Sind 103.**

——**S. 11**—*Execution proceedings*—Res judicata—*Failure of judgment-debtor to substantiate plea—Plea if can be raised again at later stage.*

Where the judgment-debtor in answer to a notice of sale proclamation objects to the proposed sale of a particular item of property on the ground that the property is not included in the decree under execution, but fails to substantiate his objection, he cannot afterwards raise the same plea in another stage of the execution, although no sale was held under the prior proclamation and a fresh proclamation is taken out for a sale. The matter in issue, being *res judicata*, cannot be re-agitated. (*King, J.*) MAHARAJA OF COCHIN *v.* THUPRAN. **1941 M.W.N. 805=A.I.R. 1941 Mad. 861= (1941) 2 M.L.J. 792.**

——**S. 11**—*Execution proceedings*—Res judicata—*Order for execution after notice—Effect of—Sons proceeded against under pious obligation theory of Hindu Law—If barred by* res judicata *from pleading limitation.*

An order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising the plea of limitation in subsequent proceedings even though the application on which the order is made does not fructify and is eventually struck off or dismissed. But the sons of the judgment-debtor who are proceeded against in execution under the doctrine of pious obligation of a Hindu son to pay his father's debts, are not precluded from pleading limitation as a bar to execution. (*Wadsworth and Patanjali Sastri, JJ.*) VENKATARANGA REDDI *v.* SITHAMMA. **53 L.W. 181= 1941 M.W.N. 329=A.I.R. 1941 Mad. 440= (1941) 1 M.L.J. 270.**

——**S. 11**—Ex parte *decree.*

A matter must be regarded as *res judicata* if it is actually heard and finally decided in a suit even though the decree is passed *ex parte*. (*Sen, J.*) PRIOMBALA DEBI *v.* JOHURI LAL RAY. **A.I.R. 1941 Cal. 574.**

——**S. 11**—Ex parte *decree—If operates as* res judicata.

An *ex parte* decree for rent cannot operate as *res judicata*. (*Sathe, J.M.*) ABDUL HAMID *v.* LAKHPAT RAI. **1941 R.D. 321=1941 A.W.R. (Rev.) 447 (1)= 1941 O.A. (Supp.) 379 (1).**

——**S. 11**—Ex parte *decree—Rate of rent—If conclusive.*

Where the question of rate of rent is raised but the defendant is subsequently absent and an *ex parte* decree is given for a particular amount, it is not conclusive owing to the failure of defendant to prosecute his case. (*Harper, S.M.*) HORILAL *v.* CHUNNA. **1940 R.D. 602=1941 A.W.R. (Rev.) 90= 1941 O.A. (Supp.) 78.**

——**S. 11**—*Findings—Several issues framed—Decision on each—If* res judicata.

Where several issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as *res judicata* between the parties to the suit. But if a decision on an issue does not support the ultimate decree, such decision cannot operate as *res judicata*. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

C. P. CODE (1908), S. 11.

——**S. 11**—*Heard and finally decided—Claim not adjudicated upon in prior suit—Plaintiff not proceeding with claim—Choice to wait for a different action.*

Where a claim made in a prior suit is not judicially considered or adjudicated upon between the parties and all that happened is that the party elected not to proceed with the action for that purpose but to seek a judicial decision thereon in other proceedings, there is no bar of *res judicata* to that claim being adjudicated in a different suit. (*Lord Russel.*) OKUSANYA *v.* AKANWO.

197 I.C. 27 = 54 L W. 618 = 1941 A.W.R. (Rev.) 781 = 1941 O A. 735 (P.C.).

——**S. 11**—Heard and finally decided—Connected cases—Appeal in one only—Effect—Suit on mortgage after insolvency of mortgagor—Application by Official Receiver to set aside mortgage—Decree in suit and dismissal of application—Appeal by Official Receiver against dismissal of application alone—If *res judicata*—Provincial Insolvency Act, Ss. 4 and 53—Scope. *See* 1940 Dig., Col. 183. SEVADAPPA GOUNDER *v.* NARAYANASWAMI AYYAR. **192 I.C. 810 = 13 R.M. 591 = (1940) 1 M.L.J. 647.**

Reversed on L.P.A. *See* **(1941) 2 M.L.J. 932.**

——**S. 11**—*Heard and finally decided—Decision in previous suit holding suit as framed under Mahomedan law barred by O. 22, R. 9 (1), C. P. Code—Question whether subsequent suit based on customary law is barred—If* res judicata.

A decision may be wrong and a decision may be on a pure point of law, but if the matter has been put into issue, then the decision will bind the parties and their privies in a representative suit. Where a suit as framed under Mahomedan law is barred by O. 22, R. 9 (1), the question whether the subsequent suit, which is based on customary law is barred, cannot be held to be *res judicata* by reason of the previous decision, whether that decision was right or wrong and whether it was on a pure point of law or on a mixed question of fact and law; for, in those circumstances, the question of customary law was neither heard nor decided and therefore there could not be any *res judicata* in the matter. (*Tek Chand and Dalip Singh, JJ.*) JAN MOHAMMAD *v.* MOHAMMAD KHAN. **196 I.C. 130 = 14 R.L. 132 = A.I.R. 1941 Lah. 169.**

——**S. 11**—*Heard and finally decided—Finding without issue.*

In lieu of certain remittances of money made by *A* to *B* the latter executed a lease, a sale deed and a mortgage of different items of property in favour of *A*. The suit by *A* for possession of property conveyed by the lease and the sale deed was dismissed on the defence of benami. *A's* story that his remittances were loan to *B* was found to be false. Subsequently *A* sued to enforce the mortgage in his favour.

Held, that the finding in the former suit that the remittances were not loan did not operate as *res judicata* in the mortgage suit, inasmuch as the question whether the remittances were loan was not really an issue in the mortgage suit. (*Henderson, J.*) NUR HOSSEIN *v.* TAMIJUDDIN. **A.I.R. 1941 Cal. 449.**

——**S. 11**—*Heard and finally decided—Matter not in issue in previous suit.*

Where in a partition suit by a co-sharer the defendant co-sharer alleges that he has a right of way over the land in suit which may be taken into account at the time of making the allotment and the right of way is neither challenged nor any issue framed as to its existence but on the contrary the right has been admitted by the other party, the decision in the partition suit cannot operate as *res judicata* on the question as to the existence of the right of way in favour of the defendant. (*Sen, J.*) BARODA PRASAD PAL *v.* ASUTOSH PAL. **A.I.R. 1941 Cal. 289.**

C. P. CODE (1908), S. 11.

——**S. 11**—"Heard and finally decided"—Partition suit—Revenue paying land—Preliminary decree declaring plaintiff to be entitled to partition—No partition effected and no execution taken out—Fresh suit for partition—*Res judicata*. *See* C. P. CODE, S. 47. **43 Bom.L.R. 971.**

——**S. 11**—*Heard and finally decided—Rent suit—Tenant's defence that he held land under third person overruled—Suit by tenant for declaration that third person and not plaintiff in rent suit was his landlord—If barred.*

In a suit by the landlord against the tenant for rent, the tenant pleaded that he was holding the land as tenant of third persons. The tenant's defence was investigated and overruled and the suit was decreed in favour of the landlord. The tenant then brought a suit for declaration that the third party and not the plaintiff in the rent suit was his landlord.

Held, that the suit was barred by the principle of *res judicata* under S. 11, C. P. Code.

Held, further, that the suit being an inter-pleader suit within the meaning of S. 88 and O. 35, R. 5, C. P. Code, was not maintainable. (*Pal, J.*) PANCHANAN GHOSH *v.* SARAT KUMAR ROY. **A.I.R. 1941 Cal. 512.**

——**S. 11**—Heard and finally decided—Second suit for redemption—Usufructuary mortgage—Prior suit for redemption—Preliminary decree—Final decree dismissing suit for non-payment of commission fee—Second suit—If barred. *See* 1940 Dig., Col. 183. ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. **A.I.R. 1941 Mad. 217.**

——**S. 11**—*Issue of law—Decision on, no longer good law—If* res judicata.

A decision on a point of law which has ceased to be good law, will not operate as *res judicata* in a subsequent suit. (*Sathe, J.M.*) BASUDEO *v.* DATWA. **1941 A.W.R. (Rev.) 480 (2) = 1941 O.A. (Supp.) 439 (2) = 1941 O.W.N. 691 = 1941 R.D. 373.**

——**S. 11**—*Issue of law—Decision on question of jurisdiction—Rights of parties not decided—Decision, if* res judicata.

A decision of Court that it has no jurisdiction to deal with the case without deciding anything regarding the rights of the parties, is not *res judicata*. (*Henderson, J.*) MEGHRAJ GOLAB CHAND *v.* CHANDRA KAMAL BHUIYAN. **196 I.C. 534 = 73 C.L.J. 410 = A.I.R. 1941 Cal. 493.**

——**S. 11**—"*Litigating under same title*"—*Meaning of.*

The expression 'title' in S. 11 refers not to the cause of action on which the suit is brought but to the interest or capacity of the party suing or being sued. If the plaintiff in both suits is suing in his individual capacity and in his own interest then he is litigating under the same title. Where the defendant is sued in both suits in his individual capacity, a plea of *jus tertii* cannot alter the character of the suit. The landlord in execution of his rent decree put the holding of the tenant to sale and purchased it himself. On being prevented by the tenant from taking possession of two plots described in the plaint in the rent suit as forming part of the holding the landlord sued for a declaration that the plots appertained to the holding purchased by him. The tenant pleaded *jus tertii* and took the defence that the plots did not appertain to the holding but belonged to a deity of which he claimed to be shebait.

C. P. CODE (1908), S. 11.

Held, that the parties in both the suits were litigating under the same title within the meaning of S. 11. (*Sen, J.*) PRIOMBALA DEBI *v.* JOHURI LAL RAY.
A.I R. 1941 Cal. 574.

——**S. 11**—Litigating under same title—Prior partition suit—Opposition by defendants on ground property was *debuttar* of which they were shebaits—Finding by Court in favour of defendants not disturbed in appeal—Subsequent suit for declaration of title to same property—Same defendants impleaded both in their personal capacity and as shebaits along with their tenant—*Res judicata*. *See* C. P. CODE, S. 11—DIRECTLY AND SUBSTANTIALLY IN ISSUE. **45 C.W.N. 854.**

——**S. 11**—Litigating under the same title—Suit on mortgage by assignee under unregistered deed—Dismissal—Fresh suit after obtaining registered deed of assignment—If barred. *See* 1940 Dig., Col. 184. JETHANAND ISSARDAS *v.* UDHOMAL. **I.L.R. (1941) Kar. 99 = 192 I.C. 676 = 13 R.S 198.**

——**S. 11**—*Miscellaneous proceedings—Decision of Revenue Court as to defendants being muafidars—Later civil suit to declare that they are not muafidars—Bar of* res judicata.

Where a Revenue Court has decided in a suit for profits that the defendants are muafidars, the decision cannot operate as *res judicata* in a later civil suit to declare that they are not muafidars. (*Bennett, J.*) AZIZ AHMAD KHAN *v.* INAYAT KHAN.
195 I.C. 1101 = 1941 A.W.R. (Rev.) 879 = 1941 O.L.R. 738 = 196 I.C. 673 = 1941 R.D. 851 = 1941 O.A. 805.

——**S. 11**—*Miscellaneous proceedings—Findings in summary cases under Land Revenue Act*—Res judicata.

Any finding in a summary case under the U. P. Land Revenue Act cannot operate as *res judicata*. (*Shirreff S.M. and Sathe, J.M.*) BALKISHUN PASI *v.* KHATRANI. **1941 A.W.R. (Rev.) 685 = 1941 O.A. 625 = 1941 R.D. 723.**

——**S. 11**—Miscellaneous proceedings—Proceeding under O. 22, R. 5—Orders in—*Res judicata*. *See* C. P. CODE, O. 22, R. 5. **43 P L.R. 16.**

——**S. 11**—Plea of *res judicata* — Availability—Reasons for declining jurisdiction—If decisions. *See* 1940 Dig., Col. 184. UPENDRA NATH BOSE *v* LALL.
I.L R. (1940) Kar. (P C.) 460 = 191 I.C. 7 = 13 R.P.C. 110 = 7 B R. 198 = 45 C.W.N. 204 = 73 C.L J. 145 = 43 Bom.L.R. 381.

——**S. 11**—Pro forma *defendant—If bound by decision—Collusion with plaintiff—Onus.*

A decision in a former suit, which affects the interests of a *pro forma* defendant against whom no relief had been claimed, can operate as *res judicata* in a subsequent suit between the same parties. It is immaterial that no express issue was framed in that suit with regard to his rights, when it is clear from the pleadings that his interest was identical with that of the plaintiff. The onus would lie on the party who asserts to show that he was colluding with the plaintiff. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

——**S. 11**—*Rent suit—Decision as to rate of rent—When constitutes* res judicata.

Where in a case no plea is raised as regards the rate of rent and no specific issue is framed and the Court decrees the suit at a certain rate of rent, the decision would no doubt not constitute as *res judicata* in a subsequent suit, but where the question has been pointedly raised and embodied in the form of a specific issue as to the proper rate of rent, then the decision arrived at by the Court upon such issue will be *res judicata* in subsequent suits for rent. (*Ghulam Hasan, J.*) MAHABIR SINGH *v.* TIRBHAWAN BAHADUR SINGH. **192 I.C. 75 = 13 R.O. 308 = 1941 O.L.R. 57 = 1941 R.D. 332 = 1941 O.A. 30 = 1941 A.W.R. (Rev.) 75 = 1941 O.W.N. 30 = A I.R. 1941 Oudh 259.**

C. P. CODE (1908), S. 11.

——**S. 11**—*Representative suit—Later suit in personal capacity.*

Where a suit for possession by a monk as representative of the Sanghas of kyaungdaik is dismissed, a subsequent suit by him for possession in the capacity of presiding monk is not *res judicata*. (*Roberts, C.J. and Dunkley, J.*) U ZAWTIPALA *v.* U THATDAMA.
1941 Rang.L.R. 204 = 194 I.C. 597 = 14 R.R. 1 = A.I.R. 1941 Rang. 159.

——**S. 11**—Representative suit—Representor abandoning suit—Representee not made a party to the suit—Fresh suit by representee, if barred by *res judicata*. *See* 1940 Dig., Col. 185. THAIVANAI ACHI *v.* RAMANATHAN CHETTYAR. **192 I.C. 683 = 13 R R. 188 = A.I.R. 1941 Rang. 24.**

——**S. 11**—Revenue proceedings—Orders in—If *res judicata*. U. P. LAND REVENUE ACT, S. 57 AND C. P. CODE, S. 11. **1941 O W.N. 461 = 1941 A.W.R. (Rev.) 228.**

——**S. 11**—Scope—General principles of *res judicata*—Application of—Limits to. *See* 1940 Dig., Col. 186. ANANTAMONI DASI *v.* BHOLANATH. **195 I.C. 870 = 14 R C. 146 = A.I.R. 1941 Cal. 104.**

——**S. 11**—Scope—Issue in proceeding decided by final order—Power of succeeding Judge to reopen issue in same proceeding at later stage. *See* 1940 Dig., Col. 186. SUBRAMANIA RAO *v.* RAMI REDDI.
193 I.C 44 = 13 R.M. 608 = (1940) 2 M.L.J. 499.

——**S. 11**—*Scope—Mortgagor adjudged insolvent—Suit by mortgagee to enforce his mortgage making special receiver a party—Application by receiver in insolvency for setting aside mortgage as one without consideration—Both suit and application heard together—Suit decreed and application dismissed—Appeal only against order dismissing receiver's application—Decree in the suit if operates as* res judicata.

A mortgagee instituted a suit to enforce his mortgage on the 23rd June, 1931 and impleaded as a party the special receiver in the insolvency of the mortgagor who had been adjudicated an insolvent on the 25th October, 1930, in the same Court. On the 20th August, 1931, the Special Receiver applied in the insolvency proceedings for an order setting aside the mortgage under the provisions of Ss. 4 and 53 of the Provincial Insolvency Act. The suit and the application were heard together and the mortgage was held to be valid. The consequence was that the Court granted the mortgagee a preliminary decree and dismissed the receiver's application. The receiver filed an appeal against the order dismissing his application but filed no appeal against the preliminary decree.

Held, that the unappealed decree did not operate as *res judicata* in the appeal against the order. 16 M.L J. 63 = I.L.R. 29 Mad. 333 (F.B.), Foll.; (1940) 1 M.L.J. 647, reversed. (*Leach, C.J. and Happell, J.*) NARAYANASWAMI AYYAR *v.* SEVADAPPA GOUNDAR.
54 L.W. 654 = (1941) 2 M.L.J. 932.

——**S. 11**—*Subject-matter different—Finding as to jointness or otherwise of Hindu family—Crucial point of time different in the two suits.*

An earlier decision that a particular Hindu family was not joint at a particular point of time, could not operate as *res judicata* in a later suit where the question is as to the jointness or otherwise of the same family, but at a point of time earlier than that to which the

C. P. CODE (1908), S. 11.

prior decision referred. (*Yorke and Agarwal, JJ.*) MOHANLAL *v.* RAM DAYAL. 194 I.C 61= 13 R.O. 525=1941 O L.R. 384= 1941 A.L.W. 525=1941 O.A. 370= 1941 A.W.R. (C.C.) 139=1941 O W.N. 577= A.I.R. 1941 Oudh 331.

——**S. 11**—*Subject-matter different—Same issue raised in subsequent suit between same parties and others—Bar.*

S. 11, C. P. Code, does not say that the entire subject-matter of both the suits should be identical. It deals with suits as well as with particular issues in the suits. If the particular issue raised in both the suits concerns the same parties, then the bar provided in S. 11 would apply to that particular issue even though there may be other issues raised in the subsequent suit and other parties involved in those issues. Accordingly, an issue raised and decided in a previous suit between the plaintiff and some of the defendants would operate as *res judicata* in the subsequent suit so far as those defendants are concerned, although that issue is raised with respect to the other defendants as well. (*Sen, J.*) BHOLANATH CHATTERJI *v.* MONMOTHA NATH DUTTA. 45 C.W.N. 420.

——**S. 11, Expl. IV**—Applicability—Prior suit for declaration of title and possession as owner under sale-deed—Dismissal on ground that plaintiff was only benamidar and that transaction was only a mortgage and not sale—Subsequent suit by benamidar and real owner to enforce mortgage—*Res judicata*—Same parties. *See* 1940 Dig., Col. 187. GURUSANGAPPA *v* BASLINGAPPA BASAPPA. 192 I.C. 305=13 R.B. 244.

——**S. 11, Expl. IV**—Applicability—Title of transferee from Hindu widow admitted by lambardar in suit for profits—Subsequent suit by lambardar as reversioner of estate against transferee, for possession, if barred. *See* 1940 Dig., Col. 187. BALARAM *v.* KEWALRAM. 191 I.C. 881=13 R.N. 221.

——**S. 11, Expl. IV**—*Matter constituting ground of defence.*

A matter constitutes a ground of defence only when it can be used for the purpose of resisting a claim. There must, therefore, be a claim and a matter must be such as would defeat the claim either wholly or in part. A bare assertion in a plaint is not a claim. It becomes a claim when the plaintiff prays expressly or impliedly for the Court's decision upon it, or if the defendant reats it as such by denying it and inviting the Court's decision thereon. (*Sen, J.*) PRIOMBALA DEBI *v.* JOHURI LAL RAY. A.I.R. 1941 Cal. 574.

——**S. 11, Expl. IV**—*Might and ought—Interpretation.*

S. 11, Expl. IV, C. P. Code, relates to any matter which might and ought to have been made a ground of attack in a former suit. The words are not "might or ought" but "might and ought". The mere fact that the plaintiff might have included his claim in the previous suit is no ground for saying that he ought to have done so. (*Tek Chand and Sale, JJ.*) SHUJA-UD-DIN *v.* SIRAJUDDIN. 195 I.C. 81=14 R.L. 30= 43 P L.R 44=A.I.R. 1941 Lah. 139.

——**S. 11, Expl. IV**—*Might and ought—Meaning.*

The 'matters that ought to be taken' referred to in the Expl. IV, to S. 11, C. P. Code, must be matters connected with the cause of action and the questions in issue between the parties at the time. (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAR SINHA. 1941 R.D. 678.

——**S. 11, Expl. IV**—*Might and ought—Previous suit by wife for divorce—No alternative plea for declaration that she is not wife—Subsequent suit for such declaration—If barred by* res judicata.

It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. These matters are so dissimilar that their union not only might but must certainly lead to confusion. Hence the failure of a wife in earlier suit for divorce to raise alternative plea for declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. (*Roberts, C.J. and Mosely, J.*) U SIN *v.* MA MA LAY. 1941 Rang.L.R. 14=194 I.C. 482=13 R R. 311= A.I.R. 1941 Rang. 118.

——**S. 11, Expl. IV**—*Might and ought*—Pro forma *defendant.*

When no relief is sought against a *pro forma* defendant, it is not necessary for him to raise any defence in the suit. A decree passed against him without amending the plaint or without giving him any opportunity to be heard cannot operate as *res judicata* by reason of S. 11, Expl. IV, C. P. Code. (*Harries, C.J. and Chatterji, J.*) BHUDEB CHANDRA ROY *v.* BHIK SHANKAR PATTANIK. 196 I.C. 837.

——**S. 11, Expl. IV**—*'Might and ought'—Rent suit—Extent of tenancy.*

The main question for determination in a suit for rent is whether the relationship of landlord and tenant exists between the plaintiff and the defendant, and whether any rent is due. It is not necessary for the Court to determine the number of dags of which the tenancy consists or the exact boundaries or extent of the land of the tenancy. The landlord in execution of his rent decree put the holding to sale and purchased it himself. On being prevented by the tenants from taking possession of two plots the landlord sued for a declaration that the plots formed part of the holding purchased by him. The land of the tenancy was described in the rent suit as including the aforesaid plots in order to comply with the procedural directions given in S. 148, Bengal Tenancy Act.

Held, that since a decision of the Court in the previous rent suit on the question whether the two plots appertained to the tenancy was not invited and a decision on the question was not necessary for the disposal of the rent suit and since the claim in the rent suit could not be defeated wholly or in part by the tenants showing that the two plots did not appertain to the tenancy, the defence that the two plots did not appertain to the holding purchased by the landlord was not barred by S. 11, Expl. 4, C. P. Code, for it could not be said that the question had been decided by implication merely because a rent decree had been passed in the previous suit in which the landlord in describing the tenancy in his plaint stated that the two plots appertained to the tenancy. (*Sen, J.*) PRIOMBALA DEBI *v.* JOHURI LAL RAY. A.I.R. 1941 Cal. 574.

——**S. 11, Expl. IV**—Might and ought—Suit for damages or mesne profits against person in possession without title—Omission to claim set-off in respect of Government revenue paid—Subsequent suit for amount of revenue paid—If *res judicata*. *See* CONTRACT ACT, S. 69. 1941 M.W.N. 965= (1941) 2 M.L.J. 866.

——**S. 11, Expl. VI**—*Parties and representatives—Attaching decree-holder—If claims under judgment-debtor.*

Attachment does not create any specific charge on the property attached. It does not by itself give the attaching decree-holder in strictness a title to the attached pro-

C. P. CODE (1908), S. 11.

perties but it is the basis of the decree-holder's right to assert his judgment-debtor's interest in the property attached. There is no reason why this right created in favour of the decree-holder by attachment cannot be considered as a claim under the judgment-debtor within the meaning of S. 11, C. P. Code. (*Syed Nasim Ali and Pal, JJ.*) RADHARANI DASSI *v.* BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**S. 11, Expl. VI**—*Parties and representatives—Suit against a person as sarbarkar of another—Decision—Binding nature.*

Where a person is mentioned by name as defendant but he is really sued as sarbakar of a pardanashin lady and is also her uncle and guardian managing her property, the decision in such a suit would bind the lady in question and would operate as *res judicata* in subsequent suits in which she or her representatives are parties. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRI DHAR. **192 I.C 259 = 13 R.O. 338 = 1941 O.L R 93 = 1941 A W.R. (Rev.) 19 = 1941 R.D. 6 = 1940 O.W.N. 1344 = 1940 O.A. 1293 = A.I.R. 1941 Oudh 189.**

——**S. 11, Expl. VI**—Parties and representatives—Suit on mortgage by mahant of math—Decree—If *res judicata* and binds succeeding mahants. *See* HINDU LAW—RELIGIOUS ENDOWMENT—MATH.

1941 P.W.N. 75 = 22 Pat.L.T. 239.

——**S. 11, Expl. (vi)**—*Religious Endowment—Mortgage decree passed against Mahanth—If binds his successor.*

A mortgage decree passed against a former Mahanth does not operate as *res judicata* against a succeeding Mahanth, when there is nothing to show that the former Mahanth was impleaded in the suit as representing the deity, and no issue on the question of legal necessity was raised or decided in that suit. (*Chatterji and Meredith, JJ.*) JANKIJEE *v.* MATHURA PRASAD MISSIR.

192 I.C. 789 = 13 R.P. 35 = 7 B.R. 569.

——**S. 11, Expl. VI**—*Representative suit or proceeding—Claim to attached property—Objection to same by decree holder—If one on behalf of all creditors.*

A suit by a creditor to set aside an adverse claim order may in certain circumstances be in essence a suit under S. 53 of the T. P. Act; but where one creditor merely resists the claim made by a claimant, his resistance in the summary proceedings cannot be deemed to be on behalf of all the creditors. (*King, J.*) PETHURAJU KONE *v.* MUTHUSWAMI AIYAR.

1941 M.W.N. 982 = (1941) 2 M.L.J. 784.

——**S. 13**—Foreign Judgment Incidents—Judgment obtained in Foreign Court against some of joint promisors—Suit against the rest in British Indian Court—If barred. *See* 1940 Dig., Col. 618. NILRATAN MUKHOPADHYA *v.* COOCH BEHAR LOAN OFFICE, LTD. **I L.R. (1941) 1 Cal. 171 = 194 I.C. 746 = 14 R.C. 11 = A.I.R. 1941 Cal. 64.**

——**S. 13**—Scope—Suit on foreign judgment—Nature of relief. *See* 1940 Dig., Col. 188. WAZIR ZAHU *v.* MUNSHI DAS. **20 Pat. 144 = A.I.R. 1941 Pat. 109.**

——**S. 13 (a)**—*Applicability—Suit in foreign Court—Defendant filing written statement attacking jurisdiction of Court—If submission to jurisdiction—Decree—Executability in British India.*

The action of a defendant in filing a written statement in a suit against him in a foreign Court and attacking the jurisdiction of that Court amounts to submission to its jurisdiction, as by such a course he is asking the Court to decide a point in controversy between himself and the plaintiff; even a mere submission of the issue of jurisdiction to the decision of the

C. P. CODE (1908), S. 13.

Court amounts to acceptance of that Court's jurisdiction. S. 13 (*a*), C. P. Code, does not apply to such a case, and the decree passed cannot be said to be one not pronounced by a Court of competent jurisdiction. (*King, J.*) SUNDARAM PILLAI *v.* KANDASWAMI PILLAI.

53 L.W. 89 = 1941 M.W.N. 182 = A.I.R. 1941 Mad. 387 = (1941) 1 M.L.J. 140.

——**S. 13 (a)**—"*Court of competent jurisdiction*"—*Person born of Cochin parents resident in British India—Decree by Cochin Court against such person—If decree of Court of competent jurisdiction—Executability in British India.*

A person born of Cochin parents in British India, where they ordinarily resided, does not lose his Cochin nationality by acquiring by birth British nationality. The fact that he can claim British nationality under S. 2 (1) (*a*) of the British Nationality and Status of Aliens Act, 1914, would not preclude him from having a dual status, dual nationality being well-recognised. Accordingly Courts in Cochin have jurisdiction to pass a decree against such a subject, capable of execution in British Indian Courts. Any renunciation of his Cochin nationality after the passing of the decree will not affect the jurisdiction of the Cochin Court to pass such a decree. (*Leach, C. J. and Somayya, J.*) RAMALINGA AIYAR *v.* SWAMINATHA AIYAR.

I.L.R. (1941) Mad 891 = 54 L.W. 73 = 1941 M.W.N. 701 = A.I.R. 1941 Mad. 688 = (1941) 2 M.L.J. 68.

——**S. 13 (a), (b) and (d)**—Foreign judgment—Conclusive character of—Suit in French Court against British Indian subject—*Ex parte* decree—Subsequent "opposition" application by defendant praying inquiry into merits—Rejection of application and confirmation of prior judgment—Effect of—If with jurisdiction and on merits—Failure to follow rules of British Indian procedure—Effect of. *See* 1940 Dig., Col. 190. WAZIR SAHU *v.* MUNSHI DAS. **20 Pat. 144 = A.I.R. 1941 Pat. 109.**

——**S. 13 (b)**—*Applicability—Defendant set* ex parte—*Defendant getting* ex parte *order set aside and filing written statement raising various issues and then withdrawing—Decree after examination of plaintiff—If not one on merits.*

Where a defendant, after getting an order setting him *ex parte* set aside, files his written statement raising various issues in the foreign Court and then withdraws, and a decree is given against him by that Court after the plaintiff has actually been examined in the witness-box, it cannot be held that the decision is an *ex parte* decision and not given on the merits of the case within the meaning of S. 13 (*b*), C. P. Code. (*King, J.*) SUNDARAM PILLAI *v.* KANDASWAMI PILLAI. **53 L.W. 89 = 1941 M.W.N. 182 = A.I.R. 1941 Mad. 387 = (1941) 1 M.L.J. 140.**

——**S. 13 (b)**—*Ex parte* decree—If not on merits. *See* 1940 Dig., Col. 190. WAZIR ZAHU *v.* MUNSHI DAS. **20 Pat. 144 = A.I.R 1941 Pat. 109.**

——**S. 13 (d)**—Natural justice—Meaning of. *See* 1940 Dig., Col. 190. WAZIR ZAHU *v.* MUNSHI DAS. **20 Pat. 144 = A.I.R. 1941 Pat. 109.**

——**S. 13 (e)**—*Applicability—"Fraud"—Meaning—Decree obtained on evidence which is not true but which is believed by Court—If vitiated.*

It cannot be said that merely because a plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true, the decree has been obtained by fraud so as to attract the operation of S. 13 (*e*), C. P. Code. In order to attract S. 13 (*e*) there must be fraud connected with the procedure in the suit itself. (*King, J.*) SUNDARAM PILLAI *v.* KANDA-

C. P. CODE (1908) S. 13.

SWAMI PILLAI. 53 L.W. 89=1941 M.W.N 182= A.I.R. 1941 Mad. 387=(1941) 1 M.L.J. 140.

——S. 13 (f)—*Applicability—Claim in foreign Court to recover money spent on marriage of minor members of joint family—Defendants over* 18 *years but minors under British Indian Law being wards under guardian—Decree—If unenforceable in British India under S.* 13 *(f).*

Plaintiff sued defendants 1 and 2 in a foreign Court. The 1st defendant was married to the plaintiff's daughter, and the plaintiff alleged that he had furnished the money to pay for the expenses of the marriage, and that both the defendants had promised to repay the money to him. The plaintiff also claimed re-payment of the money independently of the agreement as money due from the joint family of the defendants to reimburse him for what he had spent upon a marriage which was a duty devolving upon that family. Both the defendants were at that time above 18 years of age, but were minors according to the law of British India, being under 21, as they had guardians appointed for them under the Guardians and Wards Act. A decree was passed and sought to be executed in British India. The defendants pleaded S. 13 (*f*), C. P. Code, in bar of execution.

Held, that the claim was founded partly perhaps upon a breach of the Contract but also partly upon a claim under S. 68 of the Contract Act which in no way involved its breach; and whether the claim was good or bad, the decree given sustained a claim which was not wholly founded upon a breach of the Contract. The plaintiff could not therefore be prevented from executing his decree in British India by S. 13 (*f*), C. P. Code. (*King, J.*) SUNDARAM PILLAI *v.* KANDASWAMI PILLAI. 53 L.W 89=1941 M.W.N. 182= A.I.R. 1941 Mad. 387=(1941) 1 M.L.J. 140.

——Ss. 16, 99 and O. 2, Rr. 2, 3 and 4—*Applicability and scope—Suit for specific performance of contract of sale of immovable property and possession—Vendor and subsequent purchaser made defendants—Jurisdiction—Joinder of claims—Leave of Court—Necessity—Separate suits—If barred by* Res judicata.

Where an agreement is entered into for sale of immovable property in favour of one person and subsequently the vendor sells the property to another under a conveyance, the prior vendee is entitled to bring a suit against both the vendor and the subsequent vendee for specific performance of the contract as well as for possession. It is settled law that the cause of action for specific performance is distinct from that for possession and a subsequent suit for possession after a suit for specific performance would not be barred by *res judicata* or O. 2, R. 2, C. P. Code. But though a separate suit for possession is not barred, the two causes of action may be joined in the same suit for the sake of convenience or to avoid multiplicity of suits. The combination of the two suits is not repugnant to any provision of law. O 1, R. 3, C. P. Code, and S. 27, Specific Relief Act, would permit the joinder of all these defendants, *i.e.*, the vendor and the subsequent vendees. The Court where the property is situate is the Court which has jurisdiction to try the suit under S. 16, C. P. Code, so far as the suit for possession is concerned. When the subsequent purchaser also lives where the property is situate, the Court of that place and that Court alone has jurisdiction to try the suit against that defendant. Though the vendor reides and the contract is concluded at a place outside the jurisdiction of that Court, it would still have jurisdiction to try the suit against him also by reason of S. 16 (*d*), C. P. Code. The proviso to S. 16, C. P. Code, would not apply to the suit, as it cannot be said

C. P. CODE (1908) S. 20.

that the suit is one in *personam*. The joinder of the two causes of action, *viz.*, specific performance and possession, is not dependant upon the leave of the Court under O. 2, R. 4, C P.Code, because O. 2, R. 4 may not apply to a case where the recovery of property is sought as a relief consequential on the relief of specific performance of a contract, and in practice leave of the Court is not asked for. Assuming that leave of the Court is necessary for such joinder, the absence of leave of the Court is not fatal and is no ground for reversal or variation of the decree, because the case would be covered by S. 99 C. P. Code. (*Broomfield and Divatia, JJ.*) NEW MOFUSSIL CO., LTD. *v.* SHANKARLAL NARAYANDAS. I.L.R. (1941) Bom. 361=196 I.C. 146= 14 R.B. 100=43 Bom L.R. 293= A.I.R. 1941 Bom. 247.

——S. 16—*Declaratory suit—Place of suit—Immovable property attached before judgment—Objector's claim allowed—Suit for declaration that property belongs to defendant.*

Where in a money suit immovable property is attached before judgment and the objector's claim as owner is allowed, a suit by the plaintiff for a declaration that the property belongs to the defendant should be instituted in the Court within the local limits of whose jurisdiction the property is situate. (*Henderson, J.*) PRABHASINI DUTTA *v.* NRIPENDRA NATH SINHA. A.I.R. 1941 Cal. 363.

——S. 17—Applicability—Application under para. 20 (2), Sch. II—Jurisdiction—Property situate within the jurisdiction of several Courts—Jurisdiction to entertain and deal with application. *See* 1940 Dig., Col. 190. VENKATACHELLAM *v.* SURYANARAYANAMURTHY. A.I.R. 1941 Mad. 129= (1940) 2 M.L.J. 520.

——S 17—*Jurisdiction of Court—Property situate outside British India and outside local limits.*

A British Indian Court can not pass a decree in respect of property situate outside British India. But it can pass a decree in respect of property situate outside the local limits of its jurisdiction when the suit is to obtain relief in respect of that property as well as property situate within its local limits. (*Tek Chand and Beckett, JJ.*) RAM KRISHAN *v.* OM PARKASH. 43 P.L.R. 489=A.I.R. 1941 Lah. 347.

——S. 20—*'Carrying on business'—Meaning—Insurance company with a head office and different sub-agency offices at different places—Receipt of premium and other business transacted by the branch offices—Company if carries on business in the place where the sub-agency or branch office is.*

'Carrying on business' in S 20, C. P. Code, means having an interest in the business transaction at the particular place and a voice in what is done and a share in the gain or loss. Where an insurance company having a head office at Calcutta has a sub-agency office in Nagpur, and all business in connection with the policy-holders are transacted by sub-agency office and a Bank account is also maintained in that place, the company must be said to be carrying on business at Nagpur within the meaning of S. 20, C. P. Code. (*Clarke, J.*) HINDUSTAN INSURANCE CO. *v.* NATHU. 1941 N.L.J. 87.

——S 20—*Jurisdiction—Suit by wife against husband and father-in law for maintenance and return of stridhan property entrusted at time of marriage—Place of suing—Suit at place of wife's residence—Maintainability—Rule of debtor seeking out creditor—Applicability of.*

The plaintiff, a Hindu wife, whose marriage took place at Negapatam and who was residing with her hus-

C. P. CODE (1908), S. 20.

band at Vellore had to leave her husband owing to ill treatment by him and returned to her father's place at Palghat. Her father-in law was residing at Mayavaram. She filed a suit in Palghat against her husband and father-in law claiming maintenance and return of stridhanam properties alleged to have been entrusted to him at the time of marriage. It was contended that the husband and father-in-law were her debtors and that, in the absence of a contract to the contrary, the English common law rule that the debtor should seek out the creditor applied and therefore the Court at Palghat had jurisdiction to entertain the suit.

Held, that the Palghat Court had no jurisdiction because no part of the cause of action, whether for recovery of maintenance or for return of the entrusted properties (return of which must have been contemplated either at the family residence at Mayavaram or at the place where the husband resided) arose at Palghat, and neither of the defendants resided or worked for gain at Palghat. The rule that the debtor must seek out the creditor could not apply to the case. (*Leach, C. J. and Somayya, J.*) RAMALINGA IYER *v.* JAYALAKSHMI.
53 L.W. 686 = 1941 M.W.N. 629 = A.I.R. 1941 Mad. 695 = (1941) 1 M.L.J. 784.

——**Ss. 20 (a) and (b)**—Principal and agent—Suit for accounts by principal against agent—Cause of action—Place of business of agent or of principal. *See* 1940 Dig., Col., 191. AUDINARAYANA RAO *v.* LAKSHMI NARAYANA RAO. **193 I.C. 81 = 13 R.M. 616 = (1940) 1 M.L.J. 558.**

——**S. 20 (c)**—*Cause of action—Suit on contract—Place of receipt of letter or telegram of acceptance of offer.*

In suits arising out of contracts, a part of the cause of action arises where the letter or telegram of acceptance of the offer is received and delivered. (*Patanjali Sastri, J.*) SEPULCHRE BROS. *v.* KHUSHAL DAS JAGJIWAN DAS. **54 L.W. 345 = 1941 M.W.N. 838 = (1941) 2 M.L.J. 481.**

——**S. 20 (c)**—*Contract of sale of goods—Breach—Place of suing.*

The plaintiff firm carrying on business at Amritsar agreed to purchase from the defendant certain goods. The contract was entered into by correspondence and the offer to buy the goods was accepted by the defendant at Bangalore. There was no condition to the effect that the payment was to be made at Amritsar. As regards delivery, the plaintiff asked for goods to be despatched to him from Bangalore by rail at his expense. Plaintiff sued the defendant at Amritsar for damages for breach of contract.

Held, that no part of the cause of action arose at Amritsar, as the contract was completed at Bangalore and payment as well as delivery were to be made there, and that the Amritsar Court had, therefore, no jurisdiction to entertain the suit. (*Tek Chand and Beckett, JJ.*) AMAR NATH-SHADI LAL v. DHONDUSA DHAKTAPPA. **195 I.C. 300 = 14 R.L, 56 = 43 P.L.R. 158 = A.I.R. 1941 Lah 223.**

——**S. 20 (c)**—Place of suing—Contract for sale of goods—Place of payment—Creditor's place of residence—Power of Court to find out implied intention of parties. *See* CONTRACT ACT, S. 49. **22 P.L.T. 282.**

——**S. 21**—*Scope of rule embodied in.*

The rule embodied in S. 21, C.P. Code, is not limited to appeals and revisions in the same suit. (*Stone, C.J., Grille, Niyogi, Gruer and Bose, JJ.*) JAGNI RAM *v.* GANPATI. **I.L.R. (1941) Nag. 1 = 1941 N.L.J 1 = A.I.R. 1941 Nag. 36 (F.B.).**

——**Ss. 22 and 23**—Scope of—Power of High Court to transfer case pending in a Court subordinate to it, to a subordinate Court of another High Court. *See* 1940 Dig., Col. 193. KANHAIYALAL DAGA *v.* ZUMER LAL. **I L.R. (1941) Nag. 311.**

——**S. 23**—Applicability—Plea of want of jurisdiction taken in one Court—Transfer, if can be ordered. *See* 1940 Dig, Col. 193. BABU LAL GIRDHARI LAL *v.* KOTUMAL. **I.L.R. (1940) All. 737 = 192 I.C. 543 = 13 R.A. 332 = A.I.R. 1941 All. 27.**

——**S. 24**—Applicability—Proceedings for enforcement of injunction under O. 39, R. 1. *See* C. P. CODE, O. 39, RR. 1 AND 2 AND SS. 24 AND 36. **1941 A.L.J. 46.**

——**S. 24**—Powers of transfer—Suit filed in Court lacking pecuniary jurisdiction. *See* 1940 Dig., Col., 193. KANHAIYA LAL *v.* HAMID ALI. **15 Luck. 619.**

——**S. 24 and O. 7, R. 10**—Suit instituted in proper Court—Transfer for disposal to another Judge of same Court—Amendment of plaint taking suit beyond jurisdiction of Judge—Procedure to be followed—Power of High Court to transfer—Return of plaint under O. 7, R. 10—Necessity. *See* 1940 Dig., Col 194. BABU BHAI VAMALCHAND *v.* HIRALAL VAMALCHAND. **I.L.R. (1941) Bom. 131 = 193 I.C. 242 = 13 R.B. 305 = A.I.R. 1941 Bom. 69.**

——**Ss. 24 and 37**—Transfer—Effect on interim orders. *See* C. P. CODE, O. 39, RR. 1 AND 2 AND SS. 24 AND 36. **1941 A.L.J. 46.**

——**S. 34**—"Decree for payment of money"—Meaning of—Interest on damages—Award of—Discretion of Court. *See* 1940 Dig., Col. 194. BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. **I.L.R. (1941) Bom. 71 = 13 R.B. 202 = 191 I.C. 806.**

——**S. 34**—*Interest—Discretion—Province of appellate Court.*

If a lower Court in the exercise of its discretion either refuses or allows interest, an appellate Court will not ordinarily interfere. But where owing to an erroneous view of the law that interest is not allowable by him under the provisions of the Debt Conciliation Act, a Judge does not allow interest, there is no exercise of discretion at all. In such a case the appellate Court will exercise the discretion which ought to have been exercised by the lower Court. (*Stone, C.J. and Bose, J.*) SETH SHEOLAL *v.* DADDIGSINGH. **1941 N.L.J. 591.**

——**S. 34**—*Interest—Fair rate—9 per cent. per annum.*

The fair rate at which interest *pendente lite* should be awarded to the plaintiffs would be 9 per cent. per annum simple from the date of the suit. (*Harries, C.J. and Manohar Lall, J.*) TIKA SAO *v.* HARI LAL. **195 I.C. 428 = 14 R.P. 122 = 7 B.R. 924 = A.I.R. 1941 Pat. 276.**

——**S. 34**—*Interest—Right to—Facts entitling.*

Courts have no power to award interest merely because money due is withheld—Facts must be alleged and proved which would make the Court hold that it is payable under a provision of law or a settled principle. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76 = 1941 N.L.J. 371 = A.I.R. 1941 Nag. 273.**

——**S. 35**—*Appeal necessitated by mistake of Court—Respondent responsible for mistake but not contesting appeal—Appellant—If can be deprived of costs.*

Where the respondent to an appeal has been responsible for a mistake on the part of the Court which has led to the appeal, it would be inequitable to make the appellant liable for the whole costs of the appeal though the respondent does not contest the appeal. The appellant must be awarded costs against the respondent. (*Harries, C.J. and Manohar Lal, J.*) JOYRAM

C. P. CODE (1908), S. 35.

NARAYAN *v.* SHIVA PRASAD SINGH.
193 I.C. 32=13 R P. 534=7 B.R. 503=
AI.R. 1941 Pat 416.

——**S. 35**—*Assignee of decree under appeal impleaded in appeal—Assignee supporting decree—Costs of successful appellant—Liability of assignee for costs of suit and of appeal.*

An assignee of a decree who is made a party respondent to an appeal by the defendant against the decree and who actively asserts the correctness of the decree and does everything he can to obtain the dismissal of the appeal by the defendant, may properly be ordered to pay the successful defendant the costs not only of the appeal but also the costs of the trial Court. (*Gentle, J.*) THIMMAPPA CHETTIAR *v.* THANGAVELU CHETTY.
54 L.W. 100=1941 M.W.N. 854=
A.I.R. 1941 Mad. 762 (1)=(1941) 2 M.L.J. 119.

——**S 35**—*Beneficiary propounding will and applying for probate—Contest by widow—Putting plaintiff to proof—Costs of beneficiary proving the will—Right to —Practice—Duty of Probate Court to grant letters of administration with the will annexed to proper person, where no executor is appointed under will.*

Where a beneficiary applied for probate of a will and on the application being contested he was put to proof of the will.

Held, that the usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and he is merely put to proof of it, is to award costs to both parties from and out of the estate. In cases where no executor has been appointed under the will it is the duty of the Probate Court on the will being established to direct the issue of letters of administration with will annexed to such persons as are under the Succession Act competent to administer the estate thus avoiding further expense and litigation. (*Venkataramana Rao and Horwill, JJ.*) KANAKASABAPATHI CHETTY *v.* UNNAMALAI AMMAL. 53 L.W. 243=
1941 M.W.N. 301=A.I.R. 1941 Mad 502=
(1941) 1 M.L.J. 299.

——**S. 35**—*Costs in partition suits—Rule—Parties if to bear own costs up to preliminary decree.*

It is by no means correct to hold that in partition suits parties should bear their own costs up to the preliminary decree. The question would depend upon the nature of the dispute raised in the suit. (*Harries, C.J. and Chatterji, J.*) JUGESHWAR MISRA *v.* KIRET SINGH. 1941 P.W.N. 557.

——**S. 35**—Costs—Next friend—Order against—Liabilityof estate. *See* 1940 Dig., Col. 1926. SRIDHAR JEU *v.* MANINDRA KUMAR. 195 I.C. 473=
14 R C. 101=A.I.R. 1941 Cal. 272.

——**S. 35**—*Costs—Unnecessary litigation due to not raising plea in proper form—Ground for depriving successful party of his costs.*

Where owing to the defendant not raising his plea in a proper form unnecessary litigation had to be carried up to the High Court, he was disallowed his costs in the first and second appellate Courts though he succeeded in the second appeal. (*Niyogi, J.*) JAMNA PRASAD *v.* SINGHAI BANSIDHAR. 1941 N.L.J. 643.

——**S. 35**—Discretion — Defamation—Suit for damages—Decree for smaller amount than claimed—Full costs—Power of Court to award. *See* 1940 Dig., Col. 415. VENKAYYA PANTULU *v.* SURYA PRAKASAMMA.
I.L.R. (1941) Mad. 255=191 I.C. 600=
13 R.M. 499=(1940) 2 M.L.J. 328.

——**S. 35**—Discretion—Mortgage suit—Purchaser of mortgaged property undertaking with mortgagor to pay purchase-money to mortgagee but failing to do so and occasioning suit—Order directing him to pay costs of

C. P. CODE (1908), S. 38.

suit—If justified—Reversal by appellate Court—Propriety. *See* 1940 Dig., Col. 416. RAGHAVACHARIAR *v.* PONNUSWAMI MUDALI. 191 I.C. 805=
13 R.M. 510=(1940) 1 M L J. 388.

——**S. 35**—Discretionary matter. *See* 1940 Dig., Col. 416. MAHRANA *v.* MAHRAJ NARAIN.
1941 A.W.R. (Rev.) 62 (2)=
1941 O.A. (Supp) 49 (2).

——**S. 35**—Mistake of Court—Correction—Order for costs—If justified. *See* 1940 Dig., Col. 416. BADRI PRASAD *v.* AMBIKA PRASAD. 16 Luck. 294=
13 R.O. 349=192 I.C. 332=1941 O.L.R. 115=
A.I.R. 1941 Oudh 91.

——**S. 35 and O. 7, R. 10**—*Powers of Court—Order returning plaint—Condition that plaintiff should pay costs of defendant before presenting to proper Court—Jurisdiction to impose.*

The Court, when passing an order under O. 7, R. 10, C. P. Code, returning a plaint for presentation to the proper Court, has no jurisdiction to impose a condition that the plaintiff whose plaint is returned shall, before presenting it to that Court, pay the costs of the defendant as a condition precedent. Though under S. 35, C. P. Code, the fact that a Court has no jurisdiction to try a suit is no bar to the exercise of the power to award costs, there is no power to make payment of costs a condition precedent to the filing of the suit in the proper Court. (*Somayya, J.*) KESAVALU NAIDU *v.* VENKATARAMA CHETTIAR. 1941 M.W.N. 817=
54 L.W. 315=(1941) 2 M.L.J. 450.

——**S. 35**—*Rent suit—Misstatement of area of holding by landlord.*

In cases where a landlord deliberately mistates the area of the holding in respect of which he claims rent, it is only fair that he should bear the costs of the litigation. But where the landlord has purchased the interest of a co-sharer after partition and in his plaint he describes the area of the holding as it is described in the partition paper, the accuracy of which he has no reason to doubt, it cannot be said that it is a case in which the landlord deliberately misstates the area of the holding, and he should not therefore be made to bear the costs of the suit. (*Agarwala, J.*) MAHADEO DAS *v.* TRIBENI PRASAD SINGH. 192 I.C. 48=13 R P. 394=
7 B.R. 308=A I.R. 1941 Pat. 404.

——**S. 35**—Right to—Failure to produce evidence in trial Court—Disentitling circumstance. *See* 1940 Dig., Col. 417. RAM BEHARI UPADHYA *v.* SHYAM CHARAN. 1941 A.W.R. (Rev.) 62 (1)=
1941 O.A. (Supp.) 49 (1).

——**S. 35 A**—*Specific issue as to compensatory costs—If necessary—Absence—Interference in revision, if justified.*

The framing of a specific issue as to compensatory costs is not an essential condition under S. 35-A C. P. Code. The non-framing of such an issue is not therefore a material irregularity meriting interference in revision. (*Harper, S.M. and Sathe, J.M.*) MAHOMED ZEA *v.* JANGI. 1941 R D. 383 (2)=
1941 A.W.R. (Rev.) 474=1941 O.A. (Supp.) 433.

——**S. 38**—*Court passing decree incompetent to execute—If competent to entertain execution application.*

Under S. 38, C. P. Code, a Court which passes the decree is competent to entertain an execution application even though it may be incompetent to execute the same owing to the fact that the property to be attached or the judgment-debtor to be arrested is outside the Court's jurisdiction. (*Shirreff, J. M. and Sathe, A. M.*) MATHURA PRASAD *v.* JIA LAL.
1941 O.A. (Supp.) 789=1941 A.W.R. (Rev.) 915=
1941 R D. 946=1941 A.L.J. (Supp.) 136.

C. P. CODE (1908), S. 38.

——**S. 38**—*Two Subordinate Judges having same local jurisdiction—Decree passed by one—If can be executed by other—Power of District Judge to pass order in contravention of section.*

If two Subordinate Judges have the same local jurisdiction assigned to them, it is certainly competent for the District Judge to distribute the business among the two officers, but that would not empower the District Judge to make any order in contravention of S. 38, C. P. Code, and direct that the decree passed by one of the officers could be executed by the other. (*Mukherjea and Biswas, JJ.*) ATAMBA SINGH *v.* GOPAL CHANDRA.
73 C.L.J. 351.

——**Ss. 39 and 42**—*Small Cause Court decree—Transfer to regular side for execution against immovable property—Legality.*

Where the same Judge holds the office both of the Judge, Small Causes, and as a judge on the regular side, he can, on an application of the decree-holder or otherwise, transfer a Small Cause Court decree to the regular side for the purpose of obtaining attachment and sale of the immovable property. (*Young, C.J. and Blacker, J.*) JALLA MALL JAWAHAR MAL *v.* MOTIA.
I.L.R. (1941) Lah. 670=43 P.L.R. 1=A.I.R. 1941 Lah. 109.

——**S 42**—*Scope and effect—Small Cause Court decree—Transfer for execution to regular side of another Court—Orders in execution—Appealability—Revision—Competency.*

Where a decree of a Small Cause Court is transferred for execution to the regular side of another Court and executed, the orders passed in the execution of the decree by such Court are appealable and no revision under S. 20 of the Provincial Small Cause Courts Act is competent. (*Chatterji, J.*) ANANTA SAHU *v.* BARAJU SAHU. **7 Cut.L.T. 33=22 P.L.T. 819=A.I.R. 1941 Pat. 624.**

——**S. 42 and Provincial Small Cause Courts Act S. 34**—*Scope and object of S. 34, Small Cause Courts Act—Decree of Small Cause Court—Execution against immovable property.*

S. 34 of Provincial Small Cause Courts Act contemplates as legal, the transfer of an execution application by a Small Cause Court's Judge acting in that capacity to a Court of ordinary civil jurisdiction also presided over by himself. He could also transfer it to a Court of a subordinate judge. Small Cause Courts are no doubt to execute decrees against movable property, but once a decree has been passed by the Small Cause Court judge, it is of the same relative value as any other money decree passed by any other Court of competent jurisdiction. (*Davies.*) NANUNDA *v.* MAHI PAL.
1940 A.M.L.J. 133.

——**S. 42**—*Scope—Decree of one Court sent to another Court for execution—Limitation—If depends on character of executing Court.*

S. 42, C. P. Code, deals simply with the manner of execution and leaves the matter of limitation to be governed by Limitation Act. Where a decree passed by one Court is sent for execution to another Court, the period of limitation applicable to the execution of that decree concerned depends upon the character of the Court which passed the decree and not upon the character of the Court executing it. (*Dhavle and Chatterji, JJ.*) RANGANADHAM *v.* PONNACHARAMMA.
7 Cut.L.T. 45.

——**S. 42**—*Transferee Court—Jurisdiction—How conferred—Extent of.*

The same territorial jurisdiction which the transferring Court had is transferred to the transferee Court by the very order of transfer. (*Thomas, C. J. and Agarwal, J.*) LAL BHAGWAT SINGH *v.* HARI KISHAN DAS.
1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O.W.N. 1138.

C. P. CODE (1908), S. 47.

——**S. 46**—Applicability—Attachment before judgment of property outside jurisdiction. *See* C. P. CODE (1908), SS. 136 AND 46. **1941 O.W.N. 550.**

——**S. 47**—*Appeal—Decree against person in personal property—Objection to attachment and sale of property on the ground that he holds it as mutawalli—If falls under S. 47 or O. 21, R. 58—Appeal—Competency.*

Where a judgment-debtor objects to the sale of the attached property on the ground that he holds such property as a mutawalli or trustee and therefore it is not liable to be sold in execution of a decree obtained against him in his personal or individual capacity, S. 47, C. P. Code, applies to the case and the order is appealable O. 21, R. 58, C.P. Code, does not apply to the case and hence an appeal, and not a separate suit lies. (*Davis, C.J. and Weston, J.*) SHAHBAN MOHIB *v.* HEMRAJ RAGHAVJI. **I.L.R. (1941) Kar. 474.**

——**S. 47**—*Appeal—Dispute between decree-holder and court-auctioneer regarding latter's commission—Order relating to—If appealable.*

S. 47 applies to disputes relating to execution, discharge and satisfaction of the claims arising between the parties to the suit. Consequently, an order relating to a dispute between the decree-holder and the Court auctioneer who was not a party to the suit regarding the latter's commission is not appealable. (*Tek Chand, J.*) LALA HARDWARI MAL *v.* LALA GANGA RAM.
A.I.R. 1941 Lah. 450.

——**S. 47**—*Appeal—Legal representative of judgment debtor—Objection to attachment—Plea that property attached is not assets of deceased but his own property held in individual capacity—Order—Appealability—Separate suit—If necessary.*

Where a legal representative of a judgment-debtor objects to the attachment and sale of property on the ground that the property sought to be sold in execution is his own property, held by him in his individual capacity, and is not property coming to him as legal representative of the judgment-debtor and is not assets of the judgment-debtor in his hands, the question falls to be decided under S. 47, C. P. Code and not under O. 21, R. 58, C.P. Code. An appeal lies against the order dismissing the objections and no separate suit is necessary. (*Davis, C.J. and Tyabji, J.*) HARBHAGWANDAS *v.* RUGHNATH. **I.L.R. (1941) Kar. 211=196 I.C. 447=14 R.S. 63=A.I.R. 1941 Sind. 142.**

——**S. 47**—*Appeal—Objection by judgment-debtor to sale—Plea that property is* ghatwali *tenure and hence not saleable—Order on—Appealability—O. 21, R. 58—Applicability—Objection raised at late stage on day of sale—Duty of Court to consider—Summary rejection—Propriety of.*

An objection to the sale of a property in execution of a decree to the effect that the property is a *ghatwali* tenure and therefore not saleable, is one which goes to the root of the jurisdiction of the Court to hold the sale, and must be determined before the sale takes place. The mere fact that the objection is raised by the judgment-debtor at a late stage, *i.e.*, on the date fixed for the sale, is no ground for rejecting it summarily. Such an objection raised by the judgment debtor does not fall under O. 21, R. 58, C. P. Code. The objection can be raised under S. 47, C. P. Code, and the order passed thereon, is appealable. (*Chatterji and Meredith, JJ.*) KUSUM KUMARI *v.* HARNATH RAI BIRIJRAJ.
191 I.C. 138=13 R.P. 318=7 B.R. 148=A.I.R. 1941 Pat. 240.

C. P. CODE (1908), S. 47.

——S. 47—Appeal—Order fixing valuation of property under S. 14, Orissa Money Lenders Act—Appealability. *See* BIHAR MONEY LENDERS ACT, S. 14.

7 Cut.L.T. 41.

——Ss 47 and 2 (2)—*Appeal—Order interpreting scheme framed in suit under S. 92—Order finally adjudicating rights of parties under scheme—If decree.*

An order interpreting a scheme framed in a suit instituted under S. 92, C. P. Code, or giving directions for carrying out the provisions of the scheme cannot be regarded as an order passed in execution under S. 47, C. P. Code. But an order of a District Judge finally adjudicating the rights of the Mohant and the committee under the scheme framed in the suit which is kept pending and to which they may be regarded as parties, amounts to a decree and is appealable as such. (*Mitter and Khundkar, JJ.*) SRIJIB NYAYATIRTHA *v.* SREEMAT DANDY SWAMI JAGANNATH ASRAM.

73 C.L.J. 532=A.I.R. 1941 Cal. 618.

——S. 47—*Appeal—Order on application under O. 21, R. 42—Order passed after investigation of claims and objections.*

An application for attachment of property under O. 21, R. 42, C. P. Code, is a proceeding in execution and an order passed thereon must, therefore, be treated as one relating to execution and coming within the purview of S. 47, C. P. Code. The fact that before passing the order the Court entered into an investigation of claims and objections to the proposed attachment cannot affect the character of the order, particularly when the objections were filed not only by stranger objectors but also by the judgment-debtors. As such, the order will be open to appeal under S. 47, C. P. Code. (*Biswas and Roxburgh, JJ.*) JAGAT TARINI DASSI *v.* SAROJ RANJAN.

I.L.R. (1941) 1 Cal. 363=196 I.C. 247=14 R.C. 195=74 C.L.J. 169=45 C.W.N. 323=A.I.R. 1941 Cal. 357.

——S. 47—*Appeal—Order refusing to stay proceeding under S. 174, B. T. Act.*

An order of an executing Court refusing to stay a proceeding under S. 174 of the Bengal Tenancy Act in spite of a notice under S. 34 of Bengal Agriculturists' Debtors Act is an order relating to execution, and although the auction-purchaser is a party to the proceeding, it is still an order which comes within S. 47, C. P. Code, the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other are really interested. This being so, the order is open to appeal and an application under S. 115, C.P. Code, is not accordingly competent. (*Biswas and Roxburgh, JJ.*) MUKIMANNESSA CHAUDHURANI *v.* RAMESWAR SHUKUL. **194 I.C. 805=14 R.C. 17=45 C.W.N. 379=A.I.R 1941 Cal. 264.**

——S. 47—*Appeal—Order under O. 21, R. 66, amending sale proclamation—If judicial or administrative—Appealability.*

An order of the executing Court amending a sale proclamation, giving certain particulars about encumbrances or liens on the property proclaimed for sale, under O. 21, R. 66, C. P. Code, is not appealable. It is only an administrative order and not a judicial one. Even if the Court proceeds under the rule after a summary inquiry and purports to decide disputed rights between the parties, the decision would be an interlocutory decision only and not final. (*Davis, C.J. and Tyabji, J.*) GHANSHAMDAS *v.* KHUDABADI AMIL CO-OPERATIVE CREDIT BANK, LTD. **I.L.R. (1941) Kar. 199=195 I.C. 367=14 R.S. 30=A.I.R. 1941 Sind 101.**

——S. 47—*Appeal—Parties—Objection filed only by one of the heirs of judgment-debtor—Appeal by decree-holder—Other heirs, if necessary parties.*

C. P. CODE (1908), S. 47.

Where an objection under S. 47, C.P. Code, was filed by only one of the heirs of the deceased judgment-debtor, it is not necessary for the decree-holder filing an appeal to make the other heirs parties in it. (*Henderson, J.*) RADHABALLAV BASAK *v.* MAHENDRA KUMAR SEN. **45 C.W.N. 342.**

——S. 47—Appeal—Rateable distribution—Decision as between rival decree-holders—If appealable. *See* C. P. CODE (1908), SS. 73 AND 47—APPEAL.

1940 Rang L.R. 718.

——S. 47—*Appeal—Representative—Decree against insolvents—Attachment and sale of property—Notice not served on Official Receiver—Application by latter to set aside sale on ground of non-service of notice—Rejection—Appeal—Maintainability — Official Receiver—If representative of judgment-debtor.*

Official Receiver in insolvency cannot be regarded merely as the representative of the creditors. He represents the insolvent and the debtor's interest in the properties of his estate devolves on him. Where in execution of a decree against certain insolvent debtors, properties belonging to them are sold without impleading the Official Receiver or serving a notice on him under O. 21, R. 22, C. P. Code, an application by the Official Receiver to have the sale set aside on the ground of non-observance of O. 21, R. 22, C. P. Code, falls under S. 47. The dispute being one between the decree-holder and the representative of the judgment debtors, S. 47, C. P. Code, has full application and an appeal therefore lies against an order rejecting the application of the Official Receiver. (*Leach. C.J. and Krishnaswami Aiyangar, J.*) OFFICIAL RECEIVER, NELLORE *v.* VENKIAH. **53 L.W. 498=1941 M.W.N, 577=A.I.R. 1941 Mad. 606=(1941) 1 M.L.J. 569.**

——S. 47—*Appeal—Transferee of transferee from judgment debtor—Objections by to attachment—Order on—Appealability—Representative—O. 21, R. 58.*

A transferee from a transferee from a judgment-debtor is not a representative of the judgment-debtor, and the objections filed by such transferee to the attachment of the property in his hands falls not under S. 47, C. P. Code, but under O. 21, R. 58, C. P. Code. No appeal therefore lies against an order disallowing his claim or objections. (*Harries, C.J. and Manohar Lall, J.*) RAM BEHARI SAHAI *v.* BINDA PRASAD. **194 I.C. 45=18 R.P. 651=7 B.R. 680=A.I.R. 1941 Pat. 394.**

——S. 47—*Applicability—Alteration to party wall after judgment and before appeal—Remedy.*

Where after a decision that a wall is a party wall, and before an appeal is preferred therefrom a party makes alterations thereto without the knowledge or consent of the other-side it is an obstruction raised during the pendency of the suit and it should be ordered to be removed on application made, by the executing Court under S. 47 C. P. Code (*Davies.*) ACHAL DAS *v.* SUNDA RAM. **1940 A.M.L.J. 120.**

——S. 47—*Applicability—Court of Deputy Collector under Bengal Rent Act.*

S. 47, C. P. Code, does not apply to the Court of a Deputy Collector under the Bengal Rent Act. A party aggrieved by an order passed by that Court in execution proceedings has, therefore, the remedy of a suit, (*Henderson, J.*) SAKKAL SARDAR *v.* ISWAR DAS THIRANI. **I.L.R. (1941) 2 Cal. 366.**

——S. 47—*Applicability—Dispute between party and his representative or between persons representing same party.*

S. 47, C. P. Code, does not apply where the dispute arises between a party and his own representative or between two persons who both represent the same party.

C. P. CODE (1908). S. 47.

(*Leach, C.J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) ANNAMALAI MUDALI *v.* RAMASWAMI MUDALI.

I.L.R. (1941) Mad. 438 = 196 I.C. 204 = 14 R.M. 255 = 1941 M.W.N. 149 = 53 L.W. 27 = A.I.R. 1941 Mad. 161 = (1941) 1 M.L.J. 45 (F.B.).

——**S. 47**—Applicability—Execution sale—Setting aside—Power of Court under S. 47. *See* C. P. CODE, O. 21, R. 90. **A.I.R. 1941 Pat. 566.**

——**S. 47**—*Applicability—Partition decree directing payments* inter se *and for payment of creditors—Payment to creditors by one—Right to set off against payments due by him to the other.*

Where a partition decree provided for the payment of certain amounts by the plaintiff to the defendant and also declared the family liable for the payment of the debts, and the plaintiff pays certain debts, in an application for execution by the defendant for the recovery of the amounts payable to him by the plaintiff a set off was pleaded, it was held that the plaintiff's application claiming set off for the amounts paid by him could be treated as a suit for contribution under the powers conferred by S. 47, C. P. Code, and the relative rights of parties gone into. (*Stone, C.J. and Bose, J.*) YESHWANTRAO *v.* BHASKERRAO. **1941 N.L.J. 653.**

——**S. 47**—Applicability—Property of judgment-debtor's transferee before suit wrongly attached in execution of decree against judgment-debtor—Transferee paying decretal amount under protest and applying for refund—Refund under S. 151—Power of Court—Separate suit for refund. *See* 1940 Dig., Col., 199. JAISINGHANI, *In re.* **191 I.C. 635 = 13 R.S. 160.**

——**S. 47 and O. 21, R. 58**—Applicability—Representative—Insolvent judgment-debtor— Attachment—Objection by Official Receiver that all properties vested in him from date of insolvency petition—Order disallowing objection—Appeal—Competency— Remedy—Suit. *See* 1940 Dig,, Col. 199. OFFICIAL RECEIVER, GUNTUR *v.* SESHAYYA.

A.I.R. 1941 Mad. 262 = (1940) 2 M.L.J. 860.

——**S. 47**—Bar of suit—Decree for money against ward of Court of wards —Leave of Court not obtained—Execution disallowed on ground of non-compliance with S. 60-A, Bengal Court of Wards Act—Suit on decree—Maintainability—Principles. *See* 1940 Dig., Col., 200. LACHMI NARAYAN *v,* MAHOMED MEHDI.

20 Pat. 223 = 192 I.C. 387 = 13 R.P. 455 = 7 B.R. 385 = A.I.R. 1941 Pat. 70.

——**S. 47**—*Bar of suit—Decree for possession—Possession obtained without execution—Suit on subsequent dispossession—Maintainability.*

Where persons who have obtained a decree for possession get possession without execution and are subsequently dispossessed, they are entitled to sue for possession. The fact that they did not execute their decree does not debar them from suing for possession, as under S. 47, C. P. Code, it is not necessary for them to seek possession through execution, when they are already in possession. (*Ghulam Hasan and Madeley, JJ.*) LALTU SINGH *v.* MANGAU SINGH. **196 I.C. 99 = 14 R.O. 132 = 1941 R.D. 777 = 1941 O.L.R. 645 = 1941 O.A. 739 = 1941 A.W.R. (Rev.) 771 = 1941 O.W.N. 1014 = A.I.R. 1941 Oudh 615.**

——**S. 47**—*Bar of suit—Partition suit respecting lands paying Government Revenue—Preliminary decree directing that plaintiff is entitled to partition—No execution taken out—Fresh suit for partition—Bar of—C. P. Code, S.* 11—Res judicata.

Although in the case of a decree determining a right to partition which could be executed, it would fall under S. 47, C. P. Code, a preliminary decree directing that the plaintiff in the suit was entitled to partition is a merely declaratory decree, which, if not subsequently enforced, would not debar the plaintiff from filing a fresh suit ; S. 47, C. P. Code, does not apply to such a case. In the case of property paying revenue to Government, the Court only directs that the plaintiff is entitled to partition, which alone it is competent to do. The matter then rests with the Collector to effect partition. Whether it is regarded as a declaratory decree or as the final decree of the Court, there is nothing for the parties to do in execution, and S. 47 will not apply. A fresh suit for partition is not also barred by *res judicata.* Looked at as final decree, the prior decree would not prevent the Collector from performing his duty of effecting a partition in pursuance of the decree in the fresh suit, if the only difficulty be that he had not performed his duty ; and if it is a declaratory decree, it is not a decree finally decided within the meaning of S. 11, C. P. Code, so as to bar the filing of a fresh suit for partition. (*Beaumont, C.J. and Sen, J.*) VISHNU JANARDAN *v.* MAHADEV KESHAV. **43 Bom.L.R. 971.**

——**S. 47**—*Bar of suit—Person impleaded in execution as legal representative of deceased party after having been dismissed from suit—Claim to property covered by decree—If to be set up in execution—Separate suit—If barred.*

When a person comes to Court in execution proceedings as the legal representative of a deceased party, he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or if he had been dismissed from the suit his rights would be entirely unaffected and he would be in a position to enforce them in a suit instituted by him for that purpose. He is not compelled to have his own claims to the property decided in execution proceedings. (*Leach, C.J., Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.*) HAMIDGANI AMMAL *v.* AMMASAHIB AMMAL. **1941 M.W.N. 906 = 54 L.W. 448 = A.I.R. 1941 Mad 898 = (1941) 2 M.L.J. 622 (F.B.).**

——**S. 47**—Bar of suit—Puisne mortgagee purchasing part of mortgaged property—Suit by prior mortgagee—Decree and sale without impleading puisne mortgagee purchaser—Application by latter under O. 21, R. 89, C. P. Code—Dismissal—No appeal—Suit by him for redemption—Competency—If barred by S. 47 or O. 21, R. 92 (3), C. P. Code—Right to redeem part. *See* 1940 Dig., Col. 201. KHIALMAL *v.* POHUMAL. **193 I.C. 247 = 13 R.S. 214.**

—— **S. 47**—Bar of suit—Suit for possession by mortgagee decree-holder auction purchaser. *See* 1940 Dig., Col. 202. ABDUL GHANI *v.* LAL CHAND.

I.L.R. (1941) Lah. 91 = 43 P.L.R. 313.

——**S. 47**—Executability of decree—Decree for future maintenance creating charge on property—Arrears of future maintenance—Recoverability by execution—Fresh suit—Necessity. *See* 1940 Dig., Col. 202. BASUMATI KUAR *v.* HARBANSI KUAR. **20 Pat 86 = 192 I.C 866 = 13 R.P. 528 = 7 B.R. 545 = A.I.R. 1941 Pat. 95.**

——**S. 47**—Executing Court—Power of— Decree challenged as nullity on ground of want of jurisdiction—Objection to under-valuation of suit not raised in suit or appeal—If can be entertained in execution. *See* SUITS VALUATION ACT, S. 11. **22 Pat.L.T. 855.**

——**S. 47**—*Executing Court—Powers of—Validity of decree or jurisdiction of Court which passed decree—Power to go into.*

C. P. CODE (1908), S. 47.

An executing Court cannot go behind a decree and question its validity when, on the face of it, it is not a nullity. It is not open to the executing Court to go into the question of jurisdiction, territorial, pecuniary or personal, of the Court which passed the decree, which, by necessary implication, must be taken to have been decided by the trial Court when it passed the decree. But an executing Court can inquire into and decide that a decree is a nullity not on the ground of jurisdiction, but because the decree passed is not a decree at all, such as in the case of a decree against a dead man. In such a case the decree is a nullity and cannot be executed, not because the particular Court had no jurisdiction, but because no Court at all had jurisdiction. (*Davis, C.J. and Lobo, J.*) SHINGOMAL POHUMAL *v.* KHUSHALDAS LEKHRAJ. **I.L.R. (1941) Kar. 79.**

——**S. 47**—*Miscellaneous proceedings— Ejectment under S. 61 of Oudh Rent Act—If can be set aside on objection under S. 47.*

As the law provides a remedy by regular suit in the case of an ejectment under S. 61 of the Oudh Rent Act, the ejectment which has taken place under that section cannot be set aside by an objection under S. 47, C. P. Code. (*Shirreff, J.M.*) SHEO NARAIN *v.* SUNDAR LAL. **1941 A.W.R. (Rev.) 565 (2) = 1941 O.W.N. 848 (1) = 1941 A.L.J. (Supp) 103 = 1941 O.A. (Supp.) 496 (2) = 1941 R.D. 590.**

——**Ss. 47 and 144 and Court Fees Act, Sch. II, Art. 11**—*Nature of order under S. 144—For purposes of Court-fee.*

An order under S. 144, C. P. Code, is essentially different from an order under S. 47. Such an order could not be obtained by proceedings under S. 47. A clear distinction is drawn between the two cases by S. 2. An order under S. 144 is not for Court-fee purposes the same as an order under S. 47. (*Stone, C.J. and Niyogi, J.*) ABDUL MAJID SHAH *v.* ABDUL SATTAR. **I.L.R. (1941) Nag. 662 = 1941 N.L.J. 459 = A.I.R. 1941 Nag 313.**

——**S. 47**—Objection as to saleability of property—When could be raised. *See* 1938 Dig., Col. 222. MAROTI *v.* KISANLAL. **I.L.R. (1941) Nag. 381.**

——**S. 47 and O. 21, R. 2**—*Plea in bar of execution—Pre-decree agreement that mortgage decree for sale should not be executed against part of hypotheca—If can be pleaded.*

Where a final decree in a mortgage suit says that the hypotheca or a sufficient portion thereof shall be sold, a person who propounds an agreement that certain items of the hypotheca should not be sold is clearly attacking that decree. Where a judgment-debtor under a mortgage decree for sale comes up in execution with the allegation that before even the preliminary decree was passed he had made an arrangement with the plaintiff (decree-holder) that certain items of the hypotheca should not be brought to sale, he on his part undertaking not to press his defence and to remain *ex parte*, he is clearly pleading an agreement which attacks the decree itself. Such an agreement is not a mere agreement relating to the execution or executability of the decree and cannot be pleaded in bar of execution. (*Burn and Mockett, JJ.*) KANGAYA GOUNDER *v.* MUTHUSWAMI GOUNDER. **54 L.W. 157 = 1941 M W N. 1044 = 1941 (2) M.L.J. 344.**

——**Ss. 47 and 68**—Question relating to execution—Sale by Collector—Application to set aside—Forum. *See* 1940 Dig., Col. 203. ZIBAL *v.* MUKA. **193 I.C. 274 = 13 R.N. 302.**

——**S. 47**—"*Representative*"—*Decree-holder attaching property of judgment-debtor—If representative of the latter,*

C. P. CODE (1908), S. 47.

A decree-holder attaching the property of his judgment-debtor cannot be regarded as a representative of the latter, the attachment by the decree-holder is not effected by him as the privy or representative of the judgment-debtor, but by virtue of a right inherent in him to attach what is really the property of the judgment-debtor at the date of the attachment. (*King, J.*) PETHURAJU KONE *v.* MUTHUSWAMI AIYAR. **1941 M.W.N. 982 = (1941) 2 M.L.J. 784.**

——**S. 47**—*Representative—Decrees for rent in favour of landlord for earlier and later periods—Execution of earlier decree—Sale of holding—Purchase by stranger—Liability of latter for arrears for period prior to purchase—Purchaser—If representative of judgment-debtor.*

A stranger auction-purchaser who purchases a holding in execution of a decree for rent with notice that it is saddled with liability for arrears of rent for a period anterior to the date of sale, though subsequent to the decree under execution, is liable for the rent of that period. Such an auction-purchaser purchasing the holding subject to a rent charge is a representative of the judgment-debtor, and his liability may be enforced in execution of a decree for rent in respect of the period subsequent to the former decree and antecedent to the sale at which he has purchased. The rights and liabilities of the parties have to be worked out by execution proceedings and not by a separate suit; such a suit by the landlord for the arrears of rent for the period prior to the purchase under the earlier decree would be barred under S. 47, C. P. Code, his only remedy being by way of execution. (*Agarwala, J.*) DARSON MAHTO *v.* SHEO KUMAR. **22 Pat.L.T. 734 = A.I.R. 1941 Pat. 612.**

——**S. 47**—"Representative"—Meaning — Auction-purchaser of judgment-debtor's property in execution. *See* 1940 Dig., Col. 204. BASUMATI KUAR *v.* HARBANSI KUER. **20 Pat. 86 = 192 I.C. 866 = 13 R.P. 528 = 7 B.R. 545 = A.I.R. 1941 Pat. 95.**

——**S. 47**—'*Representative*'—*Stranger purchaser in execution of money decree—If representative of decree-holder—Suit for possession from judgment-debtor's representative in interest—Maintainability.*

In execution of a money decree, certain immovable property was attached on 18th September, 1921. On 26th September, 1921, the widow of the judgment-debtor (he having died) sold the property to the 1st defendant. On 7th January, 1922, the property was sold by the Court in execution proceedings, and the plaintiff, a stranger, became the auction-purchaser. The plaintiff, who obtained a sale certificate only on 30th November, 1931, filed a suit on 1st March, 1932, a suit for possession from the 1st defendant and his tenant the 2nd defendant. S. 47 was pleaded in bar of the suit,

Held, by the majority (*Patanjali Sastri, J.*, dissenting), (1) that the stranger purchaser was not entitled to apply for possession as against the judgment-debtor or his representative in interest under S. 47, C. P. Code; (2) that the suit was not therefore barred under S. 47; (3) that the stranger purchaser was not a "representative" of the decree-holder.

Per *Patanjali Sastri, J.*—(1) that the stranger auction-purchaser must be regarded as the representative of the decree-holder; (2) that the question of delivery of possession to a stranger auction-purchaser, however, did not relate to execution, discharge or satisfaction of the decree within the meaning of S. 47. (*Leach, C.J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) ANNAMALAI MUDALI *v.* RAMASWAMI MUDALI. **I.L.R. (1941) Mad. 438 = 196 I.C. 204 =**

C. P. CODE (1908), **S. 47.**

14 R.M. 255 = 1941 M.W.N. 149 = 53 L.W. 27 = A.I.R. 1941 Mad. 161 = (1941) 1 M.L.J. 45 (F.B.).

——**S. 47**—*Scope—Pre-decree agreement—Suit for money on account of sale of goods—Consent order on application for attachment before judgment—Defendants handing over goods to plaintiff for sale by latter and for appropriation of proceeds towards decree—If can be given effect to in execution.*

An application for attachment before judgment in a suit for money on account of goods sold and delivered, was amicably settled by consent of parties. The parties agreed as follows: "Without prejudice to the contentions of the parties in this suit or in other proceedings between the parties, the defendants have handed over to the plaintiffs the . . . . goods as shown in two sheets attached. These will be sold by the plaintiffs and the net sale-proceeds kept by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same, which will be appropriated towards the decree, if any, passed in their favour."

Held, that on a proper interpretation of the consent order the sum received by the plaintiffs was to be appropriated in satisfaction of the decree and this presumed a decree. If presumed a credit in execution and not a credit in the suit itself.

Held, further, that it was implicit in the terms of the agreement that the defendants were to get a fair price for the goods and to get credit for this price in the proceedings, if not in the suit itself, then in the execution of the decree and an inquiry as to the price that should have been received for the goods handed over could be and should have been ordered in execution, no separate suit being necessary for the purpose. (*Davis, C.J. and Weston, J.*) RAMA BROS. *v.* FORBES, FORBES CAMPBELL & CO., LTD.

I.L.R. (1941) Kar. 227 = 195 I.C. 626 = 14 R.S. 40 = A.I.R. 1941 Sind 103.

——**S. 47**—*Scope—Question of trust—Question whether a wakf is valid or not under Shia School of Mahomedan Law—If can be decided in execution proceedings.*

There is no invariable rule that in no circumstances can a matter relating to a trust be decided in execution proceedings. Where such questions are difficult and complicated, execution proceedings are not the appropriate proceedings for deciding them. It is not so much a question of kind, but of degree. Where the question is only whether a certain wakf is or is not a valid wakf under the Shia School of Mahomedan Law it can be decided under S. 47, C. P. Code. (*Davis, C.J. and Weston, J.*) SHAHBAN MOHIB *v.* HEMRAJ RAGHAVJI.

I.L.R. (1941) Kar. 474.

——**S. 47**—*Scope—Sale wholly without jurisdiction—Application by judgment-debtor to have it declared void—If lies.*

Where a sale is wholly without jurisdiction and consequently void as opposed to voidable, an application by the judgment-debtor to have it declared void will lie under S. 47. In such a case it is clear that no actual setting aside of the sale is really necessary. (*Dhavle and Meredith, JJ.*) BHAN KUMAR CHAND *v.* LACHMI-KANTA RAI.

A.I.R. 1941 Pat. 566.

——**S. 47**—Scope—Validity of execution sale. *See* 1940 Dig., Col. 205. SHEIKH TAMIZALI *v.* NASARALI BHUIYA.

193 I.C. 451 = 13 R.C. 439 = A.I.R. 1941 Cal. 58.

——**S. 47 (3)**—*Appeal—Dispute between rival representatives of one party—Decision, if appealable.*

S 47 (3), C. P. Code, only relates to a dispute between one of the parties to the decree and a person claiming to be a legal representative on the other side. It does not apply where the dispute is between persons who have rival claims to be accepted as legal representatives on one side only. In such cases, no appeal lies and the decision is merely a summary decision for the purpose of enabling the proceedings to be carried on, without affecting any right which any person may have to the proceeds of the decree. (*Beckett, J.*) SUNDER *v.* SITA RAM.

196 I.C 896 = 43 P.L.R. 435 = A.I.R. 1941 Lah. 342.

C. P. CODE (1908), **S. 48.**

——**S. 48**—*Applicability—Decree of Presidency Small Cause Court—Transfer for execution to Civil Court of original jurisdiction—Execution beyond* 12 *years of decree but within three years of last execution—If barred—Limitation Act, Arts.* 182 *and* 183.

It is obvious that by reason of S. 8, C. P. Code, S. 48 of the Code does not apply to a decree passed by a Presidency Small Cause Court, whether it is being executed by that Court itself or by some other Court of original jurisdiction. Where a decree of a Presidency Small Cause Court is transferred for execution to a Court of original jurisdiction an application for execution filed in the latter Court beyond 12 years of the decree will not be barred by limitation under S. 48, C. P. Code, but will be in time if filed within 3 years of the last execution as provided by Art. 182 of the Limitation Act. Art. 182 and not Art. 183 of the Limitation Act applies to such a case. (*Dhavle and Chatterji, JJ.*) RANGANADHAM *v.* PONNACHARAMMA.

7 Cut.L.T. 45.

——**S. 48**—Applicability—"Fresh application"—Execution application presented within 12 years—Application beyond 12 years for amendment to include property or person not named or specified in original application—Maintainability—If "fresh" application or only in continuation of original application. *See* 1940 Dig., Col. 205. RAM RAN BIJAIYA PRASAD SINGH *v.* KESHO PRASAD SINGH.

191 I.C. 492 = 13 R.P. 326 = 7 B R. 206 = A.I R. 1941 Pat. 635.

——**S. 48**—Applicability—Sentence of fine—Warrant under S. 386 (1) (*b*)—Execution under C. P. Code—Limitation—Penal Code, S. 70. *See* PENAL CODE, S. 70.

43 Bom.L.R. 122.

——**S. 48**—*Execution application dismissed on ground of case being old—Second application for same relief—If in continuation of old one.*

An application for execution was dismissed by the Court not because of decree-holder's default or negligence but on the ground that the case was an old one and the Court intended to remove it from its list. A second application was made for similar relief.

Held, that in these circumstances the second application must be regarded as a continuation of the old one. (*Tek Chand and Dalip Singh, JJ.*) MUNICIPAL COMMITTEE, HAFIZABAD *v.* GOPAL DAS.

193 I.C. 334 = 13 R L. 449 = A.I.R 1941 Lah. 62.

——**S. 48**—Fresh application or continuation of old—Application filing supplementary list of properties to be proceeded with. *See* EXECUTION.

45 C.W.N. 903.

——**S. 48**—Scope—If controls Ss. 6 and 7 of the Limitation Act. *See* LIMITATION ACT, SS. 6 AND 7.

A.I.R. 1941 Pat. 45.

——**S. 48**—*Starting point—Decree of Small Cause Court—New trial application and subsequent revision application in High Court—Effect of on limitation for execution—Period—If extended.*

A decree in a suit in the Presidency Small Cause Court was passed on 2—2—1926. The decree-holder unsuccessfully prosecuted a new trial application and thereafter a Civil Revision Petition in the High Court, which was dismissed on 7—3—1928. He filed one execution application in October, 1938.

C. P. CODE (1908), **S. 48.**

Held, that the application was barred by S. 48, C. P. Code, and the fact that the revision application was filed and dismissed was not immaterial for deciding the question of limitation. (*Burn and Mockett, JJ.*) NAGALINGA CHETTY *v.* SRINIVASA AIYANGAR.
53 L.W. 284=1941 M.W.N 292=A.I.R. 1941 Mad. 477=(1941) 1 M.L.J. 365.

——**S.** 48 (1)(b)—Limitation—Decree amount payable in instalments under compromise in execution proceedings—Starting point. *See* 1940 Dig., Col. 207. CHHATRAPATI PRATAP BAHADUR *v.* HARI RAM.
191 I.C. 616=13 R.A. 241.

——**S.** 50—Jurisdiction—Death of judgment-debtor—Substitution of heirs—Power of Court to which decree is transferred for execution—Order by transferee Court for substitution—Legality—Interference in appeal—S. 99. *See* 1940 Dig., Col. 207. DEBENDRA NATH HALDAR *v.* G. A. ARATOON. **193 I.C. 245=13 R P. 559=7 B.R. 515=22 Pat L.T. 439=A.I.R. 1941 Pat 139.**

——**S. 50 and O. 21, R. 95**—*Satisfaction of decree—Addition of legal representative—Necessity—Proceedings under O. 21, R. 95.*

When once a decree has been fully satisfied, there is no need to bring the legal representative on record under S. 50, C. P. Code. Where proceedings under R. 95 of O. 21 are taken they are between the auction-purchaser and the claimants, in which the legal representative of a judgment-debtor do not require to be added. (*Pollock, J.*) GANPAT SINGH *v.* RAMGOPAL.
1941 N.L.J. 494=A.I.R. 1941 Nag. 322.

——**Ss. 50 (2) and 53**—*Liability of Hindu sons—Death of father who stood surety for production of crops.*

Where a Hindu father made himself responsible to produce certain crops entrusted to him or on failure to make good a particular sum and died and the crops disappeared, it was held that

Per *Harper, S.M.*—The father was in the position of a judgment-debtor and he having died the decree or order could be executed against his legal representative who would be liable to the extent of the assets of the deceased in his hands and that under S. 53 even ancestral property could be proceeded against, if it is liable under Hindu Law and the debt not being repugnant to good morals, the property in the hands of the sons were liable.

Per *Sathe, J.M.*—The question of the applicability of Hindu Law arose only in respect of ancestral property and that as regards self-acquired property, there was no doubt it was liable under S. 50 (2), C. P. Code. (*Harper, S.M. and Sathe, J.M.*) ATTAR SINGH *v.* MOHAN.
1941 R.D. 120=1941 O.A. (Supp.) 156=1941 A.W.R. (Rev.) 229.

——**S. 51**—*Appointment of receiver in execution—When justified.*

Where decree-holder can only exercise the ordinary legal remedies at considerable risk and with doubtful results, there is ample justification for the appointment of a receiver in execution in such circumstances. (*McNair, J.*) PURSATTAMDAS *v.* BAIJNATH.
195 I.C. 69=14 R.C. 41=A.I.R. 1941 Cal. 240.

——**S. 51**—*Appointment of receiver—When may be made.*

Execution by appointment of a receiver is one of the methods of execution provided by S. 51, C. P. Code, and so long as in the circumstances of the case it is the best means of securing the rights of the judgment-creditor without causing undue hardship to the judgment-debtor, there is no valid reason for avoiding this method of execution. (*McNair, J.*) SURESH CHANDRA ROY *v.* PRAKASH KRISHNA. **45 C.W.N. 1104.**

C. P. CODE (1908), **S. 60.**

——**S 51**—Execution by arrest—Circumstances—Onus—Finding of lower Court—Interference. *See* 1940 Dig., Col. 207. JASSAWALA *v.* AMULYA CHANDRA DUTTA. **191 I.C. 799=13 R.A. 280.**

——**S. 51, Proviso**—Applicability—Decree for alimony under Divorce Act—If decree for money. *See* 1940 Dig., Col. 207. J. G. KHAMBATTA *v.* M. C. KHAMBATTA. **13 R.B. 264=192 I.C 605=A.I.R. 1941 Bom. 17.**

——**S. 53**—*Applicability—Watan property—Liability in the hands of son for father's debts—Bombay Watan Act, S. 5.*

Watan property cannot be regarded as property inherited by a son from his father so as to expose it to liability in execution under S. 53, C. P. Code. A son does not inherit watan property from his father at any rate to the extent of making that property liable for the father's debts. To hold that watan property is liable for the father's debts, like other property of a Hindu father, would be to go behind the prohibition in S. 5 of the Watan Act. (*Beaumont, C.J. and Sen, J.*) RAMABAI SHRINIVAS *v.* GOVERNMENT OF BOMBAY. **194 I.C. 431=13 R B 371=43 Bom.L.R. 232=A.I.R 1941 Bom. 144.**

——**S. 53**—Scope and applicability of—Decree for compensation in lieu of specific performance. *See* 1940 Dig., Col. 208. RAO BHIMSINGH *v.* GANGARAM.
I.L.R. (1941) Nag. 632=193 I.C 598=13 R.N. 334.

——**Ss. 55 (4) and 145**—*Forfeiture of security—Decree holder making no attempts to execute against surety for about three and a half years—Inference.*

A judgment-debtor who was arrested in execution of decree was released on his furnishing security that he would apply within one month to be declared as insolvent. He failed to apply within one month but the decree holder made no attempt to execute for over three and a half years

Held, that the obvious inference was that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purposes for which the security was given was substantially fulfilled. It would therefore be wholly inequitable at such late stage to order that the security should be forfeited. (*McNair, J.*) JITENDRA MULLICK *v.* HAFIZ ALLA BUX. **194 I C. 103=13 R.C. 483=A.I.R. 1941 Cal. 122.**

——**S. 55 (4)**—*Surety under—Liability of—Right to apply for discharge before fulfilment of conditions in security bond—Contract Act, Ss. 129 and 130.*

A person who becomes a surety under S. 55 (4) of the C. P. Code cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed under S. 55 (4), C. P. Code, and a continuing guarantee under S. 129, Contract Act and S. 130 of the Contract Act (and its principle) cannot apply to a surety under S. 55 (4), C. P. Code. The surety under S. 55 (4) cannot be discharged from his obligation at any stage before he has fully carried out his undertaking to the Court. (*Patanjali Sastri, J.*) SANKARANARAYANA AYYAR *v.* PARAMASIVAM PILLAI. **1941 M.W.N. 793=(1941) 2 M L J. 650.**

——**Ss. 60 and 73(as amended by Act IX of 1937)**—*Attachment of salary before 1st June, 1937, by creditor saved by S. 3 of Amending Act—If available for rateable distribution to other creditor not so saved.*

An attachment of salary under S. 60 before 1st June, 1937, made by a judgment-debtor saved by S. 3 of the amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by aforesaid S. 3. (*Weston, J.*) MARUTREERAO KRISH-

C. P. CODE (1908), S. 60.

NAJI *v.* THAKURDAS. 194 I.C. 582= 14 R.S. 2=A.I.R. 1941 Sind 96.

——**S. 60 (as amended by S. 35 of the Punjab Relief of Indebtedness Act)**—*Exemption under—Onus of proof.*

The onus of proving facts necessary for the exemption under S. 60, C. P. Code, as amended by S. 35 of the Punjab Relief of Indebtedness Act, lies on the judgment debtor for two reasons: (1) the burden of proving an exception is generally on the person seeking to prove the exception; (2) the judgment debtor has special knowledge of the circumstances. (*Skemp, J.*) RAMA MAL *v.* BHOLA SINGH. **I.L.R. (1941) Lah. 441.**

——**S. 60**—*'Property'—Meaning of.*

Per *Pal, J.*—The word "property" in S. 60, C. P. Code, is used in a very wide sense. All the interests in the properties which are available to the judgment-debtor for his benefit can be seized in execution. Even if the property does not belong to the judgment-debtor, if he has acquired any right or power in respect of the same which can be sold by him for his benefit, such right or power will be seizable property within the meaning of the section. (*Syed Nasim Ali and Pal, JJ.*) RADHARANI DASSI *v.* BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**S. 60 (i) and O. 21, R. 46**—*"Debt"—Provident Fund amount standing to credit of person—Liability to attachment.*

The word 'debt' as used in S. 60 and in O. 21, R. 46 means an actually existing debt that is a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. Even though in a Provident Fund account an amount stands to the credit of a member, he obtains no interest in it until the payment, which shows that the mere fact that a certain amount is credited to a member's account does not indicate that he holds an interest in such amount. The member's right to have the money paid to him will arise only in the event of his dismissal or retirement as provided in the rules of the fund which may or may not happen before his death or his becoming insane. And this applies both to contribution or subscription made by the member out of his salary and the contributions made by the company. Hence such money even though credited to the member's account cannot be attached in execution of a decree against him. (*Mya Bu and Mosely, JJ.*) SECRETARY, BURMA OIL SUBSIDIARY PROVIDENT FUND, LTD. *v.* DADIBHAR SINGH. **A.I.R. 1941 Rang. 256.**

——**S. 60 (1)**—*"Debt"—Provident fund of company for benefit of employees—Money payable to member after retirement in full or to nominee—Member not permitted by rules to dispose of moneys during service—Effect—Attachability and saleability in execution of decree against member—If trust money—Trusts Act, S. 5.*

"Debt" within the meaning of S. 60 (1), C. P. Code, does not mean a debt only presently payable, but it means also a debt due but payable at some future time. A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. The defendant-company had a provident fund for its employees called the Labour Provident Fund. One A. R. B., an employee of the company was a subscriber to this Fund. The plaintiff having obtained a decree against A. R.B., attached on 11—10—1934, a sum of Rs. 81-14-3 out of the moneys lying to the credit of A R.B. in this fund, in execution of the decree. On 21—10—1934, A. R. B. retired from the service of the company, and

C. P. CODE (1908), S. 60.

the defendant company thereupon paid to A.R B. the entire sum due to him under the Provident Fund Rules. In 1936 the plaintiff applied for sale and at the sale held on 27—4—1934, he purchased the debt. In a suit by the plaintiff for Rs. 81-14-3, the defendant pleaded that A R.B. created a trust by subscribing to the Fund and that in any case the amount was not a debt under S. 60 (1), C. P. Code. One of the Rules of the Fund provided that no member shall have any claim upon the moneys standing to his credit except in accordance with the Rule and that the Trustees shall take no cognizance of any disposition or assignment of any sums standing to the credit of a member. Another Rule provided for a separate account to be kept for each member in the books of the Fund, and that the amounts contributed by the member and the company together with interest accrued thereon should be entered therein. The rules further provided that the management and control of its funds shall be vested in the defendant company (hereinafter referred to as the "Trustees"). The money due to a member on the date of his ceasing to be a member was to be paid to him in full or to such person as he desired, within 3 months after his ceasing to be so.

Held, on a construction of the Rules, (1) that the rules were not statutory provisions but only amounted to a private contract between the parties, and that the parties could not by private agreement alter the provisions of the statute law including the provisions of S. 60 (1), C. P Code; (2) that the sum standing to the credit of A.R.B. on 11—10—1934 was a debt over which he had a disposing power within the meaning of S. 60, C.P. Code, and it could therefore be the subject of a prohibitory order or attachment although it could not be sold until it was at the disposal of the judgment-debtor. A sale held after the retirement of the employee when he ceased to be a member, would therefore be valid; (3) that taking the Rules and Regulations of the Fund, it could not be said that the moneys were trust moneys or vested in trustees, as neither the trust fund nor the beneficiary was clearly indicated, the member being at perfect liberty to withdraw the whole amount if he retired or to nominate a new nominee; the essentials of a trust under S. 5 of the Trusts Act were absent; and (4) that therefore there was valid attachment and a valid sale, and in consequence the defendants were liable to the plaintiff for the sum of Rs. 81-14-3. (*Davis, C.J. and Weston, J.*) ISMAIL JAKRIA & CO. *v.* BURMAH SHELL PROVIDENT TRUST, LTD. **I.L.R. (1941) Kar. 401.**

——**S. 60 (i)**—Scope—Exemption under—If can be waived—Public servant contracting himself out of statutory exemption—Legality. *See* C. P. CODE, O. 21, R. 48. **43 Bom.L.R. 758.**

——**S. 60 (1) (b)**—*Applicability—"Tools of an artisan"—Musical instruments of musician—If exempt from attachment.*

A musician is not an artisan and his musical instruments are not "the tools of an artisan" exempt from attachment under S 60 (1) (*b*), C. P. Code. (*Happell, J.*) MANIKYAM *v.* MANIKYAMMA. **1941 M W.N. 783=(1941) 2 M.L.J. 671.**

——**S. 60 (1) (b)**—*Exemption from attachment—Existence of ground for—Relevant point of time—Change of circumstances after date of execution—If affects question.*

Where a tailor who was using a number of sewing machines sells a couple of them after their attachment and works thereafter in another's shop, that cannot affect the question of the exemption of all the machines from attachment. The criterion in such matters is the position of affairs at the time of execution. If on that date he was working in his own shop with all the

C. P. CODE (1908), S 60

machines, then all are exempt from attachment; and his subsequent conduct and position does not affect the question of exemption. (*Collister, J.*) AHMAD SAYED *v.* KANIZAK ZOHRA. **I.L.R. (1941) All. 278 = 193 I.C. 826 = 13 R.A. 456 = 1941 A.W.R. (H.C.) 55 = 1941 O.A. (Supp.) 64 = 1941 A.L.J. 117 = 1941 A.L.W. 57 = 1941 O.W.N. 52 = A.I.R. 1941 All. 157.**

——**S. 60 (1) (b)** —*Tailor, if an artisan—Number of sewing machines used—All of them, if exempted from attachment.*

A tailor who uses a sewing machine is an artisan, and the sewing machine is an artisan's tool. S. 60 (1) (*b*), C. P. Code, does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. Hence if a tailor has a number of sewing machines all of them are exempt from attachment though as a matter of fact a single machine might be sufficient for his livelihood. (*Collister, J.*) AHMAD SAYED *v.* KANIZAK ZOHRA.

I.L.R. (1941) All. 278 = 193 I.C. 826 = 13 R.A. 456 = 1941 A.W.R. (H.C.) 55 = 1941 O.A. (Supp.) 64 = 1941 A.L.J. 117 = 1941 A.L.W. 57 = 1941 O.W.N. 52 = A.I.R. 1941 All. 157.

——**S. 60 (1) (c)**—Decree against non-agriculturist legal representative—Original debtor agriculturist—Property if liable to attachment. *See* 1940 Dig., Col. 210. SHER SINGH *v.* BALDEV SINGH **I.L.R. (1941) Lah. 588.**

——**S. 60 (1) (c) (as amended by S. 35 of Punjab Relief of Indebtedness Act)**—"*For a period of a year or more*"—*If qualify "left vacant" only.*

The words "for a period of a year or more" in S. 60 (1) (*c*), C. P. Code, as amended by S. 35 of the Punjab Relief of Indebtedness Act, qualify "left vacant" only and not "let out on rent or lent to others." (*Skemp, J.*) RAMA MAL *v.* BHOLA SINGH. **I.L.R. (1941) Lah. 441.**

——**S. 60 (1) (c)**—"*Houses and other buildings*"—*Exemption from attachment.*

By the deliberate use of the two words "houses and buildings" in S. 60 (1) (*c*) the Legislature meant that not only the residential house lived in by the agriculturist but also the other buildings occupied by him should be exempt. On a plain reading of the clause, there are only two conditions governing the exercise of this privilege. Firstly the person claiming it should be an agriculturist and secondly he should occupy the house and the buildings. There is nothing in S. 60 (1) (*c*) to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors. (*Mir Ahmad, J.*) MOHAMMD JAN *v.* S. S. KIRPAL SINGH. **196 I.C. 356 = 14 R Pesh. 28 = A.I.R. 1941 Pesh 68.**

——**S. 60 (1) (c)**—*Mortgage decree—House of agriculturists—If can be sold.*

The house of an agriculturist cannot be sold in execution even of a mortgage decree passed against that property. (*Almond, J.C. and Mir Ahmad, J.*) MAHOMED JAN *v.* GUTTA SINGH. **194 I.C. 716 = 14 R Pesh. 3 = A.I.R. 1941 Pesh. 53.**

——**S. 60 (1) (c)**—*Plea under—Availability to stranger, as against auction purchaser.*

Where an owner of property has failed to raise a plea under S. 60 (1) (*c*), C.P. Code, at the time of the execution sale, it is not open to a stranger in possession to raise the plea in a suit by the auction purchaser for possession of the property purchased by him in auction.

C. P. CODE (1908), S. 60.

(*Ghulam Hasan, J.*) SHEORAJ *v.* GANGA PRASAD. **193 I.C. 675 = 13 R.O. 502 = 1941 O.L.R. 361 = 1941 A.L.W 519 = 1941 A.W.R. (Rev.) 372 = 1941 O.A. 399 = 1941 R.D. 328 = 1941 A. L.W. 462 = 1940 O.W.N. 618 = A.I.R. 1941 Oudh 395.**

——**S. 60 (1) (f)**—*Money due to firm of managing agents from company—If constitutes right of personal service.*

Money due to the firm of managing agents of a company from the company does not constitute a "right of personal service" within the meaning of S. 60 (1), Cl. (*f*). (*McNair, J.*) PURSATTAMDAS *v.* BAIJNATH. **195 I.C. 69 = 14 R.C. 41 = A I R. 1941 Cal. 240.**

——**S. 60 (1), Proviso (g)**—*Applicability—Money received by retired Government servant in commutation of pension—Liability to attachment.*

It cannot be said that commutation of a pension comes under the heading of stipends or gratuities under S. 60 (1) (*g*), C. P. Code, the proviso was never intended to apply to money after it has passed into the pocket of the pensioner. Where a retired Government servant has received a certain sum of money in commutation of his pension, such amount is not exempt from attachment under S. 60 (1) (*g*). (*Davis, C.J. and Weston, J.*) HASOOMAL SANGUMAL *v.* DIAROMAL LALOOMAL. **I.L.R. (1941) Kar. 479.**

——**S. 60 (1) (i) and (k), (as amended in 1937)**—Scope and effect of—Decree obtained against public officer in suit instituted after 1st June, 1937—Extent of salary attachable—Contribution to Provident Fund—Deduction of—Salary—If means net salary or gross salary—Income tax—If deductible. *See* 1940 Dig., Col. 211. BHAGWAN DASS RAMPRASAD *v.* SECRETARY OF STATE. **193 I.C. 360 = 13 R.P. 584 = 7 B.R. 598 = A I.R. 1941 Pat. 157.**

——**S. 60, Proviso 1 (i)**—Scope of—If controls S. 73, C. P. Code. *See* C. P. CODE, SS. 73 AND 60, PROVISO 1 (*i*). **1941 N.L.J. 331.**

——**S. 60 (1) (i), proviso**—Scope—If controls S. 60, Presidency Towns Insolvency Act—Order of allocation under latter—If liable to revocation by reason of S. 60, C. P. Code. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 60. **1941 M.W.N 924 = (1941) 2 M.L.J. 845.**

——**S. 60 (1) (k)**—Applicability—Railway guard—Allowance of over and above salary—Attachability—Advance from Provident Fund—Repayment in monthly instalments—Instalments—If deductible from attachable salary. *See* 1940 Dig., Col. 211. KONDAYYA NAIDU *v.* MARIANAN. **191 I.C. 462 = 13 R.M. 498 = (1940) 1 M.L.J. 936.**

——**S. 60 (1) (k)**—*Provident Fund—Agreement between member and trustee of Provident Fund—Third parties, if affected—Rule as to forfeiture of amount on attachment—Effect.*

Two parties cannot by a mutual agreement do away with the existing rights of independent third parties. Hence the member and the trustees of a Provident Fund cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees that interest should cease to exist. When the attachment is received it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. On an attachment being made the only effect of such an agreement or rule is that that portion of the interest of the member which is not covered by the attachment, or which exceeds the amount mentioned in the prohibitory order, is forfeited to the trustees. But an attachment order cannot be

C. P. CODE (1908), S. 60.

rendered ineffective so far as regards the amount referred to therein, and when the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. (*Mackney, J.*) R. C. DASS *v.* SECRETARY OF BURMA OIL SUBSIDIARY PROVIDENT FUND TRUST (INDIA), LTD.
A.I.R. 1941 Rang. 239.

——**S. 60 (m)**—*Applicability—Sale of Hindu coparcener's interest in joint family property—If illegal—Want of specification of the interest of coparcener—If vitiates sale.*

Where in execution of a decree against a Hindu coparcener, the share of that coparcener in a part of the joint family property is put up for sale, the want of specification of the extent of the coparcener's interest in the joint family property cannot invalidate the proclamation or the sale. S. 60 (*m*) has no application to the case. The interest of a coparcener in the joint family property is not a matter of contingency or dependant upon any future happening. So far as it is an interest, it must *ex hypothesi* be a vested interest. (*Burn and Mockett, JJ.*) SHANMUGHAM CHETTIAR *v.* NAGASWAMI AYYAR & CO. **54 L.W. 365 = 1941 M.W.N. 985 = (1941) 2 M.L.J. 550.**

——**S. 64**—Applicability—Attachment — Subsequent mortgage by judgment-debtor—Execution sale—Private sale by debtor before confirmation of execution sale with permission of Court—Deposit of sale proceeds by private purchaser—Decree satisfied and attachment withdrawn—Position and rights of purchaser—Mortgage—If void as against purchaser—*Lis pendens*—Applicability—T. P. Act, S. 52. *See* 1940 Dig., Col. 212. LANKARAM *v.* SUNDARAGOPALA AYYAR.
195 I.C. 212 = 14 R.M. 152 = 1941 M.W.N. 66 = A.I.R. 1941 Mad. 208 = (1940) 2 M.L.J. 1038

——**S. 64**—*Applicability—Contract to sell land—Subsequent attachment in execution of decree against owner—Sale deed in pursuance of contract after attachment—Subsequent Court-sale in pursuance of attachment—If prevails over sale in pursuance of contract—T. P. Act, S. 54.*

It is quite clear that though a contract to sell land does not create any interest in, or charge on, the property in question, it does give rise to an obligation which limits the right of the owner; and the attachment of the right, title and interest of the owner in the property in execution of a decree against him is subject to such limitation by which the judgment-debtor (owner) was bound. There is no legal basis for the theory that an attachment will prevail against a pre-existing contract binding the owner of the land if the attaching decree-holder has no notice of the contract. If the attachment is followed by a Court-sale and the purchaser at the Court-sale has no notice of this obligation, he will no doubt get a good title and the promisee under the private contract would be left to seek his remedy against his promisor. Where, however, a registered sale-deed is executed after the attachment and before the Court-sale, in pursuance of the prior contract to sell made before the attachment, the position is different. The sale can only be attacked under S. 64, C. P. Code, which section will apply only if it is shown that the sale is a private transfer contrary to the attachment. But when the attachment is subject to the obligation under the previous contract, the sale in pursuance of the contract cannot be a transfer contrary to the attachment. (*Wadsworth, J.*) ATHINARAYANA KONAR *v.* SUBRAMANIA AIYAR. **54 L.W. 474 = 1941 M.W.N. 896 = (1941) 2 M.L.J. 722.**

——**S. 64 and O. 38, R. 10**—*Attachment before judgment of land—Prior agreement by defendant to sell land to third party—Right of decree-holder to bring property to sale in execution—Remedy.*

The holder of a money decree, who has attached immovable property of his judgment-debtor before judgment, cannot bring that property to sale in satisfaction of his decree, when the judgment-debtor has, before the attachment, agreed to sell the property to a third party, and the sale has been completed by a conveyance after the attachment. The attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the purchase-money, if any. He would also have the benefit of the vendor's lien under S. 55 (4) (*b*), T. P. Act. (*Broomfield and Divatia, JJ.*) RANGO RAMCHANDRA *v.* GURLINGAPPA. **I.L.R. (1941) Bom. 290 = 195 I.C. 547 = 14 R.B. 45 = 43 Bom.L.R. 206 = A.I.R. 1941 Bom. 198.**

C. P. CODE (1908), S. 66.

——**S. 64**—*Effect of attachment—Scope and applicability of S. 64.*

Attachment creates no new title. The attaching creditor only obtains certain negative rights which are limited in scope. S. 64 of the C. P. Code sets out these limits. The section is restricted to private transfers of, and private dealings with the property attached and does not extend to involuntary transfers or other consequences which ensue *ad invitum* the parties because of a statutory enactment. (*Stone, C.J. and Bose, J.*) BHURA *v.* SADDULAL. **1941 N.L.J. 593.**

——**S. 64**—*Private transfer—Meaning.*

A 'private transfer' in S. 64 C.P. Code, means transfer carried out without the intervention of the attaching Court or of some Court superior to it or again of some Court to which the proceedings have been lawfully transferred. A transfer during the pendency of an attachment is illegal. (*Davies.*) NOOR MOHAMMED *v.* UMRAO MAL. **1941 A.M.L.J. 51.**

——**S 64**—Scope of—Attaching creditor, if can claim to restrict the effects of a private transfer. *See* 1940 Dig., Col. 213. RAM CHANDRA *v.* RAM LAL.
I.L.R. (1940) All. 681 = 191 I C. 745 = 13 R.A. 266.

——**S. 64, Expl. and S. 73**—*Court ordering execution application to be filed but mentioning in order that attachment should subsist—No such order made on application for rateable distribution which was also filed—Decree-holder, if can take advantage of order on execution application.*

S. 64, Explanation clearly indicates that applications for rateable distribution go hand in hand with execution application. Consequently, where the Judge orders an execution petition to be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application. (*Almond, J.C. and Mir Ahmad, J.*) SOHAN LAL GULAB RAI *v.* MOHAMMAD DIN MOHAMMAD YUNIS. **193 I.C. 712 = 13 R. Pesh. 65 = A.I.R. 1941 Pesh. 18.**

——**S. 65**—Auction-purchaser's right to possession—When accrues—Right to mesne profits. *See* 1940 Dig., Col. 214. ABDUL GHANI *v.* LAL CHAND.
I.L.R. (1941) Lah. 91 = 43 P.L.R. 313.

——**S. 65**—Scope and effect of. *See* 1940 Dig., Col. 214. CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **192 I.C. 213 = 7 B.R. 344 = 13 R.P. 444 = 1940 P.W.N. 994.**

——**S. 66**—Applicability—Revenue sale. *See* 1940 Dig., Col. 214. SHRIDEO RAM JANKI *v.* NATHURAM.
I.L.R. (1941) Nag. 90 = 195 I.C. 91 = 14 R.N. 35 = A.I.R. 1941 Nag. 84.

C. P. CODE (1908), **S. 66.**

——**S. 66**—*Applicability—Sale by Revenue Court in execution of decree for rent under Madras Estates Land Act—Suit for declaration that purchase was for benefit of plaintiff—Maintainability—Estates Land Act, S. 192.*

S. 66, C. P. Code, is not applicable to sales in execution of a decree for arrears of rent by a Revenue Court under the provisions of the Madras Estates Land Act. Such a sale is not held and certified in pursuance of the provisions of the Civil Procedure Code, therefore a suit by a person for a declaration that the property sold was purchased by the defendant for the benefit of the plaintiff is not barred. (*Venkataramana Rao, J.*) MUTHUKUMARU MANIAKARAR *v.* PETHIA MANIAKARAR.

54 L.W. 539 = 1941 M.W.N. 962 = (1941) 2 M.L.J. 717.

——**S. 66**—Scope of—Absence of case independent of auction-sale—Right to relief. *See* 1940 Dig., Col. 215. BISHUN DAYAL *v.* KESHO PRASAD.

I.L.R. (1940) Kar. (P.C.) 406 = 7 B.R. 146 = 1941 P.W.N 23 = 45 C.W.N. 266 = 43 Bom L.R. 138 (P.C.).

——**S. 67 (2)**—Rule by Coorg Chief Commissioner—Applicability—Execution of decree of Coorg Court in British India. *See* 1940 Dig., Col.. 215. ABDULLA KAKA *v.* MUTHANNA. **193 I.C. 46 = 13 R.M. 610 = A.I.R. 1941 Mad. 45 = (1940) 2 M.L.J. 420.**

——**S. 68**—Notification under, by Punjab Government—Notification No. 365-R (Revenue Department) dated 17th January, 1939—Applicability—Pending execution proceedings. *See* 1940 Dig., Col. 215. NARAIN DAS GULAB SINGH *v.* PATIALA DURBAR.

191 I.C. 704 = 13 R.L. 325.

——**S. 68**—Notification under, by Punjab Government—Notification No. 365-R (Revenue Department) dated 17th January, 1939—Land falling within its purview ordered to be sold—Execution of entire decree—If should be transferred to Collector. *See* 1940 Dig., Col. 215. NARAIN DAS GULAB SINGH *v* PATIALA DURBAR. **191 I C. 704 = 13 R.L. 325.**

——**Ss. 68 and 70**—Collector proceeding—Relative powers of Collector and Civil Court. *See* 1940 Dig., Col. 215. ZIBAL *v.* MUKA. **193 I C. 274 = 13 R.N. 302.**

——**Ss. 68, 70 and 96**—*Order of Collector refusin to direct alienation of judgment-debtor's land—Appeal.*

Even before the promulgation of the rules made by the Punjab Government under S. 70, C.P. Code, any decrees passed by a Collector to whom execution proceedings had been transferred as the result of the notification under S. 68, were by the operation of S. 96 of the Code decrees subject to appeal to the Court of the Commissioner. An order of the Collector refusing to direct the alienation of any portion of the judgment-debtor's land on the ground that it was barely sufficient for the maintenance of the judgment-debtor and his family is clearly a decree and is appealable as such to the Commissioner. (*Alan Mitchell, F.C.*) BUDHU RAM *v.* PANDHI.

20 Lah.L.T. 167.

——**S. 70 (1)**—*Rules under, R. 13—Scope of—Collector if can adjudicateon disputed adjustment.*

R. 13 of the rules framed under S. 70 (1), C.P Code, only invests a Collector with powers specifically referred to in the notified rules and not with all powers conferred by rules under O. 21 or otherwise by the C. P. Code. The Collector is not a Court within the meaning of the term occurring in O. 21, R. 2. A Collector is justified in filing the proceedings, when there is an amicable settlement admitted by both parties. But he cannot legally come to a decision regarding a disputed adjustment. (*Binney, F. C.*) DHANRAJ *v.* BALKISAN.

1941 N.L.J. 300.

C. P. CODE (1908), **S. 73.**

——**Ss. 73 and 47**—*Appeal against order under S. 73—If lies—Question between rival decree-holders.*

An order under S. 73, C. P. Code, determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 and is not appealable. (*Mya Bu and Mosely, JJ.*) S. B. DASS *v.* GHANSHAMDAS.

1940 Rang.L.R. 718 = 194 I.C. 46 = 13 R.R. 287 = A.I.R. 1941 Rang. 113.

——**S. 73**—Applicability—Conditions—Creditor obtaining attachment before judgment but not taking out execution—Right to rateable distribution *See* 1940 Dig., Col. 216. MOIDIN *v.* DAKSHAYANI AMMA.

192 I.C. 864 = 13 R.M. 601 = A.I.R. 1941 Mad. 125 = (1940) 2 M.L.J. 844.

——**S. 73**—Applicability—Creditor becoming heir of debtor subsequent to decree—Right to claim rateable distribution as against other creditors—Merger—Right of retainer. *See* DEBTOR AND CREDITOR.

54 L.W. 688 = (1941) 2 M.L.J. 1024.

——**S. 73**—*Applicability—Transferee of decree—Application by for execution before receipt of assets—Transfer not recognised before receipt of assets—If bars claim for rateable distribution.*

All that S. 73, C. P. Code, requires is that an applicant for rateable distribution must have applied, before the receipt of assets by the Court, for execution of his decree. A transferee of a decree for money is entitled to claim and get rateable distribution if he applies for execution before the receipt of assets even though the transfer in his favour is not recognised by the Court before such receipt. The section says nothing about the recognition of the transfer by the Court in the case of an application for execution by the transferee. (*Patanjali Sastri, J.*) VENKATACHALAM *v.* SUBRAMANYAM.

1941 M.W.N. 699 = 54 L.W. 714 = A.I.R. 1941 Mad. 795 = (1941) 2 M.L.J. 219.

——**S. 73**—*Assets held by the Court—Meaning of—Cheque, when amounts to asset.*

The expression "assets held by the Court" in S. 73, C. P. Code, obviously implies the idea of assets realised or converted into cash, for, unless the property has been converted into some form which renders it available for immediate distribution, the Court cannot be said to have received or held such assets. A cheque may, in certain circumstances, amount to an asset within the meaning of the section. Where the money representing the sale proceeds of the attached goods of the judgment-debtor is lying in the Treasury to the credit of the District Judge, a cheque drawn on the Treasury by the District Judge for payment to the attaching decree-holder and delivered over to the executing Court and accepted by it will amount to an asset, when the only form of payment which the decree holder desires is that the cheque should be endorsed over to him. After the receipt of such a cheque, the Court cannot entertain an application for rateable distribution by any other decree-holder. (*Mukherjea and Biswas, JJ.*) JOGESH PRASAD *v.* SALIGRAM LACHMI NARAYAN. **45 C.W.N 674.**

——**S. 73**—*Construction—'Passed'—Object of addition of.*

The Legislature added the word 'passed' in the new section in order to make it clear that the words "against the same judgment debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section. (*Iqbal Ahmad, Bajpai and Verma, JJ.*) HOTI LAL *v* CHATURA PRASAD. **I L.R. (1941) All. 77 = 194 I.C. 276 = 13 R.A. 477 = 1 41 A.W.R. (H.J.) 93 =**

C. P. CODE (1908), S. 73.

1941 O.A. (Supp.) 169=1941 A.L.J. 137= A.I.R. 1941 All. 110 (F.B.).

——**S. 73**—*Interpretation—Words "passed against same judgment debtor"—If includes judgment-debtor's legal representatives.*

Per *Iqbal Ahmad and Verma, JJ.*—The expression "passed against the same judgment-debtor" must be liberally construed. The object of S. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must be interpreted as referring more to the property which a judgment-debtor represents "than to the person against whom execution has been sought." Hence where *A* has obtained a decree for a certain sum of money against *B* upon the basis of a promissory note executed by *B* and on *B's* death *M* obtains a decree for money against *B's* son *N* personally and against the assets of *B* in the hands of *N* and *C*, sons of *B*, on the basis of a promissory note executed by *B* and *N*, the decrees are against the same judgment-debtor and S. 73 therefore applies.

Per *Bajpai, J*—The personality, the character and the capacity of the judgment debtor should not be ignored and undue preference should not be given to the property from which the assets are realized. The decree-holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees were not against the same persons S. 73, C. P. Code, would not be applicable. (*Iqbal Ahmad, Bajpai and Verma, JJ.*) HOTI LAL *v.* CHATURA PRASAD. **I.L.R. (1941) All. 77=194 I.C. 276= 13 R.A. 477=1941 A.W.R. (H.C.) 96= 1941 O.A. (Supp.) 169=1941 A.L.J. 137= A.I.R. 1941 All. 110 (F.B.).**

——**S. 73**—*Object of.*

Per *Iqbal Ahmad, J.*—The object underlying the enactment of S. 73, C. P. Code, was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of those assets. (*Iqbal Ahmad, Bajpai and Verma, JJ.*) HOTI LAL *v.* CHATURA PRASAD. **I.L.R. (1941) All. 77=194 I.C. 276= 13 R.A. 477=1941 A.W.R. (H.C.) 96= 1941 O.A. (Supp.) 169=1941 A.L.J. 137= A.I.R. 1941 All. 110 (F.B.).**

——**S. 73**—*Rateable distribution—Right to—Starting point—Date of execution or date of application for rateable distribution.*

Where a decree-holder applies for execution and subsequently finding that the assets of his judgment-debtor are under attachment in respect of other decrees in other Courts, thereafter applies under Ss. 63 and 73, C. P. Code, for transfer of his decree to the Court holding the assets and for rateable distribution, his right to rateable distribution arises from the date of the execution application itself and not from the date of the application under Ss. 63 and 73, C. P. Code. (*Ghulam Hasan, J.*) ELSIE C. GRIFFIN EDWARD *v.* W. A. C. HOWARD. **193 I.C 38=13 R.O. 424= 1941 A.W.R. (C.C.) 66=1941 O.L.R. 247= 1941 A.L.W. 99=1941 O.W.N. 115= 1941 O.A. 138=A.I.R. 1941 Oudh 277.**

——**S. 73**—*Rateable distribution—Who are entitled to—'Date of receipt of assets'.*

The ordinary equitable view is that persons who have already claimed against a judgment-debtor are entitled to share in the rateable distribution of property that has been received or attached by the Court before the date of their execution application. The date of the receipt of the assets is the date on which the assets in whatever form are attached or if there is no attachment, on which they are actually taken into possession by the Court. (*Davies.*) AJMERI LAL *v.* BAL MUKAND. **1941 A.M.L.J. 19.**

——**S. 73**—Receipt of assets— Date of— Decree against father and son—Official Receiver directed to sell son's share also within time fixed—Failure to sell—Sale subsequently by receiver afterwards ratified by Court—Application by holder of decree for execution after receipt of money by receiver but before payment by him to Court—Right to rateable distribution. *See* 1940 Dig., Col. 218. ANNAMALAI CHETTIAR *v.* VELLAYAN CHETTIAR. **193 I.C. 536= 13 R.M. 678=(1940) 2 M.L.J. 23.**

——**S. 73**—*Receipt of assets—Necessity for.*

Under S. 73, C. P. Code, no order for rateable distribution can be passed unless assets are held by the Court. An order allowing an application for rateable distribution made when no sale has been held and no assets have been received by the Court, is liable to be set aside. (*Chatterji and Meredith, JJ.*) DHIRENDRA NATH CHANDRA *v.* BIMALANANDA TARKATIRTHA. **196 I.C. 728=8 B.R. 94.**

——**Ss. 73 and 60, Proviso 1 (i)**—*Right to rateable distribution—Decree-holder subsequent to Amendment of S. 60 in 1937—If can participate in attachment prior to 1937.*

Where there has been an attachment of the judgment-debtor's salary by one creditor prior to 1937 and another creditor obtains a decree subsequent to the Amendment of S. 60, C. P. Code in 1937, he can claim rateable distribution in the amount attached in respect of earlier decree. The amendment does not control S. 60. (*Bose, J.*) KHAIRULLAH KHAN *v.* MIRAJANKHAN. **195 I.C. 609=14 R.N. 63=1941 N.L.J. 331= A.I.R. 1941 Nag. 239.**

——**S. 73 and Companies Act, Ss. 186 and 199**—*Right to rateable distribution—Right of decree-holder against holder of payment order.*

A holder of a decree is entitled under S. 73, C. P. Code, to claim rateable distribution against the official Liquidator as the holder of a payment order under S. 186 of the Companies Act. S. 199 of the Companies Act puts the payment order on the same footing as a decree so far as the execution goes and rateable distribution under S. 73 is clearly a method of enforcement of a decree or of an order in the nature of a decree. (*Young, C. J. and Blacker, J.*) RADHESHAM BEOPAR COMPANY LTD., OKRA *v.* KARAM CHAND. **195 I.C. 386= 14 R.L. 65=1941 Comp. C. 229= 43 P.L.R. 310=A.I.R. 1941 Lah. 273.**

——**S. 73**—Same judgment-debtor—Decree against debtor during his lifetime and decree against his legal representatives—If 'passed against the same judgment-debtor'. *See* 1940 Dig., Col. 218. SARJU SUKUL *v.* RANGIDHAR DUBAY. **191 I.C. 361=13 R.R. 123.**

——**S. 73**—"Same judgment-debtor" — Decree against Hindu father and decree against father and son —Sale of son's share in execution of latter decree— Right of holder of former decree to rateable distribution. *See* 1940 Dig., Col. 218. SUBRAMANIAM CHETTIAR *v.* ANNAMALAI CHETTIAR. **194 I.C. 803= 14 R.M. 89=(1940) 1 M.L.J. 553.**

——**S. 73**—*"Same judgment-debtors" — Decree against Hindu father and son and decree against father alone as manager of family—If against "same judgment-debtor."*

C. P. CODE (1908), S. 73.

The expression, "the same judgment-debtor" in S. 73, C. P. Code, must be construed strictly. A decree against a father and son, members of a Hindu joint family, and a decree against the father alone as manager of the joint Hindu family cannot be regarded as decrees against the same judgment-debtor within the meaning of S. 73, C. P. Code. (*Beaumont, C.J. and Macklin, J.*) LAXMAN ANANT *v.* GOVIND RAMBHAT. **196 I C. 644 = 43 Bom.L.R. 695 = A.I.R. 1941 Bom. 324.**

——**S. 73**—*'Same judgment-debtor'—Decree against person personally and decree against him as legal representative of a deceased person—If against same judgment-debtor.*

The expression "the same judgment-debtor" in S. 73, C. P. Code, denotes identity, not only of individuality but of character or interest. Decrees against the same person cannot always be regarded as decrees against the same judgment-debtor for the purposes of S. 73. A decree against a person individually and a decree against that person as representative of a deceased person cannot be held to be decrees against the same judgment-debtor within the meaning of S. 73, C. P. Code, so as to entitle the holders of the two decrees to rateable distribution. (*Beaumont, C.J. and Macklin, J.*) JAMIYATRAM GAURISHANKAR *v.* UMIYASHANKAR PRANSHANKAR. **196 I.C. 595 = 43 Bom.L.R 699 = A.I.R. 1941 Bom. 327.**

——**S. 73**—*Scope and applicability.*

Per *Iqbal Ahmad, J*—S. 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. Hence S. 73 cannot be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if S. 73 was not on the statute book. Conversely the provisions of S. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution. (*Iqbal Ahmad, Bajpai and Verma, JJ.*) HOTI LAL *v.* CHATURA PRASAD. **I.L.R. (1941) All. 77 = 194 I C. 276 = 13 R A. 477 = 1941 A.W.R. (H.C.) 96 = 1941 O.A. (Supp.) 169 = 1941 A.L J. 137 = A.I.R. 1941 All. 110 (F.B.).**

——**S. 80**—*Applicability—Public officer—If should have acted* bona fide—*Motive of officer in doing act—Relevancy—Notice of suit.*

S. 80, C. P. Code, cannot be read as being limited in its application to cases in which an officer has acted *bona fide* in the exercise of his powers; the duty of the Court is to give effect to the natural meaning of the language used in the section. The question of good faith or bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under S. 80. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. The motives with which the act was done do not enter into the question at all. The Court has simply to see what act was done by the defendant and whether it purported to be an official act. Where a police officer arrested the plaintiff and led him to the police station as a person accused of theft, that is an act which every police officer has a statutory power to do under S. 54, Cr. P. Code, and it is as a police officer that he must have taken the plaintiff to the police-station. Where it is known to all parties concerned that he was a police officer and it is clear that he purported to act as such, whether in good faith or bad faith, S. 80, C. P. Code, applies and notice of suit has to be served under the section. (*Rowland, J.*) NOOR MAHOMED *v.* ABDUL FATEH. **194 I.C. 263 = 13 R P. 696 = 7 B R. 737 = 22 Pat.L.T. 392 = 1941 P.W.N. 502 = A.I.R. 1941 Pat. 461.**

C. P. CODE (1908), S. 80.

——**S. 80**—Applicability — Receiver—Suit against for royalty of lands in his possession—Notice—Necessity. *See* 1940 Dig., Col. 219. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON **192 I.C. 17 = 13 R.P. 362 = 7 B R. 283.**

——**S. 80**—*Applicability—Suit against ex public officer in respect of act done when he was public officer—Notice—Necessity.*

The notice contemplated by S. 80, C. P. Code, for a suit against a "public officer" is unnecessary in the case of a suit against a person who on the date of the suit has ceased to be such officer. The section cannot be read as including a suit against a person who is not a public officer but was a public officer at the time of the cause of action. To do so would be to extend the section beyond its apparent purport. (*Wadsworth, J.*) PADMANABHA NAYAR *v.* APPU. **54 L.W. 172 = 1941 M.W.N. 734 = (1941) 2 M.L.J. 242.**

——**S. 80**—*'Cause of action'—Construction—Notice of suit to recover amounts realized from plaintiff—Payments actually made after notice—Notice, if invalid.*

The words 'cause of action' in S. 80, C. P. Code, should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. A notice of suit to recover amounts realized from plaintiff is not bad merely on the ground that on the date of the notice the amounts had not been paid by the plaintiff but they were paid only later on. It is enough if the cause of action is stated with precision. (*Agarwal, J.*) JANKI PRASAD *v.* GOVERNMENT OF THE UNITED PROVINCES. **16 Luck. 421 = 192 I.C. 545 = 13 R.O. 367 = 1941 A.Cr.C. 16 = 1941 A.W.R (C.C.) 82 = 1941 O.L.R. 185 = 4 F.L.J. (H.C.) 75 = 1941 O W.N. 63 = 1941 O.A. 31 = A.I.R. 1941 Oudh 355.**

——**S. 80**—Municipal Committee superseded under S. 238 of Punjab Municipal Act—Service of notice on Deputy Commissioner—Validity. *See* 1940 Dig., Col. 219. MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY. **192 I.C. 729 = 13 R.L. 401.**

——**S 80**—*Notice—Necessity—Suit against Deputy Commissioner appointed* mutwalli *under a wakf.*

A suit against the Deputy Commissioner as the person appointed by the District Judge to perform the duties of *mutwalli* under a waqf deed, is not a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity and as such no notice under S. 80, C. P. Code, is necessary for such a suit. (*Yorke, J.*). HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. **196 I.C. 797 = 1941 A.W.R. (C.C.) 274 = 1941 O.L.R. 764 = 1941 O.W.N. 906 = 1941 O.A. 621 = A.I.R. 1941 Oudh 529.**

——**S. 80**—*Notice not necessary—Liquidator of co-operative Society—House of member attached by him in execution of award issued by Registrar — Member claiming in suit exemption from attachment as agriculturist.*

C. P. CODE (1908), S. 80.

S. 80, C. P. Code, bars the institution of a suit unless notice has been given, only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under the section. Where, therefore, a Liquidator appointed under the Bihar and Orissa Co-operative Societies Act attaches a house belonging to a member of the Co-operative Society in liquidation in execution of an award issued by the Registrar and the member institutes a suit against the Liquidator to obtain a decision as to whether his house is liable to be attached, he being an agriculturist, the suit does not require the service of notice under the section assuming that the Liquidator is a public servant within the meaning of the section. (*Agarwala, J.*) LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE SOCIETY *v.* DOMI RAM CHAUDHARY.
193 I.C. 142=13 R.P. 549=22 P.L.T. 465=1941 P.W.N. 373=7 B.R. 585=A.I.R. 1941 Pat. 438.

——**S. 80**—Notice served under old section—Suit lodged subsequent to Government of India (Adaptation of Indian Laws) Order, 1937—Validity of notice. *See* 1940 Dig., Col. 220. THAKAR DAS *v.* TULSI RAM.
191 I.C. 182=13 R.L. 267.

——**S. 80**—Official Receiver—Notice—Necessity for. *See* 1940 Dig., Col. 220. ASIA KHATUN *v.* AMARENDRA NATH BASU. **191 I.C. 783=13 R.C. 283.**

——**S. 80**—*Period of two months—Computation of,*

In computing the period of two months provided by S. 80, C. P. Code, the day of the delivery of the notice to the Secretary to the Provincial Government or to the Collector of the District, must be excluded. (*Venkataramana Rao, J.*) MARINA AMMAYI *v.* SECRETARY OF STATE. **53 L.W. 233=1941 M.W.N 205=A.I.R. 1941 Mad. 446=(1941) 1 M.L.J. 328.**

——**S. 80**—*'Public officer'—Common manager appointed under S. 95 of B. T. Act—Loan taken by him by executing bond—Suit on such bond—Notice, if necessary.*

Per *Pal, J.*—The common manager appointed under S. 95 of the B. T. Act is a public officer within the meaning of S. 80, C. P. Code. If he takes a loan and executes a bond, the act of taking the loan and executing the bond will be an "act done by a public officer in his official capacity". But his omission to pay either interest or principal cannot be an act purporting to be done by him in his official capacity. Consequently a suit by the creditor for the recovery of the money due under the bond will not come within S. 80, C. P. Code, and a notice under that section is not required for such a suit. (*Nasim Ali and Pal, JJ.*) SUKUMARI GUPTA *v.* DHIRENDRA NATH ROY. **73 C.L.J 356=A.I.R. 1941 Cal. 643.**

——**S. 80**—'Public officer'—Liquidator of Co-operative Society—Suit against—Notice—Necessity. *See* 1940 Dig., Col. 221. GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY. **194 I.C. 769=14 R.M. 67=(1940) 2 M.L.J. 241.**

——**S. 80**—*Scope — Mandatory nature of—Suit within two months—Maintainability—Plea of absence of proper notice—If can be waived.*

S. 80, C. P. Code, is explicit and mandatory and provides that no suit shall be instituted till after the expiry of two months after delivery of the notice. A suit filed within two months, *i.e.*, before the expiry of the full two months, is premature and ought to be dismissed. It is not open to the Collector representing the Crown to waive the plea as to the want of a proper notice under

C. P CODE (1908), S. 91.

S. 80, C. P. Code. (*Venkataramana Rao, J.*) MARINA AMMAYI *v.* SECRETARY OF STATE. **53 L.W. 233=1941 M.W.N. 205=A.I.R. 1941 Mad. 446=(1941) 1 M.L J. 328.**

——**S. 80**—*Scope—Suit against public officers and others—Notice of suit not served on public officers—Effect—Bar—If applies to whole suit—Procedure—Rejection of plaint.*

The requirements of S. 80, C. P. Code, cannot be evaded or explained away and a suit instituted in contravention of the section is unsustainable *in limine*. Where one or some of the defendants are public officers to whom notice of suit is necessary, the bar of S. 80, applies to the suit as a whole and not merely to the claim for relief against these particular defendants. If no notice is served on those defendants, the consequence of instituting the suit in face of the statutory prohibition is that under O. 7, R. 11, C. P. Code, the plaint should be rejected. (*Rowland, J.*) NOOR MAHOMED *v.* ABDUL FATEH. **194 I.C. 263=13 R P. 696=7 B.R. 737=22 Pat.L.T. 392=1941 P.W.N. 502=A.I.R. 1941 Pat. 461.**

——**S. 80**—*Scope and effect of—Suit instituted during currency of notice—Duty of Court to dismiss—Waiver of plea—What amounts to—Suit failing on facts admitted and alleged by plaintiff—Failure of Secretary of State to deny receipt of notice—If waiver.*

S. 80, C. P. Code, imposes a statutory and unqualified obligation upon the Court. The Code, though a Procedure Code, must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions. If a suit is instituted before the expiry of two months prescribed by S. 80, the suit is clearly unsustainable *in limine* and must be dismissed. But a plea that a suit has been instituted during the currency of the notice may be waived. Where the applicability of S. 80 depends upon proof of certain facts, and the Secretary of State does not deny the facts alleged in the plaint then he would be held to have waived his objection to the proof of those facts. When, for instance, a plaintiff states in his plaint that the notice has been served on a certain date which is beyond two months of the date of the institution of the suit and the Secretary of State does not raise any objection, the latter would be debarred from challenging these facts at the trial. So also when it has been alleged in the plaint that notice was sent with all the requisites beyond two months and the Secretary of State does not deny that the notice was received by him, he cannot during the trial be heard to say that he has not received the notice. But where the facts are admitted by the plaintiff himself and he fails under the express provisions of the statute no question of waiver can arise at all. The Secretary of State cannot be held to have waived the objection where the provisions of S. 80 have not been complied with on the admitted facts. (*Manohar Lall and Chatterji, JJ.*) SECRETARY OF STATE *v.* SAGARMAL MARWARI. **20 Pat. 394=195 I.C. 93=14 R.P. 74=7 B.R. 866=A.I.R. 1941 Pat. 517.**

——**S. 88**—Interpleader suit—Matter in dispute—Valuation. *See* 1940 Dig., Col 222. RAFIQ AHMED *v.* BABU RAM. **191 I.C. 531=13 R.A. 233.**

——**S. 91 and O. 1, R 8**—Applicability and relative scope—Village pathway—Obstruction—Right of action—Proof of special damage—Necessity—Sanction of Advocate-General—Necessity—S. 91—If overrides O. 1, R. 8. *See* 1940 Dig., Col. 223. BIBHUTI NARAYAN SINGH *v.* GURU MAHADEV ASRAM PRASAD SAHI.
22 Pat.L.T. 46.

C. P. CODE (1908), **S 92.**

——**S. 92**—*Applicability—Conditions.*

The applicability of S. 92 does not depend upon whether the defendants had or had not taken objection to the form of the suit. The Legislature requires that if a suit of this kind is to be instituted it must be instituted in a particular way, and it is not open either to the plaintiffs or to the defendants as it were, to contract themselves out of this section. (*Davis, C. J. and Tyabji, J.*) MULCHAND *v* HARKISHINDAS.

I.L.R. (1941) Sind 204 = 194 I.C. 461 = 13 R.S. 277 = A I.R. 1941 Sind 88.

——**S. 92**—*Applicability—Suit by trustee against stranger to recover trust property—Consent of Advocate-General—If necessary.*

The consent of the Advocate-General under S. 92, C. P. Code, is not necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. (*Sir George Rankin.*) O RM. O. M. SP. FIRM *v.* P. L. N. K. M NAGAPPA CHETTIAR.

67 I.A. 448 = I L.R. (1941) Mad 175 = I.L.R. (1941) Kar. (P.C.) 1 = 7 B.R. 466 = 13 R.P.C. 139 = 45 C.W.N. 385 = 53 L W. 522 = 73 C L.J. 166 = 1941 A.L.W 28 = 43 Bom.L.R. 440 = 1941 P.W.N. 299 = 1941 M.W.N. 571 = 1941 Comp. C. 231 = 192 I.C. 1 = 1941 O.L.R. 108 = A.I.R. 1941 P.C. 1 = (1941) 1 M L.J. 393 (P.C.).

——**S. 92**—*Applicability—Suit to dismiss Pujari for misconduct.*

A suit to dismiss a Pujari for misconduct is not one coming within the provisions of S. 92. He is not a trustee in any sense of the term. He is only responsible for the services in the temple. (*Davies.*) SINGARI *v.* KISHEN LAL. **1940 A.M.L.J. 66.**

——**S. 92**—*Appointment of committee—Directions—Proper procedure.*

When deciding a case under S. 92, C. P. Code, if it is decided to appoint a committee, it is best to state so clearly in the judgment and to add that the personnel of the committee will be decided later on an application by the parties. The personnel can then be determined. (*Davies.*) KUBRA BEGAM *v.* MUSTAFA BEGAM. **1940 A.M.L.J. 112.**

——**S. 92**—*Jurisdiction—Suit relating to trust—Compromise decree—Subsequent suit for declaration that compromise petition and decree are fraudulently obtained—Transfer for trial to Munsif—Jurisdiction of Munsif to make new decree under S. 92—Procedure.*

Where a compromise decree is made in a suit under S. 92, C. P. Code, and a subsequent suit before the District Judge for a declaration that the terms of the decree and of the compromise petition in the former suit on which the decree was based did not represent the true agreement between the parties and are vitiated by fraud, is transferred for trial to a Munsif, the latter, if he finds the allegation to be true can only declare that the facts are what he finds them to be and that in consequence the decree of the District Judge in the prior suit must be and should stand as vacated. It would then be for the parties to go to the District Judge and to ask him to revive the prior suit and dispose of it according to law giving them the necessary and proper reliefs. The Munsif has no jurisdiction to make a new decree under S. 92, C. P. Code, as that is a matter within the exclusive jurisdiction of the District Judge. (*Rowland and Manohar Lall, JJ.*) MAHOMED IDRIS HAIDAR *v.* HABIBUR RAHMAN. **196 I.C 554 = 14 R.P. 204 = 8 B.R. 38 = 22 Pat.L.T. 799.**

——**S. 92**—*Procedure—Suit under—Compromise—Leave of Court—Necessity.*

Quaere.—Whether in a representative suit affecting a public trust under S. 92, C. P. Code, a compromise can be entered into without leave of Court. (*Rowland and Manohar Lall, JJ.*) MAHOMED IDRIS HAIDRI *v.* MAHOMED HABIBUR RAHMAN. **196 I.C. 554 = 14 R.P. 204 = 8 B.R. 38 = 22 Pat.L.T. 799.**

——**S. 92**—*Removal of trustee—Ground for—Denial of trust property in suit.*

Mere assertion in a suit under S. 92, C. P. Code, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. (*Nasim Ali and B. N. Rau, JJ.*) LOKE NATH MUKHERJEE *v.* ABANI NATH. **194 I.C. 874 = 14 R.C. 19 = 72 C.L.J. 362 = A.I.R. 1941 Cal. 68.**

——**S. 92**—Right to sue—Sanction obtained by several persons—One of them dying before suit—Suit by rest if regular. *See* 1940 Dig., Col. 226. SHEO RAM *v.* RAM CHAND. **192 I.C. 429 = 13 R L. 378.**

——**Ss. 92 and 151**—Scheme—If can be modified by application under S. 151. *See* 1940 Dig., Col., 226. FAIYAZ ALI KHAN *v.* SAIFULLAH. **15 Luck 730.**

——**S. 92**—*Scheme—Provision for its modification by application in suit—Power of Court.*

It is not beyond the power of the Court which frames a scheme in a suit under S. 92, C. P. Code, to provide for the modification of the scheme by an application in the very suit itself in which the scheme is framed. (*Mitter and Khundkar, JJ.*) SRIJIB NYAYATIRTHA *v.* DANDY SWAMI JAGANNATH ASRAM. **73 C.L.J. 532 = A.I.R. 1941 Cal. 613.**

——**Ss. 92 and 115**—*Scheme under S. 92—Absence of any provision as to removal of trustee—Removal of existing trustee on application—Jurisdiction—Proper procedure—Interference in revision.*

Where in a scheme framed in a suit under S. 92, C. P. Code, no express provision is made for the removal of a trustee for a breach of trust or for any other cause and no liberty is reserved by the Court in the scheme itself either for the removal of a trustee or the modification of the scheme *suo motu* or upon the application by any other person interested, the Court has no jurisdiction to remove an existing trustee on a mere application without having recourse to S. 92, C. P. Code, and such an order cannot be sustained in revision. (*Ghulam Hasan and Agarwal, JJ.*) SAADAT HUSAIN *v.* MOJIZ HUSSAIN. **1941 O.W.N. 1269 = 1941 A.W.R. (C.C) 375 = 1941 O.A. 963**

——**S. 92**—*Scope—Declaratory suits.*

Mere declarations are outside the scope of S. 92, C., P. Code. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under S. 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of S. 92. But in a suit under that section the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. (*Nasim Ali and B. N. Rau, JJ.*) LOKE NATH MUKHERJEE *v.* ABANI NATH. **194 I.C. 874 = 14 R.C. 19 = 72 C L J. 362 = A.I.R. 1941 Cal. 68.**

C. P. CODE (1908), S. 92.

——**S. 92**—*Scope of—Consent to institute suit given to certain individuals—Suit instituted by some of them only—Validity.*

Where consent has been given to two or more persons, some only of those persons, even if they are more than two cannot institute the suit. A condition precedent to the valid institution of the suit is the fulfilment of the conditions of the consent which has been given. The section does not contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds should be joined as defendants. (*Davies, C.J. and Tyabji, J.*) MULCHAND *v.* HARKISHINDAS.

I.L.R. (1941) Sind 204 = 194 I C. 461 = 13 R S. 277 = A.I.R. 1941 Sind 88.

—— **S. 92**—*Scope—Trustee—Removal of trustee—Grounds—Proof of breach of trust or mismanagement—If essential—Trustee putting forward baseless claim to exclusive management—If ground for removal.*

Proof of breach of trust or mismanagement is not essential for the removal of a trustee from management. The Court has a wide discretion under S. 92, C.P. Code, to take such action as it thinks necessary or desirable for the good of the charity. The fact that a trustee puts forth an unwarranted claim to the right of exclusive management does not necessarily call for the penalty of exclusion from management. (*Broomfield and Macklin, JJ*) BAPUGOUDA YADGOUDA *v.* VINAYAK SADASHIV. **196 I.C. 826 = 43 Bom.L.R. 706 = A.I.R. 1941 Bom. 317.**

——**S. 92**—*Suit for account—Parties—Basis of relief.*

In a suit under S. 92, C.P. Code, for accounts, against trustees all of them must be joined and they must be asked to account on one of the two basises: (*a*) for the moneys they have received, or (*b*) for the monies they ought to have received—It is a case of taking accounts on what is known as the basis of wilful default. The account being finally taken, it would then be a matter for direction as to which of the trustees is liable in the first place, though they all would be liable in the event. The primary liability would be on the trustee who has received the money, and the final liability on all together. (*Stone, C.J. and Bose, J.*) NAGORAO *v.* GULABRAO. **1941 N L J. 587.**

——**S. 92**—*Suit under—Amendment—Powers of Court—Procedure—Sanction of Advocate-General or Collector—Necessity.*

It cannot be held that no amendment of the plaint is ever possible in suits under S. 92, C. P. Code. Amendments may be made with the consent of the Advocate-General or of the Collector. Although the Code does not provide for recourse to the Advocate-General or the Collector after the suit has been instituted, it does not follow that the Advocate General or the Collector may not take any further part in the suit. The true position is that it is for the Court to decide in suits under S 92 whether an amendment is permissible and the consent of the Advocate-General or the Collector as the case may be is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. There is no reason why amendments which do not substantially change the character of the suit or enlarge the scope of it should not be made by the Court itself without sanction Amendments which enlarge the scope of the suit, for instance by allowing further reliefs without substantially changing its character, may be made with the sanction of the Advocate-General or the Collector. Amendments substantially changing the character of the suit would not be permissible even with sanction, for in such a case it can hardly be said that the

C. P. CODE (1908), S. 92.

suit in its amended form was ever validly instituted. (*Broomfield and Macklin, JJ.*) BAPUGOUDA YADGOUDA *v.* VINAYAK SADASHIV. **196 I.C. 826 = 43 Bom.L.R. 706 = A.I.R. 1941 Bom. 317.**

——**S 92**—*Suit under—Appointment of committee—Counsel of parties—If can be appointed for client as members in the committee.*

Where it is decided to appoint a committee, it is, most inadvisable that parties' counsel should be appointed as members. It is not right to ask counsel to act on behalf of their clients as committee members in a trust for which they appeared on opposite sides in a court of law. (*Davies.*) KUBRA BEGAM *v.* MUSTAFA BEGAM. **1940 A M.L J. 112.**

——**S. 92**—*Suit under—Scope of settlors asking for the handing over back of trust property—If falls under S. 92.*

Where the settlors of a trust ask one of the several trustees to hand over trust property to them, the settlors, it is not the sort of case that is contemplated in S. 92, C. P. Code. The section is concerned with vesting of property in trustees, with accounts and enquiries by trustees which requires payment of moneys found due by the trustees by somebody accountable to the trust or accountable in respect of the trust to trustees. (*Stone, C.J. and Bose, J.*) NAGORAO *v.* GULABRAO. **1941 N.L.J. 587.**

——**S. 92**—Trustee de son tort—Person succeeding to religious institution as son and chela of his father. *See* 1940 Dig., Col. 227. SHEO RAM *v.* RAM CHAND. **192 I C. 429 = 13 R L 378.**

——**S. 92**—*Trustee setting up adverse title—If fit to be trustee.*

It is a serious delinquency on the part of the person for the time being administering the trust to set up a case that it was his private property; ond generally in such cases, Court should not continue such a person in the post of chief trustee. (*Davies.*) KUBRA BEGAM *v.* MUSTAFA BEGAM. **1940 A.M L.J. 112.**

——**S 92**—"*Two or more persons*"—*Meaning of.*

The phrase "two or more persons" in S. 92, C. P. Code, means two or more individuals who are named or so described in the consent that they can be identified. (*Davis, C.J. and Tyabji, J.*) MULCHAND *v.* HARKISHINDAS. **I.L.R (1941) Sind 204 = 194 I.C. 461 = 13 R.S. 277 = A.I.R. 1941 Sind 88.**

——**S. 92 (1) (h)**—"*Further or other relief*"—*Meaning of.*

The words "further or other relief" in S. 92 (1) (*h*), C. P. Code, mean relief of the same nature as the reliefs indicated in Cls. (*a*) to (*g*). It need not be further relief in the sense of being additional to one or some of the reliefs mentioned in Cls. (*a*) to (*g*) also prayed for in the plaint. A prayer for a direction that in the administration of a trust the trustee should apply the income to certain purposes is within Cl. (*h*), because it is of the same nature as that which is contemplated in Cl. (*e*). (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL. **46 C.W.N. 59.**

——**S. 92 (2)**—*Applicability—Relief covered by Cl. (h) of sub-S. (1).*

The prohibition contained in S. 92 (2), C. P. Code, applies not only to suits brought to obtain the reliefs mentioned in Cls. (*a*) to (*g*) of sub-S. (1) but also to those covered by Cl. (*h*). (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL. **46 C.W.N. 59.**

——**S. 92 (2)**—*Retrospective operation.*

Per *Khundkar, J.*—The prohibition contained in S. 92 (2), C. P. Code, applies although the cause of action

C. P. CODE (1908), **S. 95.**

on which the suit is founded is a right which was in existence prior to its enactment. (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL **46 C.W.N. 59.**

——**S. 95**—Appeal against order under—Prope court-fee. *See* COURT-FEES ACT, SCH. II, ART. 11 AND C. P. CODE, S. 95. **1940 A.M.L.J. 70.**

——**S. 95** –Order under—Not a decree. *See* COURT FEES ACT, SCH. II, ART. 11 AND C. P. CODE, S. 95 **1940 A.M L.J. 70.**

——**S. 95**—*'Plaintiff"—Next friend of minor plaintiff—Order of compensation against—Jurisdiction to make.*

The word plaintiff in S. 95, C. P. Code, cannot be read as including the next friend of a minor plaintiff. The Court has no jurisdiction to order a next friend to pay compensation under S. 95, C. P. Code. The injured party is not, however prevented from instituting a suit to recover from the next friend compensation, should he wish to do so. (*Leach, C. J. and Somayya, J.*) SATYANARAYANA *v.* ANJAREDDI. **53 L.W. 675 = 1941 M.W.N. 567 = A.I.R. 1941 Mad. 719 = (1941) 1 M.L.J. 765.**

——**S. 96**—*Right of appeal—Unnecessary party joined by consent of all.*

Where a person not necessary for the adjudication of the case before the Court is added as a party by the consent of all for the purpose of enabling him to protect his interest he must be allowed to do so and to press the matter in appeal in an appealable case. (*Stone, C. J. and Bose, J.*) KISANLAL HIRALAL *v.* GANESHDAS GULAB CHAND. **1941 N.L J, 657.**

——**S. 99**—*Absence of prejudice—No question of jurisdiction—Defects, if can affect decree.*

Where there is neither prejudice to a party, nor a question of jurisdiction, misjoinder even if it existed cannot by reason of S. 99, C. P. Code, affect a decree passed. (*Agarwal, J.*) HAR KRISHNA LAL *v.* QURBAN ALI. **196 I.C. 685 = 14 R.O. 198 = 1941 O.W.N. 1124 = 1941 O.A. 832 = 1941 O.L.R. 730 = 1941 A.L.W. 948 = 1941 A.W.R. (Rev.) 938.**

——**S. 99**—Applicability—Application wrongly filed under S. 86 of the Agra Tenancy Act instead of a suit under S. 207 of that Act—Condonation. *See* AGRA TENANCY ACT, SS. 207 AND 86 AND C. P. CODE, S. 99. **1941 A.W.R. (Rev.) 5.**

——**S. 99**—Scope—Joinder of claims in contravention of O. 2, R. 4—If ground for reversal of decree. *See* C. P. CODE, SS 16, 99 AND O. 2, RR. 2, 3 AND 4. **43 Bom.L.R. 293.**

——**S. 99, O. 2, R. 3**—*Scope—Suit on mortgage by assignee of mortgage—Prayer for decree on mortgage and in the alternative against assignor—If bad for misjoinder—Refusal of decree against mortgagor—Right to decree against assignor.*

Where the assignee of a mortgage bond brings a suit against the mortgagor and his assignor praying for a mortgage decree against the mortgagor on the mortgage which has been assigned to him and in the alternative for a decree against his assignor, the suit is not a suit where distinct causes of action are joined. Even if it be held that he is not entitled to a mortgage decree as against the mortgagor, there is no reason why he should not get a decree against the assignor who admits the assignment and consideration therefor. Courts of law and equity always delight in concluding litigations between the parties and preventing them from harassment which would result, if they are driven to a separate suit. O. 2, R. 3, C. P. Code, is no bar to such a suit or to the grant of relief ; even if there be misjoinder, S. 99, C. P.

C. P. CODE (1908), **S. 100.**

Code, would be a complete answer to it, when there is no failure of justice, and when the result of the trial has not affected the merits of the case or the jurisdiction of the Court which tried it. (*Manohar Lall, J.*) CHANDRA KANT LAL *v.* MST. BASMATIA. **22 Pat.L.T. 196.**

——**S. 100.—Second Appeals.**

Adverse finding.
Applicability.
Error or defect in procedure.
Findings of fact.
Interference.
New Plea.
Powers of High Court.
Question of fact.
Question of law.
Scope.

——**S. 100**—*Adverse possession — Finding as to—Interference.*

The question of adverse possession is a mixed question of fact and law. Though the facts found by the first appellate Court must be accepted in second appeal as final, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal. (*Yorke and Ghulam Hasan, JJ.*) IQBAL ALI *v.* HUMAYUN QADAR. **194 I.C. 50 = 13 R.O 515 = 1941 O.L R. 374 = 1941 O.W.N. 537 = 1941 O.A 320 = 1941 A.W.R. (Rev.) 289 = A.I R. 1941 Oudh 436.**

——**S. 100**—Applicability— Collector's decision under S. 74, Madras Estates Land Act—Appeal to District Court—Decision on—Second appeal—Competency. *See* MADRAS ESTATES LAND ACT, S. 75. **(1941) 2 M.L.J. 529.**

——**S. 100**—*Error or defect in procedure—Lower appellate Court not adverting to documentary evidence of party and giving no reason for rejecting opinion of trial Judge as to credibility of witness—Effect—Second appeal—Competency.*

Where the lower Court deals with the entire evidence in the case in a few sentences, without any advertence to the documentary evidence on the side of a party, and gives no reason for rejecting the conclusions of the trial Judge, as regards the credibility of the witnesses examined on the side of that party, its judgment does not satisfy the requirements of law and must be deemed to be a judgment vitiated by an error in procedure. The lower appellate Court is bound, as a matter of law, not to go against the opinion of the trial Judge, who had an opportunity of seeing and hearing the witnesses before him, in deciding upon the credibility of the witnesses. Unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed to be erroneous in law. A second appeal is competent in such a case under S. 100, C. P. Code. (*Pandrang Row, J.*) MANGAMMA *v.* PAIDAYYA **53 L.W. 160 = 1941 M.W.N. 98 = A.I.R. 1941 Mad. 393 = (1941) 1 M.L.J. 174.**

——**S. 100**—*Finding of fact—Conclusive character of—Erroneous finding—Interference.*

Conclusions of fact arrived at by the lower appellate Court, however erroneous or unsatisfactory, are conclusive in second appeal and cannot be challenged before the High Court in second appeal. (*Manohar Lall, J.*) CHANDRA KANT LAL *v.* MST. BASMATIA. **22 Pat L.T. 196.**

——**S. 100**—*Finding of fact—Concurrent finding that certificate sale was not vitiated by fraud—If conclusive.*

A concurrent finding by both the Courts below that a sale under the Public Demands Recovery Act was not vitiated by fraud is a finding of fact and binds the

C. P. CODE (1908), S. 100.

High Court in second appeal. (*Manohar Lal, J.*) NIZAR MAHOMED KHAN *v.* TAUQUIR AHMAD.
194 I.C. 479=13 R.P. 729=7 B.R. 782= A.I.R. 1941 Pat. 529.

——**S. 100**—*Findings of fact—Concurrent findings —Question of custom—Interference in second appeal.*

Where the concurrent findings of the lower Courts that a certain custom did not exist is based on the rejection of the evidence which should not have been rejected, the findings could be questioned in second appeal (*Bennett, J.*) HARUN RASHID *v.* KANIZ FATIMA. **16 Luck. 626=194 I C. 394= 13 R.O. 593=1941 R.D 472=1941 O.L R. 459= 1941 O.W.N. 623=1941 A.W.R. (Rev) 362= 1941 A. L.W. 467=1941 O.A. 394= A.I.R. 1941 Oudh 468.**

——**S. 100**—*Finding of fact—Deed, if executed as guardian of a minor—Minor, if benefited—Interference with findings on—If justified.*

A finding that a mortgage was not executed by a lady as the guardian of her minor grandson, and a finding that the minor had not been benefited by the mortgage are findings of fact and are binding on the second appellate Court and cannot be assailed or reversed. (*Bennett and Ghulam Hasan, JJ.*) RAJ BAHADUR SINGH *v.* NAR SINGH MISRA.
192 I.C.712=13 R.O 397=1941 A.W.R. (C.C) 54= 1941 O.W.N. 204 =1941 O.L.R. 217= 1941 A.L.W. 193=1941 O.A. 17= A.I.R. 1941 Oudh 226.

——**S 100**—*Finding of fact—Finding as to rate of rent payable under tenancy—Interference in second appeal or Letters Patent appeal.*

A finding as to the rate of rent payable under a tenancy is a finding of fact and cannot be disturbed in second appeal or Letters Patent appeal. (*Harries, C.J. and Fazl Ali, J.*) CHINTIKAHARIN *v.* KRIPA SHANKAR WARRAT. **7 B.R. 750= 13 R.P. 698=194 I C. 300= 1941 P.W.N. 513=A.I.R. 1941 Pat 488.**

——**S. 100**—Finding of fact—Finding based on wrong legal view—Interference. *See* 1940 Dig., Col. 229. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275=7 B.R. 153= A.I.R. 1941 Pat. 118.**

——**S. 100**—*Finding of fact—Finding as to fact of adoption—If can be questioned on the ground of improbability of such adoption.*

Where there is a finding as to the fact of adoption, it cannot be attacked in second appeal on the ground of improbability of such an adoption having taken place and the likelihood of its being invented in order to keep the occupancy holding in the family. (*Shirreff, J.M.*) COLLECTOR, GHAZIPUR *v.* RAM DEO KOERI.
1941 O.A. (Supp.) 825=1941 A.W.R. (Rev.) 981.

——**S. 100**—*Finding of fact—Interference—Finding of fact based on clerical mistake.*

Although it is the policy of the law for the Board not to interfere with the findings of fact in second appeal, yet where there is no evidence to support it, and it is obviously based upon an entry in the papers which is clearly a clerical mistake, it is a fit case for interference. (*Shirreff, S.M. and Sathe, J.M.*) BAL KISHUN PASI *v.* KHATRANI. **1941 A.W.R. (Rev.) 685= 1941 O.A. 625=1941 R.D. 723.**

——**S. 100**—*Finding of fact—Finding that deed was tampered with—If conclusive.*

A finding by the lower Court that a document was tampered with is a finding of fact and binding in second appeal. (*Mahomed Noor and Dhavle, JJ.*)

C. P. CODE (1908), S. 100.

JANARDAN PARIDA *v.* PRANDHAN DAS.
22 Pat.L.T. 666.

——**S. 100**—Finding of fact—Finding without considering all the evidence or based on inadmissible evidence—If conclusive. *See* 1940 Dig., Col. 229. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER.
191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.

——**S. 100**—*Finding of fact—Grove—If constituted.*

The finding as to the existence of a particular number of trees on a plot is a finding of fact, but the finding that these do not constitute a grove is not a question of pure fact. (*Harper, S.M. and Shirreff, J.M.*) MADAN GOPAL *v.* SANKATHA PRASAD.
1941 A.W.R. (Rev.) 513 (2)= 1941 O.A. (Supp.) 472 (2)=1941 R.D. 526.

——**S. 100**—*Findings of fact—Interference.*

A finding of fact cannot be interfered with in second appeal unless it is obviously inconsistent with the evidence on record. (*Sathe, A.M.*) HAR CHARAN SINGH *v.* KINNO. **1941 O.A (Supp.) 810= 1941 A.W.R. (Rev.) 890=1941 R.D. 940.**

——**S. 100**—*Finding of fact—Interference.*

A finding on the question as to whether the zamindar entered into possession by voluntary surrender or not, cannot be disregarded merely because a fresh consideration might lead the appellate Court to arrive at a different conclusion. (*Harper, S. M.*) DURBIJAY SINGH *v.* RAMZANI. **1941 R.D. 426 (1)= 1941 O.A. (Supp.) 495=1941 A.W.R. (Rev.) 564.**

——**S. 100**—Finding of fact—Interference—Existence of document not appreciated. *See* 1940 Dig. Col. 230. SHANKARRAO DAGADUJIRAO *v.* SAMBHU.
I.L.R. (1940) Kar. (P.C.) 380=43 Bom.L.R. 1= I.L.R. (1941) Bom. 107=73 C.L.J. 612= (1941) 1 M.L.J. 427 (P.C.).

——**S. 100**—*Findings of fact—Interference—Findings confused and involving mistakes of fact—Material evidence not considered.*

Where the judgment of the lower Court dealing with points of fact is confused and contains mistakes of fact and material evidence bearing on the disputed matters has not been considered, the findings of fact are not conclusive and binding on second appeal and the second appellate Court is justified in re-opening those matters and examining the evidence itself. (*Tek Chand and Dalip Singh, JJ.*) KESHO DAS *v.* JIWAN.
I.L.R. (1941) Lah. 568=195 I.C. 786=14 R L 98= 43 P.L.R. 450=A.I.R. 1941 Lah. 10.

——**S. 100**—*Finding of fact—Interference—Principle.*

In second appeal, the Court will not interfere with questions of fact unless evidence has improperly been admitted. (*Davis.*) RAMA NAND *v.* HAR NATH.
1940 A.M.L J. 115.

——**S. 100**—*Finding of fact—Interference—Question of onus—If material.*

Where evidence has been led by both sides and findings have been arrived at on a consideration of the evidence so led, the question of onus in a second appeal would be immaterial. But where the lower appellate Court has placed the onus wrongly on the plaintiff and has discussed only the evidence of the plaintiff and his witnesses, its findings are not binding in second appeal. (*Mitter, J.*) SURENDRABALA DEBI *v.* BHUPENDRA KUMAR. **45 C.W.N. 177.**

——**S. 100**—Finding of fact—Question of consideration in pre-emption suit. *See* 1940 Dig., Col. 231. JAIRAJ SINGH *v.* HAR NARAIN SINCH.
191 I.C. 759=13 R.A. 270.

C P. CODE (1908). **S. 100.**

——**S 100**—*Finding of fact—Question of fraud.*

The finding on a question of fraud is a clear finding of fact and so could not be challenged in second appeal. (*Bennett and Ghulam Hasan, JJ.*) GOKUL PRASAD *v.* MAHADEI. **194 I C 195 = 13 R.O. 563 = 1941 O.L.R. 425 = 1941 A.L.W. 520 = 1941 O.W N. 643 = 1941 O.A. 412 = 1941 A.W.R. (C.C.) 166 = A.I.R 1941 Oudh. 341.**

——**S. 100**—*Finding of fact—Suit for rent—Finding that plaintiff was unable to prove rate of rent payable—Finality—Lower Courts rejecting plaintiff's documents for insufficient reasons—If ground for interference in second appeal.*

A finding of fact by the lower Courts in a suit for rent, that the plaintiff has been unable to prove the rate of rent payable by the defendants, is conclusive and the High Court cannot interfere with such a finding in second appeal, although the Courts of fact have rejected the documents filed by the plaintiff for reasons which are not quite satisfactory. (*Manohar Lall, J.*) RAMGOBIND SAHU *v.* MOSO DHOBI. **193 I C. 780 = 13 R.P. 647 = 7 B R 639 = A I.R. 1941 Pat. 371.**

——**S. 100**—Findings of fact—Tenancy—Binding nature. *See* 1940 Dig., Col. 231. SHANKARRAO DAGADUJIRAO *v.* SAMBHU. **I.L.R. (1940) Kar. P C. 380 = 43 Bom.L.R. 1 = I.L.R. (1941) Bom 107 = 73 C L.J. 612 = (1941) 1 M.L J. 427 (P.C.).**

——**S. 100**—*Finding of fact—When questionable.*

A finding of fact can only be questioned in second appeal if it is without any basis of evidence. It is not enough to show in a second appeal that if the Court were hearing the case either as a Court of first instance or first appeal it might have come to a different conclusion on the evidence on record. To justify interference with a finding of fact, it must be shown that the findings of the lower appellate Court are such that they have no basis whatsoever in the evidence on record. (*Sathe, J. M.*) SUKHDEO *v.* DHANAI SINGH. **1941 R.D. 319 = 1941 A.W.R. (Rev.) 356 = 1941 O.A. (Supp.) 270.**

——**S. 100**—*Interference—Grounds.*

It is not allowable for a learned Judge in second appeal, to say merely that he is not satisfied that matters of fact were proved. He should have to go further in order to impugn the finding of fact of the lower appellate Court, and say that there was no sufficient evidence in law (*i.e.*) no material at all, from which a deduction and inference could be made. If there is any evidence at all, it is plain that the High Court cannot interfere—High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact. (*Roberts, C.J. and Mosely, J.*) DFOKALI PATTAK *v.* RAMDEVI. **1940 Rang L R. 777 = 193 I.C. 286 = 13 R.R. 239 = A.I.R. 1941 Rang. 76.**

——**S 100**—*Interference—Plea that valuation of suit for jurisdiction is not correct and that trial Court had no jurisdiction—If can be given effect to in Second Appeal.*

Where the lower Courts have held that the valuation for purposes of jurisdiction placed on the suit was not unreasonable, it is not open to a party in second appeal to plead that the valuation of the suit was not correct, and that the suit, if properly valued, would be beyond the jurisdiction of the trial Court. Such a plea cannot be given effect to in second appeal. (*Rowland and Manohar Lall, JJ.*) MAHOMED IDRIS HAIDRI *v.* HABIBUR RAHMAN. **196 I.C. 554 = 14 R.P. 204 = 8 B.R. 38 = 22 Pat.L.T. 799.**

——**S. 100**—*New plea.*

C. P. CODE (1908), **S. 100.**

A point that could easily have been met by evidence if it had been raised at the proper time, cannot be allowed to be taken for the first time in second appeal. (*Blacker, J.*) THE PEOPLES' INSTALMENTS AND SAVINGS BANK, LTD., LAHORE *v.* GIAN CHAND. **196 I.C. 619 = 14 R.L. 161 = 43 P.L.R. 499 = A.I.R. 1941 Lah. 345.**

——**S. 100**—*New plea—Fraudulent suppression of particulars.*

An objection raised in High Court but not raised in either of the Courts below to the effect that the present application for execution is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court must be disallowed. (*Bose, J.*) NATHMAL *v.* BALKRISHNA. **194 I.C. 641 = 14 R.N. 4 = 1941 N.L.J. 319 = A.I.R. 1941 Nag. 152.**

——**S. 100**—*New plea—If can be raised in second appeal.*

A new point requiring investigation of matters of fact not raised in the Courts below cannot be allowed to be taken in second appeal. (*Rowland, J.*) MIDNAPORE ZAMINDARY CO., LTD. *v.* CHINTAMONI MONDAL. **196 I.C. 33 = 14 R.P. 169 = 7 B.R. 989 = A I.R. 1941 Pat. 600.**

——**S. 100**— New point—Discretion of executing Court under O. 21, R. 64, C. P. Code, to order sale of part only of part of property—No request made to Court—If can be urged in second appeal. *See* C. P. CODE, O. 21, R. 64. **22 Pat.L T 855.**

——**S. 100**—Powers of High Court—Remand—When necessary—High Court's power to set aside findings of lower Courts and to substitute its own findings of fact. *See* 1940 Dig., Col. 233. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275 = 7 B.R. 153 = A.I.R. 1941 Pat. 118.**

——**S. 100**—*Question of fact—Inference from entries in settlement record.*

Inferences from the entries in the settlement record are inferences of fact with which the High Court cannot interfere in second appeal. Even if there is any error in interpreting a portion of the settlement record, there is no error of law which the Court can be said to have committed. (*Mukherjea, J.*) NARENDRA CHANDRA DE *v.* RAJENDRA CHANDRA CHANDA. **197 I.C. 45 = 45 C.W.N. 654 = 73 C.L.J. 159 = A.I.R. 1941 Cal. 506.**

——**S. 100**—Question of fact—Negligence *See* 1940 Dig., Col. 233. RAMDAS TOPANDAS *v.* SUKKUR MUNICIPALITY. **192 I.C. 494 = 13 R.S. 191.**

——**S. 100**—*Question of fact—Question whether conveyance by Mahomedan to wife and relinquishment by latter of dower debt is gift or sale—Finding on—If conclusive in second appeal.*

The question whether a transaction by which a Mahomedan conveys certain property to his wife and she in return relinquishes her dower debt is a transaction in the nature of a sale or a transaction in the nature of a gift, is a question of fact, and the finding of the lower appellate Court on the question is conclusive in second appeal. (*Meredith and Shearer, JJ.*) SHAIKH MAHOMED ZOBAIR *v.* MT. BIBI SAHIDAN. **20 Pat 798.**

——**S. 100**—*Question of law—Burden of proof, if correctly laid.*

Whether the burden of proof has been correctly laid or not is a question of law. (*Stone, C.J. and Clarke, J.*) RAMGULZARILAL *v.* BHANUPRASAD. **195 I.C. 527 = 14 R.N. 55 = 1941 N.L.J. 117 = A.I.R. 1941 Nag. 188.**

C. P. CODE (1908), S. 100.

——**S. 100**—Question of law—Construction of document. *See* 1940 Dig., Col. 233. OM PARKASH *v.* MUKHTAR AHMAD. **I.L.R. (1941) Lah. 601 = 13 R.L. 482 = 193 I.C. 789**

——**S. 100**—*Question of law—Interpretation of lease.*

The interpretation of a lease deed is a question of law. (*Henderson, J.*) GOPAL CHANDRA *v.* DWARIKA NATH. **195 I.C. 864 = 14 R.C. 144 = A.I.R. 1941 Cal. 446.**

——**S. 100**—*Question of law—Interpretation of order of Judge.*

Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law depends on the circumstances of each particular case. The general rule is quite clear. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed question of fact and law ; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order. then the question may be either a question of pure fact or, again, may be a question of mixed fact and law. (*Tek Chand and Dalip Singh, JJ.*) MUNICIPAL COMMITTEE, HAFIZABAD *v.* GOPAL DAS. **193 I.C. 334 = 13 R.L. 449 = A.I.R. 1941 Lah 62.**

——**S. 100**—*Question of law—Legal effect of proved fact—Meaning.*

The statement that "the proper legal effect of a proved fact is essentially a question of law" does not mean that it is a question of law whether a certain inference should be drawn from proved facts. It only means that the legal effect of a finding of fact is a question of law. (*Bennett and Madeley, JJ.*) KESHRI KUMAR SINGH *v.* RAM SWAROOP SINGH. **196 I.C. 175 = 14 R.O. 138 = 1941 A.L.W. 877 = 1941 O.L.R. 654 = 1941 O A. 746 = 1941 A.W.R. (Rev.) 778 = 1941 O.W.N. 1027.**

——**S. 100**—*Question of law or fact—Existence of custom.*

Whether a particular custom is proved to exist or not, is undoubtedly a question of fact, and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. But questions of the existence of an ancient custom are generally mixed questions of law and fact ; the Judge first finding what were the things done in alleged pursuance of the custom and then determining whether these facts so found satisfied the requirements of the law. The latter is a question of law and not fact. (*Mukherjea and Biswas, JJ.*) JOGESH CHANDRA GHOSH *v.* SREE DHAKESWARI MATA. **I.L.R. (1941) 2 Cal. 258 = 73 C.L.J. 544 = 45 C.W.N 809.**

——**S. 100**—*Question of law—Question whether facts found constitute "sufficient cause" under S. 5 of Limitation Act*

The question whether facts found by the lower appellate Court are such as to constitute 'sufficient cause" within the meaning of S. 5 of the Limitation Act, is a question of law for purposes of second appeal. (*Tek Chand, J.*) KISHAN CHAND *v.* MOHAMMAD HUSSAIN. **43 P.L.R. 502.**

——**S. 100**—*Question of law—Whether tenancy is permanent or precarious.*

The proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference from facts and not in itself a question of fact. Hence the finding that the tenants had the status of permanent tenants is not binding on the

C. P. CODE (1908), S. 102.

High Court in second appeal. (*Harries, C. J. and Fazl Ali, J.*) RAM LAL SAHU *v.* BIBI ZOHRA. **20 Pat. 115 = 195 I.C. 583 = 14 R.P. 136 = 22 P.L.T. 721 = 7 B.R. 946 = A.I.R. 1941 Pat. 228.**

——**S. 100**—*Scope—Second appeal—Competency——Incompetent appeal entertained and decided by lower Court—Second appeal—Revision.*

Where the lower appellate Court entertains an appeal which does not lie and decides it on the merits, its order may be challenged by a second appeal to the High Court. Assuming that a second appeal, is incompetent, the decision of the lower Court being one without jurisdiction, is liable to be set aside in revision under S. 115, C. P. Code, the second appeal being treated as a revision application. (*Dhavle and Chatterji, JJ.*) BANKA DAS *v.* SRINIVAS PADHI. **7 Cut L.T. 41 = A.I.R. 1941 Pat. 616.**

——**S. 100**—*Scope—Second appeal — Interference—Trial Court's finding based on credibility of witnesses—Reversal on mere surmises—Powers of second appellate Court.*

Where a lower appellate Court disregards the opinion of the Judge who saw and heard the witness and was in the best position to judge of their credibility and has based his finding on it, and reverses such a finding on mere surmises and suspicions, the High Court can interfere in second appeal and reverse the decision of the lower appellate Court. (*Clarke, J.*) ANDOLI UDAIBHAN *v.* JAMNABAI. **1941 N.L.J. 230.**

——**S 100**—Scope—Second appeal—Question of costs—Competency—Interference—Principles. *See* 1940 Dig., Col. 234. KOZHUVAMMAL AMMAD *v.* PARU AMMA. **192 I.C. 82 = 13 R.M. 529 (2) = (1940) 1 M.L.J. 764.**

——**S. 100**—*Second appeal—New and inconsistent plea in.*

Per *Shirreff, J.M and Sathe, A.M.* dissenting.—Where the plaintiff's suit to recover possession of certain properties of a deceased person is based on their claiming to be the daughter's sons of that person and it is resisted by the defendants on the ground of their being the nearer heirs, it is found that the plaintiffs are really daughter's sons and that the defendants are not nearer heirs, it is not open to defendants in second appeal to raise a new and in consistent plea, that in the absence of allegation or proof that the mother of the plaintiff who is the nearer heir was not alive or that she had surrendered in favour of the plaintiffs, the plaintiffs had no *locus standi* to sue. Such a plea cuts at the root of their own case. (*Shirreff, J.M. and Sathe, A.M.*) BHUSAI *v.* DIRGAJ. **1941 O.A. (Supp.) 898 = 1941 A.W.R. (Rev.) 1105.**

——**Ss. 101 and O. 47, R. 1 (b)**—*Dismissal under S. 101—Remedy for amendment thereafter.*

Where a second appeal is dismissed under S. 101, C. P. Code and the decree is sought to be amended then it has to be obtained by a review application. O. 47, R. 1 (*b*) permits a review application, because the second appeal was not one allowed by law. (*Davies.*) WALI UDDIN *v.* MOHAMMAD SHAFI. **1941 A.M.L.J. 54.**

——**S. 102**—Applicability—Suit of small cause nature—Co-sharer suit for rent against tenant—Dispute as to share of plaintiff in land—Other co sharers made parties to suit—Decision in—Second Appeal—If barred. *See* 1940 Dig, Col. 235. VIZIA RAMAMURTHI *v.* SURYANARAYANA MURTHI. **191 I.C. 496 = 13 R.M. 496.**

——**S 102**—Second appeal—Suit of Small Cause nature tried as original suit. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 16. **(1941) 1 M.L.J. 635.**

——**S. 102**—Suit of Small Cause nature—Matter in execution of decree—Second appeal, if lies. *See* 1940

C. P. CODE (1908), S. 102.

Dig., Col. 235. SITA RAM *v.* BADRI DASS.
191 I C 227 = 13 R O. 239 = A.I.R. 1941 Oudh 101.

——**Ss. 102 and 115**—*Suit to declare non-liability to pay tax and to recover tax realised—Nature of decree—Second appeal if lies—Revision.*

Where a suit is to declare that the plaintiff is not liable to pay a particular tax and to recover the tax alleged to be illegally realised from him, the Small Cause Court is not competent to try it in view of the prayer for declaration. But the claim is substantially one for refund of tax and the suit is one of a Small Cause Court nature and a second appeal cannot lie from the decree in such a suit, but a revision is competent. (*Collister, J.*) BANSI LAL *v.* CHAIRMAN, TOWN AREA COMMITTEE, SAIDPUR.
I.L.R. (1941) All. 216 = 193 I.C. 633 = 13 R.A. 434 = 1940 A.L.J. 889 = 1941 A.W.R. (H.C.) 13 = 1941 A.L.W. 1 = A.I.R. 1941 All 144.

——**S. 104 (c), O. 43, R. 1 (m) and Sch. II, Para. 16 (2)**—*Award—Agreed modifications—Objections—Disposal—Appealability—Revision.*

Where an award is by consent of parties ordered to be modified and a decree in the light of such modification is also ordered to be drawn up, an order disposing of objections to such modified award is not appealable under S. 104 (*c*), C. P. Code, for it is not an order modifying or correcting the award. Nor is it a decree which could be appealed against under Sch. II, Para. 16 (2). Neither does it amount to an order recording or refusing to record an agreement or compromise which could be appealed against under O. 43, R. 1 (*m*). Being an interlocutory order it is not revisable either. (*Thomas, C. J. and Agarwal, J.*) RAM GOPAL *v.* RAM SHANKAR.
196 I C. 496 = 14 R O. 183 = 1941 O.L.R. 695 = 1941 A.W.R. (C.C.) 329 = 1941 O.A. 785 = 1941 A L.W. 896 = 1941 O.W.N 1077 = A.I.R. 1941 Oudh 598.

——**S. 104 (f) and Sch. II, Para. 21**—Relative scope of—Filing followed by judgment and decree—Appeal—Competency. *See* 1940 Dig., Col. 236. KESHO LAL *v.* LAXMAN RAO. **192 I.C. 371 = 13 R.N. 244.**

——**S. 104 (f) and O 43, R. (1) (v)**—*Remand in appeal against refusal to file award—Second appeal.*

Where in an appeal against a refusal to file an award, the appellate Court remands the case to the lower Court for the award being filed the order is one under S. 104 (*f*) and hence no second appeal lies against it. It cannot be appealed against as one under O. 43, R. (1) (*v*). (*Davies.*) SUKHDEO *v.* NATHU LAL.
1941 A.M.L.J. 40.

——**S. 104 (1) (f) and (2)**—Application under Sch. II, para 20—Decree passed on award without recording formal order filing award—Appeal filed against whole decision but directed against only award and not decree—Second appeal—If competent. *See* 1940 Dig., Col. 235. TRAILOKYA NATH BANERJI *v.* SUKUMAR BASU.
I.L.R. (1940) 2 Cal 551 = 194 I.C 610 = 14 R.C. 2 = A.I.R. 1941 Cal. 202.

——**S. 104 (1) (f) and (2)**—Order filing award—Validity of reference challenged—Second appeal—If competent. *See* 1940 Dig., Col. 236. TRAILOKYA NATH BANERJI *v.* SUKUMAR BASU.
I.L.R. (1940) 2 Cal. 551 = 194 I.C. 610 = 14 R.C. 2 = A.I.R. 1941 Cal. 202.

——**S. 104 (2)**—*Interpretation of.*

The words of sub-S. (2) of S. 104, C. P. Code, are perfectly general and there is no reason to restrict their meaning by interpreting them to mean an order deciding the appeal on the merits. (*Verma, J.*)

C. P. CODE (1908), S. 109.

UMMATUR RABAB *v.* MAHADEO PRASAD.
196 I.C. 574 = 1941 A.W.R. (H C.) 251 = 1941 O W.N. 1010 (2) = 1941 A. L.W. 826 = 1941 O.A. (Supp.) 681 = 1941 A.L.J. 516 = A.I.R. 1941 All. 338.

——**S. 104 (2)**—Order under O. 22, R. 10—Second appeal. *See* C. P. CODE, O. 22, R. 10.
43 Rom.L R. 719.

——**S. 105 and O. 47, R. 7**—*Granting of review—Difference in scope between appeal against order granting review and appeal against final decision.*

Where a review is granted and an appeal is filed against that order, the attack has to be confined only to the grounds set out in R. 7 of O. 47, C. P. Code. But if an appeal is preferred against the final decision itself after review, there is no such restriction. Only if the order granting review is attacked it could be done only on the grounds set out in R. 7 of O. 47, C. P. Code. (*Bose, J.*) ANANDRAO BALIRAM *v.* PARWATIBAI.
1941 N.L.J. 519 = A.I R. 1941 Nag. 308.

——**S. 105 (1)**—Construction—"Affecting the decision of the case"—Meaning of—Preliminary issue in suit decided for plaintiff—Reversal by High Court in revision—Suit dismissed in consequence—Appeal to High Court—Order in revision—Correctness of—If can be considered in appeal. *See* 1940 Dig, Col. 236. PICHU AYYANGAR *v.* RAMANUJA JEER SWAMIGAL.
194 I.C. 809 = 14 R.M. 84 = (1940) 1 M.L J. 882.

—— **S. 107 and O. 41, R. 27**—Additional evidence in appeal—Filling up of gaps in evidence—Evidence of attesting witness—Production in second appeal—If permissible. *See* 1940 Dig., Col. 237. KALI CHARAN *v.* SURAJ BALI. **191 I.C. 215 = 13 R.O. 222 = A.I.R. 1941 Oudh 89.**

——**Ss. 109 and 110**—*Applicability—Orders under S. 66, Income-tax Act—Appeal to Privy Council—If governed by Ss. 109 and 110.*

Appeals from orders passed under S. 66 of the Income tax Act cannot be regulated by Ss. 109 and 110, C. P. Code. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) HARIHAR GIR *v.* COMMISSIONER OF INCOME-TAX, B. & O. **20 Pat 561 = 195 I.C. 589 = 14 R.P. 133 = 7 B.R 951 = 22 Pat.L T. 341 = 1941 I.T.R 246 = 1941 P.W.N. 267 = A.I.R. 1941 Pat. 225.**

——**Ss. 109 and 110**—Application for leave to appeal—Leave asked for purpose of raising new point for first time—If to be granted. *See* 1940 Dig., Col. 237. MAHOMED SHADAK KOYI SAHEB *v.* VENKATA KOMARAJU. **193 I.C. 353 = 13 R.M. 656 = (1940) 2 M.L.J. 433.**

——**S 109 and U. P. Encumbered Estates Act (1934), S 13**—*'Final order'—Remand to lower Court to enable filing of written statement by creditors.*

Where the High Court remands a case under the U. P. Encumbered Estates Act and directs the lower Court to allow an opportunity to the respondents to file their written statements and then to proceed to adjudicate upon the rights of parties in accordance with the Act is not a "final order" within the meaning of S. 109, C. P. Code and hence leave could not be granted to appeal to Privy Council. (*Iqbal Ahmad, A.C.J. and Verma, J.*) AIDAL SINGH *v.* MATA PRASAD.
I.L R.(1941) All. 573 = 196 I.C. 340 = 14 R.A. 153 = 1941 O.A. (Supp.) 514 = 1941 R.D. 656 = 1941 A.L.W. 738 = 1941 O.L.R. 674 = 1941 A.W R. (H C.) 219 = 1941 A.W.R. (Rev.) 585 = A.I.R. 1941 All. 333.

——**Ss. 109 and 110**—*Scope and effect of—Right of appeal.*

C. P. CODE (1908), S. 109.

The effect of Ss. 109 and 110 is to give a proposed appellant an appeal as of right in cases where the value of the subject-matter of the suit and of the appeal are over Rs. 10,000 and the decree appealed from is not one of affirmance. On the other hand, where the decree of the High Court is one of affirmance, there is no right of appeal unless the appeal involves some substantial question of law. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO **20 Pat. 459 = 195 I.C. 344 = 14 R.P. 109 = 22 Pat.L.T. 736 = 7 B.R. 906 = A.I.R. 1941 Pat. 269 (S.B.).**

——**Ss. 109 (c) and 115**—*Certificate of fitness to appeal to Privy Council—When could be granted—Revision against award.*

A case should be certified to be a fit one to appeal to His Majesty in Council under S. 109 (*c*), C. P. Code, when it is of wide public importance and the principle, when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but also to the public at large. Where the question was whether a revision against an award was rightly held by the chief Court to raise a question of jurisdiction, the decision on that point, it was held would not be a decision on a matter of general public importance and that leave could not be granted under S. 109 (*c*), C. P. Code. (*Yorke and Agarwal, JJ.*) MOOL CHAND *v.* PHOOL CHAND. **192 I.C. 778 = 13 R.O. 408 = 1941 A W.R. (C.C.) 63 = 1941 O.L.R. 233 = 1941 O.W.N. 130 = 1941 O.A. 135 = A.I.R. 1941 Oudh 245.**

——**S. 109 (c)**—Grant of certificate — Principles applicable. *See* 1940 Dig., Col. 238. MUSAHEB KHAN *v.* RAJ KUMAR BAKSHI. **15 Luck. 716.**

——**S. 109 (c)**—*Interpretation—'Fit one for appeal,' meaning of—Leave against refusal to stay criminal complaint—If can be granted.*

The meaning of the expression 'fit one for appeal' in S. 109 (*c*), C. P. Code, is that the question should be either of great general importance to the public at large or great private importance to the particular litigant and the matter is not measurable in money. As it could not be said that a refusal to stay a criminal complaint would be a matter of great private importance to the particular accused, leave to appeal to Privy Council against such refusal cannot be granted. (*Collister and Bajpai, JJ.*) RADHEY LAL *v.* NIRANJAN NATH. **I.L.R. (1941) All. 364 = 194 I.C. 606 = 14 R.A. 3 = 1941 A.Cr.C. 98 = 1941 A.L.J. 265 = 1941 A.L.W. 319 (2) = 42 Cr.L.J. 370 = 1941 O.W.N. 455 = 1941 O.A. (Supp.) 193 = 1941 A.W.R. (H.C.) 120 = A.I.R. 1941 All. 211.**

——**S. 109 (c)**—*Public importance.*

Where the order of the Board of Revenue decides a question as to whether the decision of a special judge as to proprietary rights should be accepted or whether it should be overruled by a further inquiry by the Collector, it is not a matter of such public importance as would justify a reference to the Privy Council. (*Harper, S. M.*) MAHABIR PRASAD *v.* SHAH MUKHTAR AHMAD. **1941 R.D. 792 = 1941 A.W.R. (Rev.) 1090 = 1941 O.A. (Supp.) 880.**

——**S. 110**—*Applicability —Appeal—Valuation of appeal below Rs.* 10,000—*Decree involving dispute about property worth more than Rs.* 10,000—*Leave to appeal—Grant of.*

The plaintiff (appellant) sued for a declaration that a certain property could not be attached and sold in execution of a certificate, basing his claim on a purchase of the property in execution of a mortgage decree

C. P. CODE (1908), S. 110.

obtained by himself against the former owner of the property. The suit and the appeal were valued below Rs. 10,000 according to the value of the certificate, but it was found that the value of the property itself which was involved was over Rs. 10,000.

Held, that if the plaintiff did not succeed in the litigation, the property which he had purchased in execution of his mortgage decree would be liable to be sold and the property being worth more than Rs. 10,000, it must be held that the decree sought to be appealed from did not involve indirectly a question respecting property of more than Rs. 10,000 in value and the case was fully covered by the second paragraph of S. 100 C.P. Code, the case was a fit one for appeal to His Majesty in Council and leave should therefore be granted. (*Harries, C.J. and Fazl Ali, J.*) ISHWARI PRASAD SINGH *v.* KAMESHWAR PRASAD SINGH. **194 I.C. 654 = 14 R.P. 13 = 7 B.R. 812 = 22 Pat.L.T. 284 = A.I.R. 1941 Pat. 288.**

——**S. 110**—Applicability—Case under S. 66 (3), Income-tax Act—Order of summary rejection—Application for leave to appeal to Privy Council—If can be granted—Seriousness of question involved—If ground for grant of leave. *See* INCOME-TAX ACT, S. 66 (3). **22 Pat.L.T. 341 = 1941 I.T.R. 246.**

——**S. 110** — *Construction — Court 'immediately below'—Single Judge of High Court.*

Where a Bench of two or more judges has affirmed on a Letters Patent Appeal the judgment of a Judge of the High Court, sitting singly on the original side, the decision of the single Judge is the decision of the Court immediately below the Court passing the decree or final order within the meaning of S. 110, C. P. Code. In such a case, a certificate of fitness for leave to appeal to His Majesty in Council can be granted only if the appeal involves some substantial question of law. (*Derbyshire, C.J. and Panckridge, J.*) PROBHAWATI KANWAR *v.* PANMAL LODHA. **45 C.W.N. 1002.**

——**S. 110**—*Construction—Decree of affirmance—Meaning of.*

The expression "the decision of the Court immediatel below the Court passing such decree," as used in S. 11 means the same as the expression "decree of the Court below," and the word "decision" in the aforesaid expression means the decision of the trial Court taken as a whole. The true test for determining whether the High Court's decree affirms the decision of the lower Court is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. Consequently, where the decree of the High Court reverses in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below and therefore an appeal to His Majesty in Council is competent even on points of concurrence between High Court and the lower Court without proving substantial question of law. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **20 Pat. 459 = 195 I.C. 344 = 14 R.P. 109 = 22 Pat.L.T. 736 = 7 B.R. 906 = A.I.R. 1941 Pat. 269 (S.B.).**

——**S. 110**—"Decree of affirmance" for appeals against same decree by both parties—One dismissed and other allowed—Only one decree issued—Application for leave to appeal by party whose appeal is dismissed—Competency. *See* 1940 Dig., Col. 238. CHOKKALINGAM CHETTI *v.* OFFICIAL ASSIGNEE, MADRAS. **A.I.R. 1941 Mad. 227 = (1940) 2 M.L.J. 645.**

——**S 110**—*Right of appeal—Modification of extent of liability.*

C. P. CODE (1908), S. 110.

An appellant is entitled to challenge the decision of the High Court even if the High Court has modified in his favour a decision of the trial Court, where the amount involved is Rs. 10,000 or upwards. Where the trial Court awarded interest to the plaintiff which amounted to Rs. 18,700 and the High Court on appeal by the defendant reduced only the amount of interest to Rs. 12 380 and the defendant denied his liability for interest, since the decision of the trial Court in regard to the extent of the liability has been modified by the High Court the defendant is entitled to a certificate under S. 110 of the C. P. Code. (*Thom, C.J., Collister and Ganga Nath, JJ.*) JAGGO BAI *v.* HARIHAR PRASAD SINGH. **I.L.R. (1941) All. 180 = 192 I.C. 461 = 13 R A. 325 = 1941 A.W.R. (H.C.) 14 = 1941 O.A (Supp.) 40 = 1941 A.L.W. 2 = 1940 A.L.J. 869 = A.I.R. 1941 All. 66 (F.B.).**

——**S. 110**—*Valuation—Approbate and reprobate—Suit and appeal valued below Rs.* 10,000*—Valuation found defective and appeal re-valued at over Rs.* 10,000 *without objection by defendant—Latter relying on re-valuation—If can object to valuation later.*

The plaintiff originally valued the suit below Rs. 10,000. His appeal to the High Court was also valued on the same basis, but it was found that certain reliefs claimed in the plaint were not valued. A proper valuation of the reliefs brought the total value of the suit to over Rs. 10,000 and the deficiency in court fee was made good by the plaintiff. The defendant respondent took no objection to the re-valuation and was actually executing his decree for costs which had been calculated on the new valuation.

Held, that as the new valuation of the suit in appeal was accepted without demur and a decree for costs based on such valuation actually enforced, it was not open to the defendant to contend subsequently that the value of the suit was not over Rs. 10 000. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **20 Pat. 459 = 195 I.C 344 = 14 R P. 109 = 22 Pat.L.T. 736 = 7 B.R. 906 = A.I R. 1941 Pat. 269 (S.B.).**

——**S. 110**—*Value of subject-matter in appeal—Decree of trial Court for amount less than Rs.* 10,000 *—Award for future interest and costs amounting to over Rs.* 10,000*—Defendant appealing—Dismissal of suit by High Court—Application for leave to appeal—Valuation—Interest and costs awarded by trial Court—If to be taken into account.*

It is well-settled that where a plaintiff's suit is decreed by the High Court and the defendant wishes to appeal against the whole decree, the value of the defendant's appeal is the principal sum decreed together with interest awarded on the principal sum up to the date of the decree of the High Court. This rule, however, cannot be applied entirely when the plaintiff proposes to appeal from an appellate decree of reversal dismissing his claim either in whole or in part. Where the plaintiff in a suit obtains a decree from the trial Court for an amount below Rs. 10,000 with future interest and costs, bringing the total amount over Rs. 10,000, but on appeal by the defendant, the decree is reversed and the suit is dismissed in its entirety, the plaintiff seeking to appeal to His Majesty in Council, cannot as a matter of right claim to add to the amount decreed in his favour by the trial Court interest on the principal sum decreed at the rate allowed by that Court up to the date of the decree of the High Court, and the costs, so as to bring the value of the subject-matter to over Rs. 10,000. For the purpose of valuing an appeal, the material date is the date of the decree against which the appeal is to be made. Interest and costs being in the discretion of the Court cannot be included in valuing the appeal. It may be if interest is not in the discretion of the Court, but payable under some law or statute, different considerations may arise. But where that is not the case, and the plaintiff who has not appealed from the decree of the trial Court claiming a larger amount than that allowed by that Court and claims, in the proposed appeal from the appellate decree dismissing the suit, the restoration of the decree of the trial Court, which is all that he can claim, the value of the appeal cannot be more than the amount decreed by the trial Court. This amount cannot be enhanced by adding either the cost or interest directed to be paid under the decree of the trial Court. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) BRIJMOHAN SINGH *v.* BHUNESHWAR PRASAD SINGH. **20 Pat 481 = 195 I C. 196 = 7 B R. 884 = 14 R.P. 94 = 1941 P.W N. 287 = 22 Pat L T. 363 = A.I.R. 1941 Pat. 255 (F.B.).**

C. P. CODE (1908), S. 115.

——**S. 110, Para. 2**—*Appealability—Valuation—Test—Amount of decree less than Rs.* 10,000 *but value of property involved more than Rs.* 10,000.

Where a suit is to declare the non-liability of certain property valued at over Rs. 10,000 to attachment and sale in execution of a a decree for an amount less than Rs. 10,000 leave to appeal to Privy Council could not be granted as the test laid down by para. (2) of S. 110, C.P, Code, is not satisfied by the case. (*Bennett and Ghulam Hasan, JJ.*) SUDAMAN PRASAD *v.* MAHOMED ABDUL ALIM. **193 I.C. 639 = 13 R.O. 486 = 1941 O.L.R. 311 = 1941 A.W.R (C.C.) 134 = 1941 O.A. 365 = 1941 A L.W. 424 = 1941 O.W.N. 562 = A I.R. 1941 Oudh 407.**

——**S. 110, Para. 2**—*Valuation—Conditions.*

The second paragraph of S. 110, C. P. Code, means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. (*Agarwal and Madeley, JJ.*) PRAG NARAIN TRIVEDI *v.* FAKHRUL NISA. **1941 A.W.R. (Rev.) 1059 = 1941 O.W N. 1234 = 1941 O.A. 937.**

——**S. 113 and O. 46, R. 1 and C. P. Relief of Indebtedness Act, S. 20**—*Right of reference, if a substantive right—Proceedings under Relief of Indebtedness Act, if a 'suit'—Applicability of O.* 46, *R.* 1 *to District Court acting under S.* 20, *Relief of Indebtedness Act, if can make reference to High Court.*

The right of reference given by S. 113, C. P. Code, is a substantive right and not a mere matter of procedure. Unless this power is given specifically by statute, a Court has no power to make a reference. The proceedings under the Relief of Indebtedness Act are not 'suits' and as they are neither 'suits' nor 'appeals' nor proceedings in execution of a 'decree', the provisions of O. 46, R. 1 are not attracted. Hence the Court acting under S. 20 of the Relief of Indebtedness Act has no power of making a reference to the High Court and the High Court has no jurisdiction to entertain a reference. (*Stone, C.J. and Bose, J.*) DISTRICT JUDGE *v.* SETH SHRIKISANDAS. **I.L R. (1941) Nag 588 = 1941 N L.J. 485.**

——**S. 114**—Power under—If a matter of substantive law. *See* U. P. ENCUMBERED ESTATES ACT RULES, R. 6 AND C. P. CODE, S. 114. **1940 R.D. 604 (2).**

——**S 115—Revision.**

Acting illegally in exercise of jurisdiction.

Amendment of decree.

Amendment of plaint.

Applicability.

Arbitration.

C. P. CODE (1908), S. 115.

Case decided.
Court.
Court-fee.
Court subordinate.
Discretionary order.
Error of law.
High Court's powers.
Jurisdiction.
Material irregularity.
Miscellaneous proceedings.
New evidence.
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Other remedy open.
Pauper application.
Scope
Substantial justice done.
Withdrawal of suits.

——**S. 115**—Acting illegally in the exercise of jurisdiction—Lower Court misdirecting itself regarding basis for decision of matter before it—Interference in revision. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 9 (5). **(1941) 1 M.L.J. 250.**

——**S. 115**—Amendment of decree if revisable. *See* 1940 Dig., Col. 239. MUJAWIR HUSAIN *v.* KISHWAR JEHAN BEGAM. **16 Luck. 252=191 I.C. 185= A.I.R. 1941 Oudh 66.**

——**S. 115 and O 6, R. 17**—Amendment of plaint —Order refusing—If revisable. *See* 1940 Dig , Col. 239. PURSHOTTAM LALJI *v.* HARA NARAYAN DASS. **191 I.C. 729=13 R.O. 273=1941 O.L.R. 21= A.I.R. 1941 Oudh 87.**

——**S. 115**—*Amendment of plaint—Revision.*

An order allowing an amendment of plaint by which a suit for possession and damages for unlawful occupation was sought to be converted into one for ejectment and rent cannot be revised. (*Agarwal, J.*) RAM PYARI *v.* GOVIND PRASAD. **196 I.C. 432= 14 R.O. 170=1941 O.W.N. 1100= 1941 O.A. 811=1941 R.D 850=1941 O.L R. 684= 1941 A.W.R. (Rev.) 873=A.I.R. 1941 Oudh 623.**

——**S. 115**—*Applicability—Orders passed under U. P. Encumbered Estates Act.*

If S. 115, C. P. Code, is made applicable to orders passed under the U. P. Encumbered Estates Act, it would be inconsistent with S. 47 of the Act. Hence it is not applicable to such orders. (*Ghulam Hasan and Agarwal, JJ.*) HARI RAM *v.* SHYAM BAHADUR. **1941 O.W.N 948=1941 O.A. 673= 1941 A.W.R. (Rev.) 647=1941 R.D. 708= A.I R. 1941 Oudh 566.**

——**S. 115**—*Applicability — Suit or proceedings under U. P. Tenancy Act.*

S. 115, C.P. Code, is not applicable to suits or proceedings under the U. P. Tenancy Act in view of the clear provision in S. 243 and list 1 of the second schedule of the U. P. Tenancy Act. (*Agarwal, J.*) JAGANNATH SINGH *v.* SITA RAM. **194 I.C. 543=1941 R D. 488= 1941 O.W.N. 819=1941 A.W.R. (Rev.) 533= 14 R.O. 5=1941 A.L.W. 669=1941 O A. 554= A.I.R. 1941 Oudh 497.**

——**S. 115**—Arbitration—Interference—Wrong view as to what constitutes misconduct—If a ground. *See* 1940 Dig., Col. 240. KESHOLAL *v.* LAXMAN RAO. **192 I C. 371=13 R.N. 244.**

——**S. 115**—Case decided—Decision on one issue—Issue in suit—Revision—Competency—Interference. *See* 1940 Dig., Col. 240. MUTHUSAMI CHETTIAR *v.* PERIYAL ACHI. **A.I.R 1941 Mad. 84= (1940) 2 M.L.J. 606.**

C. P. CODE (1908), S. 115.

——**S, 115**—*Case decided—Order overruling objection as to maintainability of application for amendment of decree—If revisable.*

Where an application for amendment of decree obtained on a mortgage under Ss. 4, 5 and 30 of the U. P. Agriculturists' Relief Act was dismissed as also an application for its restoration and a fresh application was thereafter put in for amendment and a preliminary objection as to its maintainability was dismissed, on a question whether such an order was revisable under S. 115, C. P. Code, it was held that the question involved though one of jurisdiction, before it could be interfered with it must be shown that there was a 'case decided' and as the order was only an interlocutory one, no case was decided and hence the order was not revisable under S. 115. (*Bennet and Madeley, JJ.*) KUSHAL CHAND *v.* SRI NARAIN. **196 I.C. 698=1941 R.D. 930= 1941 O.L.R. 744=1941 O.W.N 1136= 1941 O.A. 861=1941 A.W.R. (Rev.) 947.**

——**S. 115**—*Case decided—Order under O. 33, R. 7.*

The proceedings on an application for permission to sue as a pauper are anterior to, and independent of, the suit and an order under O. 33, R. 7, C. P. Code, whether it grants or rejects the application, terminates those proceedings and is a "case decided" within the meaning of S. 115, C P. Code, and is open to revision on any of the grounds mentioned in that section. (*Tek Chand and Din Mohammad, JJ.*) HARI CHAND *v.* MST. DURGA DEVI. **I.L.R. (1941) Lah. 697= 195 I.C. 742=14 R.L. 92=43 P.L.R. 82= A.I.R. 1941 Lah. 128.**

——**S. 115**—*"Case decided"—Proceedings under S. 476, Cr. P. Code—Order by Civil Court—Revision to High Court—If governed by C. P. Code, S. 115 or by S. 439, Cr. P. Code.*

Proceedings under S. 476, Cr. P. Code, are proceedings subject to the High Court's jurisdiction under S. 439, Cr. P. Code, even when the Court inquiring is a Civil Court. The power to inquire is given under the Cr. P. Code, and the proceedings are in the nature of criminal proceedings. An order of the Court under S. 479, Cr. P. Code, even when made by a Civil Court is not a 'case decided" within the meaning of S. 115, C. P Code. S. 439, Cr. P. Code, and not S. 115, C. P. Code, applies to a revisional application against an order under S. 476, Cr. P. Code. (*Davis, C.J. and Weston, J.*) VALIRAM LILARAM *v.* GOBINDRAM. **I.L.R. (1941) Kar. 422=A.I.R. 1941 Sind. 217.**

——**S. 115 and O. 6, R 17**—*Case decided—Refusal of amendment—Revision, if lies.*

Where the effect of refusal of permission to amend a plaint is to shut out a part of the plaintiff's claim it is a "case decided" within the meaning of S. 115, C P Code and where the effect of allowing a revision in a matter in which an appeal might also lie will be a convenience to the parties and will save expense, the Court will interpret S 115 liberally. (*Clarke, J.*) SETH MANGILAL *v.* ZAMSINGH. **196 I.C 190=14 R.N. 85= 1940 N.L J. 340=A.I.R. 1941 Nag. 289.**

——**S. 115 and O. 9, R. 9**—*Case decided—Restoration after dismissal for default—Propriety—Revision.*

The question whether an application to sue as pauper dismissed for default is properly restored could not be raised in an appeal from a decree passed in the suit and therefore there is a 'case decided' within the meaning of S. 115 and an application in revision will lie in respect of it. (*Bennett and Ghulam Hasan, JJ.*) BAIJNATH *v.* RAM NARAIN. **194 I.C. 354= 1941 O.L.R. 448=13 R.O. 587= 1941 A.W.R. (C.C) 170=1941 O.W.N. 678= 1941 O.A. 427=A.I.R. 1941 Oudh 367.**

C. P. CODE (1908), S. 115.

———**S. 115**—Case decided—Supersession of award in arbitration with permission of Court. *See* C. P. CODE, O. 23, R. 3 AND S. 115. **1941 N.L.J. 333.**

———**S. 115 and O. 6, R. 17**—Case decided—What may amount to—Rejection of application to explain array of parties—Revision, if lies. *See* 1940 Dig., Col. 241. JAGDISH SARAN *v.* BHAGWAT SARAN.
191 I.C. 294 = 13 R.A. 223.

———**S. 115**—*"Court"—Magistrate or bench of Magistrates hearing appeal under S.* 86, *Bombay District Municipal Act—If Court or* persona designata—*Revision—Competency.*

A Magistrate or bench of Magistrates hearing an appeal under S. 86 of the Bombay District Municipal Act is a *persona designata* and not a Court, and the decision of the Magistrate or bench of Magistrates is not open to revision under S. 115, C. P. Code. (*Wadia, J.*) VITA MUNICIPALITY *v.* GANGARAM TATYAJI.
I.L.R. (1941) Bom. 427 = 197 I.C. 23 = 43 Bom.L.R. 333 = A.I.R. 1941 Bom. 184.

———**S. 115**—*Court-fee—Order as to—Revision.*

Revision lies against an order relating to Court-fees where the question is not one as to the proper valuation on which the Court-fee is to be computed but whether an *ad valorem* fee or a fixed fee is payable on the plaint. But if the decision is not final and is open to appeal, this itself would be a bar to the Court interfering with the order in revision. (*Biswas and Roxburgh, JJ.*) RABINDRA NATH CHAKRAVARTHY *v.* GIRINDRA MOHAN. **196 I.C. 762 = 73 C.L.J. 240 = A.I.R. 1941 Cal. 518.**

———**S. 115**—*Court-fee—Order as to—Revision—Competency.*

An order of a Subordinate Court adverse to the plaintiff upon a Court-fee matter is open to revision by the High Court. (*Chatterji and Meredith, JJ.*) RAMAUTAR SAO *v.* RAM GOBIND SAO. **20 Pat. 780.**

———**S. 115**—"Court subordinate" — Commissioner for workmen's compensation. *See* WORKMEN'S COMPENSATION ACT, SS. 19 AND 23. **21 Pat.L.T. 1067.**

———**S. 115**—Discretionary order — Interference—Grounds—Order refusing to fix smaller number of instalments under Bihar Money-Lenders Act—Discretion—Interference. *See* BIHAR MONEY-LENDERS ACT (1939), S. 12. **1941 P.W.N. 507.**

———**S. 115**—*Discretionary order—Order refusing to exercise inherent powers—Revision—Sale set aside on failure to furnish requisite stamp—No appeal—Application to vacate order setting aside sale under inherent powers—Refusal—Interference in revision.*

A decree-holder who purchased the properties at an execution sale having failed to deposit the full stamp required for the sale certificate, the Court set aside the sale. No appeal was filed against the order setting aside the sale, but long afterwards the decree-holder applied to the Court to vacate the previous order under its inherent powers under S. 151, C. P. Code, or to accept the amount deposited as sufficient for such of the items of property on the sale of which the stamp would amount to the amount deposited, though the decree-holder had not asked the Court previously to confirm the sale of such items only. The Court refused to interfere holding that there was no reason to exercise its inherent powers. The decree-holder applied to the High Court in revision.

Held, that the decree-holder having failed to appeal against the order setting aside the sale, though he had a right of appeal, the lower Court was right in refusing to interfere with its order in its inherent powers, even if it had such powers, and the High Court could not interfere in revision. (*Harries, C.J. and Fazl Ali, J.*)

C. P. CODE (1908), S. 115.

BINRAJ MARWARI *v.* RAM SAHAI MAHTO.
194 I.C. 21 = 13 R.P. 672 = 7 B.R. 685 = 22 Pat.L.T. 818 = A.I.R. 1941 Pat. 408.

———**S. 115**—*Discretionary orders — Order under O. 22, R. 10—Revision—Maintainability.*

The power to add the name of any person upon whom any interest has devolved as a party to the proceedings is one within the discretion of the Court, hence an order under O. 22, R. 10, C. P Code, adding or refusing to add a party is not subject to revision by the High Court. (*Wadia and Wassoodew, JJ.*) KRISHNAJI RAMCHANDRA *v.* BHIKCHAND RAMKARAN.
43 Bom.L.R. 719.

———**S. 115**—*Error of law—Interference—If justified.*

An erroneous conclusion of law does not warrant interference in revision. (*Dhavle, J.*) PUNYA RAULO *v.* KHETRA GAUDA. **7 Cut. L.T. 58.**

———**S. 115**—*Error of law—Order holding application to be barred by limitation—Revision—Competency.*

An order rejecting an application under O. 21, R. 95, C. P. Code, for possession of the property purchased by the applicant as auction purchaser, on the finding that it was barred by limitation, is not open to revision by the High Court under S. 115, C. P. Code. A finding on a question of limitation, whether right or wrong, is a finding on a question of law which does not bring the case within the ambit of S. 115, C.P. Code. There is no question of jurisdiction or illegality or material irregularity in the exercise of jurisdiction. A revision application is therefore incompetent. (*Broomfield and Macklin, JJ.*) MITHALAL RANCHHODDAS *v.* MANEKLAL MOHANLAL. **195 I.C. 601 = 14 R.B. 67 = 43 Bom L.R. 480 = A.I.R. 1941 Bom. 271.**

———**S. 115 and Agra Tenancy Act (III of 1926), S. 253**—*High Court—Powers of, in revision.*

Once the High Court is seized of the revision, then, it becomes its duty to cast its eyes (over) not merely on part of the proceedings but the whole of them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole. (*Braund, J.*) RATI RAM *v.* NIADER MAL.
194 I.C 640 = 1941 O W.N. 546 (2) = 1931 A.W.R. (Rev.) 308 = 1941 O.A. (Supp.) 238 = 1941 A.L.J. 230 = 1941 R.D. 462 = 1941 A.L.W. 397 (2) = 14 R.A. 4 = 1941 A.W.R. (H.C.) 130 = A.I.R. 1941 All. 215.

———**S. 115**—Jurisdiction — Absence of — Lower Court entertaining incompetent appeal and deciding same—Revision. *See* C. P. CODE, S. 100.
7 Cut.L.T 41.

———**S. 115**—Jurisdiction—Absence of—Pauper application—Dismissal on ground of want of cause of action not apparent on the application—Court looking into evidence and rejecting on ground that suit is barred by *res judicata*—Revision—Interference. *See* C. P. CODE, O. 33, Rr. 5 (*d*) AND 7. **(1941) 1 M.L.J. 31.**

———**S. 115**—*Jurisdiction—Decision as to absence of—Confirmation in appeal—Revision if lies.*

The High Court has power to interfere in revision with an order passed in appeal confirming the trial Court's decision that it had no jurisdiction to try the particular suit before it. (*Niyogi and Gruer, JJ.*) KESHEORAO *v.* GANESHRAO.
I.L.R. (1941) Nag. 543 = 1941 N.L.J 245 = A.I.R. 1941 Nag. 278.

———**S. 115**—Jurisdiction—Failure to exercise jurisdiction—Application under O. 21, R. 89—Consideration on

C. P. CODE (1908), S. 115.

merits—Sufficiency. *See* C. P. CODE, O. 21, R. 89 AND S. 115. **1941 O.W.N. 835.**

——**S. 115 and O. 21, R. 88**—Jurisdiction—Failure to exercise jurisdiction vested by law—Misconception as to law—Revision, if lies. *See* 1940 Dig., Col. 242. MUNNALAL *v.* GOPILAL. **I.L.R. (1941) Nag. 150 = 191 I.C. 217 = 13 R.N. 190.**

——**S. 115**—Jurisdiction—Order refusing time to extend for payment of deficit Court-fee—Revision—Interference. *See* C. P. CODE, S. 149. **1941 P.W.N. 516.**

——**S. 115**—Material irregularity—Application for leave to sue as pauper—Applicant possessed of share in inheritance but not having possession—Grant of leave—Failure to consider whether applicant could raise money with inheritance — Effect—Revision—Interference. *See* C. P. CODE, O. 33, R. 1, EXPL. **7 Cut. L.T. 28.**

——**S. 115**—*Material irregularity — Application under scheme framed under S. 92—Order deciding only some of questions raised—Revision.*

Where on an application filed under a scheme framed under S. 92, C. P. Code, the District Judge does not give his decision on all the points raised by the parties, and an appeal is incompetent from his order, the High Court can interfere in revision under S. 115 (*c*), C. P. Code, not only to the extent of supplying those omissions in the District Judge's order by giving the directions on those points but can consider and reopen in revision the points on which the District Judge has given his decision, when the consideration of the former would necessarily involve a re-consideration of the latter. (*Mitter and Khundkar, JJ.*) SRIJIB NYAYATIRTHA *v.* DANDY SWAMIJAGANNATH ASRAM. **73 C.L.J. 532 = A.I.R. 1941 Cal. 618.**

——**S. 115**—*Material irregularity—Court, when acts with.*

A Court acts with material irregularity, "if not illegally," within the meaning of S. 115, (*i*) if it shuts its eyes to a proposition of law or to an important fact in evidence before it as distinct from misapplying the one or attaching a wrong legal consequence to the other; (*ii*) if it saddles the wrong party with a burden of proof; (*iii*) if it decides an appeal on a point of fact not raised at all before the Court from which the appeal is brought It is also a material irregularity if a Court decides an appeal on a point of law which the party in whose favour it decides has waived and which is not one (such, for example, as limitation gambling and public policy), of which the Court is bound to take cognizance irrespective of the parties. (*Blagden, J.*) BHAWANI SANKAR JAISI *v.* GANGA PRASAD. **A.I.R. 1941 Rang. 244.**

——**S. 115**—"*Material irregularity*"—*Failure to note that certain decision followed does not apply to the case.*

Failure by the lower Court to notice that a certain ruling which it has followed does not apply to the case is a case of material irregularity. (*Mir Ahmad, J.*) TILA MAHOMED *v.* MUNICIPAL COMMITTEE, PESHAWAR. **196 I.C. 648 = A.I.R. 1941 Pesh. 76.**

——**S. 115**—*Material irregularity—Ignoring or failing to grasp essentials of reported ruling of High Court.*

The ignoring of a reported ruling of the High Court or complete failure to grasp its essentials, must be taken as material irregularities. (*Baguley, J.*) U PO HLAING *v.* DAW NGWE. **192 I.C. 801 = 13 R.R. 197 = A.I.R. 1941 Rang 22.**

——**S. 115, O. 3, R. 1, and O. 11, R. 1**—*Material irregularity—Order of Court rejecting act performed by party through recognised agent—No direction to perform it in person—Interference in revision.*

When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do. That is a material irregularity on a question of procedure and justifies interference in revision. (*Bose, J.*) K. C. MAJUMDAR *v.* SURAJ SINGH. **193 I.C. 707 = 13 R.N. 345 = 1941 N.L.J. 418 = A.I.R. 1941 Nag. 205.**

——**S. 115**—Material irregularity — Reference to arbitration by next friend of minor plaintiff—Failure to conform to O. 32, R. 7—Revision—Interference. *See* 1940 Dig., Col. 244. LOUNG TAHIR *v.* RAMSING TAKHATRAM. **191 I.C. 291 = 13 R.S. 129.**

——**S. 115**—Material irregularity—Refusal to stay trial of suit pending decision of Special Judge under U.P. Encumbered Estates Act—If revisable. *See* 1940 Dig., Col. 245. MAHOMED IHTISHAM ALI *v.* LACHHMAN PRASAD. **15 Luck. 641.**

——**S. 115**—Miscellaneous proceedings—Decision of District Judge on appeal against decision of special Judge, second grade—Revision—Maintainability. *See* U. P. ENCUMBERED ESTATES ACT, S. 46 AND C. P. CODE, S. 115. **1941 O.W.N. 1160.**

——**S. 115 and C. P. Land Alienation Act**—*Miscellaneous proceedings—Revision, if lies.*

A revision lies to High Court against an order passed on an application under S. 25 (2) of the Central Provinces Land Alienation Act. (*Clarke, J.*) JANKILAL *v.* THE D. C., BILASPUR. **196 I.C. 360 = 14 R.N. 101 = 1941 N.L.J. 224 = A.I.R. 1941 Nag. 163.**

——**S. 115**—*New evidence—Admissibility.*

Where parties to a suit were misled into not filing a letter of authority under the belief that no objection was being taken in respect of its absence, and there was no issue also about it, it was held that in the interests of justice it should be admitted in revision agaiast a decision based on the absence of such letter of authority. (*Shirreff, S.M. and Sathe, J.M.*) GOKARAN AHIR *v.* SAMMATH. **1941 R.D. 719 = 1941 O.A. (Supp.) 622 = 1941 A.W.R. (Rev.) 682**

——**S. 115**—*New plea—If can be raised in arguments in revision for the first time.*

A plea not raised in the written instrument, on which there was no issue and which was not raised even in the grounds of revision could not be allowed to be raised for the first time in arguments on the revision petition. (*Ghulam Hasan, J.*) BRIJ LAL *v.* SURAJMAN. **194 I.C. 662 = 14 R.O. 32 = 1941 O.L.R. 519 = 1941 O.A. 562 = 1941 A.W.R. (Rev.) 583 = 1941 O.W.N. 832 = A.I.R. 1941 Oudh 420.**

——**S. 115**—*Other remedy open—Appeal competent—Revision—Order dismissing suit as against some defendants as suit cannot proceed against them for want of compliance with S. 270 (1), Government of India Act—If decree—Appealability—Revision — Competency—C. P. Code, O. 7, R. 11.*

It is the established practice of the High Court not to exercise its powers of revision in cases where a party entitled to appeal has not appealed. An order dismissing the suit as against some of the defendants in a suit on the ground that so far as they are concerned, S. 270 (1) of the Government of India Act applied but was not complied with and holding that as against them the suit cannot proceed, is a decree within the meaning S. 2 (2), C.P. Code, and is therefore appealable. The order is one rejecting the plaint as against those defendants, and as

C. P. CODE (1908). S. 115.

such an order conclusively determines the rights of the parties so far as regards the Court which decided the matter, it is a decree and hence an appeal lies against that order. Consequently the plaintiff cannot be allowed to invoke the special remedy afforded by S. 115, C. P. Code. The fact that the Court purports to act under O. 1, R. 10, C. P. Code, by expunging the names of the defendants concerned, does not alter the nature of the order, because in substance, it is an order under O. 7, R. 11, C. P. Code.

Quaere.—Whether in such a case when the suit cannot proceed against some of the defendants the Court should reject the entire plaint as a whole and not merely as against some of the defendants. (*Fazl Ali and Rowland, JJ.*) NAND KUMAR SINHA *v.* PASUPATI GHOSH.

20 Pat. 417 = 193 I.C. 276 = 42 Cr.L.J. 375 = 13 R.P. 576 = 7 B.R. 506 = 4 F.L.J. (H.C.) 161 = 1941 P.W.N. 25 = 22 Pat.L.T. 779 = A.I.R. 1941 Pat. 385.

——**S. 115**—*Other remedy open—Appealable order not appealed from—Revision—Maintainability.*

The dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96, C. P. Code, and a civil revision petition against the order of dismissal is therefore incompetent. (*Wadsworth and Patanjali Sastri, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BHUSHANARAO.

54 L W. 107 = 1941 M.W.N. 741 = 4 F.L.J. (H.C.) 280 = A.I.R. 1941 Mad. 817 = (1941) 2 M.L J. 125.

——**S. 115**—*Other remedy open—Interference.*

Where the effect of allowing a revision in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the Court will interpret S. 115 liberally and will interfere in revision. (*Clarke, J.*) MANGILAL *v.* ZAM SINGH.

196 I.C. 190 = 14 R.N. 85 = 1941 N.L.J. 340 = A.I.R. 1941 Nag. 289.

——**S. 115**—Other remedy open—Remedy by way of suit available—Interference in revision—Jurisdiction of High Court. *See* 1940 Dig., Col. 245. OFFICIAL RECEIVER, GUNTUR *v.* SESHAYYA.

A.I.R. 1941 Mad. 262 = (1940) 2 M.L J. 860.

——**S. 115 and C P. Relief of Indebtedness Act (1939), S. 6 (3)**—*Other remedy open—Revision—Maintainability — Stay of passing decree absolute on receipt of notice under S. 6 (3)—Proper remedy of aggrieved party.*

Where on receipt of a notice issued under S. 6 (3) of the C. P. Relief of Indebtedness Act, a Civil Court stays the proceedings for the passing of a decree absolute, the remedy of the aggrieved party is to go before the Debt Relief Court and if that Court come to a conclusion adverse to him, to apply, under S. 20 of the Act to the District Court for redress of his grievance. He cannot omit that procedure and agitate the questions in the High Court in the guise of an application for revision of the Civil Court's order, which was merely carrying out the directions of the Debt Relief Court to stay proceedings. (*Clarke, J.*) KULESHWAR PRASAD *v.* DWARKANATH. **1941 N.L.J. 391 = A.I.R. 1941 Nag. 268.**

——**S. 115**—Pauper application—Rejection—Revision. *See* C. P. CODE, O. 33, R. 5 (*d*) AND S. 115.

1941 N.L.J. 473.

——**S. 115**—Scope—Construction of S. 23 of Madras Agriculturists' Relief Act—Revision. *See* 1940 Dig., Col. 246. SUBBA NAICKER *v.* SAVARIMUTHU PILLAI.

A.I.R. 1941 Mad 73 (2) = (1940) 2 M.L.J. 709.

——**S. 115**—Scope—Order granting permission to withdraw suit with permission to file fresh suit under

C. P. CODE (1908). S. 136.

O. 23, R. 1—Interference. *See* 1940 Dig., Col. 247. JAGADAMBAL *v.* SUNDARAMMAL.

A.I.R. 1941 Mad. 46 = (1940) 2 M.L.J. 398.

——**S 115 and Cr. P. Code, Ss. 476 and 476-B**—*Scope—Power to prosecute under S. 476—Interference by High Court, if and when justified.*

S. 476, Cr. P. Code, confers the power to prosecute. That power is conferred on the Court in which, or in relation to a proceeding in which the offence appears to have been committed, and if that Court refuses to prosecute, then the power is transferred to the appellate Court under S. 476 B. Excepting these two Courts, no other Court, not even the High Court, unless it happens to be the appellate Court contemplated by S. 476-B has power to prosecute. Before a prosecution can be launched, the Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If the lower Courts consider the matter under Ss. 476 and 476-B and deal with them judicially and come to the conclusion that it is not, in their opinion, expedient in the interests of justice to prosecute, the High Court has no power to compel them to do so. The discretion is theirs and theirs alone. The High Court has no jurisdiction whatever to interfere in revision under S. 115, C. P. Code, however wrong or erroneous the High Court may consider the conclusion to be. The High Court can, it is possible, interfere in revision, if the lower Courts do not consider the matter under these sections or if they direct their minds to matters which are foreign to those sections or if they act arbitrarily or capriciously. (*Bose, J.*) RAMBILAS *v.* JAI KISAN.

194 I.C. 583 = 14 R.N. 1 = 1941 N.L.J. 91 = A.I.R. 1941 Nag. 155.

——**S. 115**—Scope—Revision—Competency—Appellate orders under S. 45 (2) or revisional orders under S. 46. *See* U. P. ENCUMBERED ESTATES ACT, SS. 45 (2) AND 46 AND C. P. CODE, S. 115.

1941 A.L.J. 85 (F.B.).

——**S. 115**—*Substantial justice done—Interference on a technical point—Rule and limits of the rule as to.*

The rule that where substantial justice has been done between the parties, even if the lower Court has erred in law the High Court ought not to exercise its discretion in favour of the party relying on a technical plea, though a sound one, has to be applied with care. The substantial justice referred to above relates to rights to which a party has a legal right as opposed to a purely moral claim. The rule applies when owing to some technical rule of procedure or to some stupid blundering the claim is likely to fail whereas had the proper rule or remedy been applied it would have succeeded. It does not refer to cases where whatever the plaintiff had done his claim could not in any event have succeeded. If a plaintiff's suit is barred by time, the rule referred to is not attracted to such a case. (*Bose, J.*) MOHAMMAD HUSSAIN KHAN *v.* BALA LAXMAN. **196 I.C. 201 = 14 R.N. 88 = 1941 N.L.J. 324 = A.I.R. 1941 Nag. 261.**

——**S. 115**—Withdrawal of suit—Revision, if lies. *See* C. P. CODE, O. 23, R. 1 AND S. 115—REVISION.

1941 O.A. 343.

——**S. 132 (1)**—*'Personal appearance'—Meaning of.*

The words "personal appearance" used in S. 132, C. P. Code, mean "personal attendance" (*Edgley, J.*) KISSEN LAL KANKORIA *v.* PURSHOTTAM DAS.

I.L.R. (1941) 2 Cal. 155.

——**Ss. 136 and 46**—*Property beyond jurisdiction of Court—Attachment before judgment—Procedure—S. 46 if applies to such a case.*

S. 136, C. P. Code, directs that where property is situated outside the local limits of the Court to which an application for attachment before judgment is made

C. P. CODE (1908), S. 141.

and the Court passes an order for attachment, it has to send the order of attachment to the District Court and the District Court on receipt of the order, has to cause the attachment to be made by its own officers or by a Court subordinate to the District Court and after making the attachment the District Court has to inform the Court which had ordered the attachment, of its compliance. It is not open to the Court ordering such attachment to send its order for compliance directly to any other Court except the District Court and an attachment made by any Court except the District Court and without the intervention of the District Court, would be unauthorised and invalid. S. 46, C. P. Code, could have no application to such a case, for it only applies to matters which arise after a decree has been made. (*Dar, J.*) SURAJ BALI *v.* MOHAR ALI.

195 I.C. 891=14 R.A. 118=1941 A.W.R. (H.C.) 135=1941 A.L.J. 225=1941 O.A. (Supp.) 245=1941 A.L.W. 401=1941 O.W.N. 550=A.I.R. 1941 All. 212.

——**S. 141**—*Applicability—Execution application—Preliminary mortgage decree—Death of decree-holder—Application by legal representative to come on record and for final decree—Dismissal for default—Fresh application—If in order.*

S. 141, C. P. Code, does not apply to applications for execution, but only to 'original matters in the nature of suits such as proceedings in probates, guardianships and so forth'. Hence where after the passing of a preliminary mortgage decree the decree-holder dies and his legal representative applies to be brought on record and also applies for a final decree and they are dismissed for default, he is not bound under S. 141, C. P. Code, to apply to set aside the dismissal under O. 9, R. 9, C. P. Code. A fresh application by him to be brought on as the legal representative is quite in order. (*Mya Bu and Shaw, JJ.*) MA THAN SFIN *v.* MA HLA YI.

1941 Rang L.R. 246=195 I.C. 342=14 R.R. 39=A.I.R. 1941 Rang. 201.

——**S 144—Restitution.**
Applicability.
Appointment of receiver.
Construction and scope.
Court-fee
Mesne profits.
Parties.
Scope.

——**S. 144**—*Applicability.*

S. 144, C. P. Code, only applies when a decree or order is varied in appeal. (*Sathe, J.M.*) AMJAD ALI *v.* MAHESHWAR NATH. **1941 R D. 429=1941 A.W.R. (Rev.) 481=1941 O.A. (Supp.) 440.**

——**S. 144**—*Applicability—Appeal from money decree—Application for stay of execution—Order granting stay on condition of security—Defendant depositing decree amount—No execution pending—Appeal allowed—Application by defendant for award of interest on amount deposited—Competency.*

Where a defendant against whom a decree for money is passed appeals against the decree, and applies for stay of execution of the decree pending appeal although no application for execution is pending, and obtains stay on condition of his furnishing security in the form of immovable property, but the defendant instead of furnishing such security, deposits the decree amount in cash, he cannot, on reversal of the decree in appeal, claim interest on the amount deposited by him, by way of restitution under S. 144, C. P. Code. S. 144 does not apply to such a case. The plaintiff in such a case is clearly not liable to pay interest on the amount. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) SITARAMAYYA *v.* VENKANNA. **54 L.W. 594=(1941) 2 M.L.J. 768.**

C. P. CODE (1908), S. 144.

——**S. 144**—*Applicability—Change of position in consequence of decree—Meaning of—Property held by receiver until one of rival claimants establishes his title—Property handed over to party obtaining decree—If direct consequence of that decree.*

It is settled law that S. 144, C. P. Code, does not apply only when execution has been taken out, but applies also when property has passed in consequence of the decree which has been reversed. The section will not apply if it can be found as a question of fact that the change of position does not result from the decree which is set aside. When property is being held by a receiver until one of the rival claimants succeeds in establishing his title and the property is then made over to one of the parties who has obtained a decree to this effect, then it is difficult to see how this can be regarded as anything but the direct consequence of the decree, whether the decree is one for possession or not. (*Tek Chand and Beckett, JJ.*) SALEHON SHAH *v.* ZAWAR HUSSAIN SHAH. **43 P.L.R 467=A.I.R. 1941 Lah. 343.**

——**S. 144**—Applicability—Decree for money—Execution sale—Subsequent reduction of decree amount in second appeal—Such reduced amount higher than price fetched at sale—Application for restitution—Maintainability—Finding that judgment-debtor unable to pay up even reduced amount on date of sale or within 30 days thereof—Effect. *See* 1940 Dig., Col. 249. GANSU RAM *v.* PARVATI KUAR.

193 I.C. 411=7 B.R. 604=13 R.P. 587=1940 P.W.N. 1037=A.I.R. 1941 Pat. 130.

——**S. 144**—Applicability—Decree for possession of estate—Reversal on appeal—Execution—Subsequent restoration of decree of original Court on appeal to Privy Council—Right to restitution—Extent of right—Trial Court refusing to pass decree for future mesne profits—If bare claim to future mesne profits by way of restitution. *See* 1940 Dig., Col. 250. ZAMINDAR OF SANNAKHIMIDI *v.* SUSI IAMALA PATTA MAHADEVI.

194 I.C. 486=13 R.M. 782=(1940) 2 M.L.J. 47.

——**Ss. 144 and 151**—*Applicability—Delivery of possession under S. 60, Oudh Rent Act—Restoration to tenant under mistake—Proper remedy of zamindar to regain possession.*

Where after possession was delivered to the zamindar under S. 60 of the Oudh Rent Act and on an appeal being preferred by the other party and a stay being obtained, possession was restored to the tenants under a misapprehension of the stay order, on a question as to the proper remedy of the zamindar, it was held that an application under S. 144, C. P. Code, would not lie as the original decree for ejectment was not reversed or modified in any way in appeal and that as the zamindar had already once obtained possession under S. 60 of Rent Act, it was not open to him to apply once again under it and hence the only remedy open to him was to apply under S. 151, C. P. Code. (*Sathe, J.M.*) AUSAN *v.* PRAG NARAIN. **1941 R.D. 670=1941 A.W.R. (Rev.) 856=1941 O.A. (Supp.) 757.**

——**S. 144**—*Appointment of receiver—Propriety—Applicant for restitution entitled to joint possession—Further appeal pending.*

Where all that could be given to an applicant for restitution is some sort of joint possession over the land in suit, and the previous relations between the parties do not hold out much hope that they are likely to arrive at an amicable working arrangement between themselves, more particularly while a further appeal is pending and one of the parties still claims the right to exclusive possession of the whole of the land, it is proper to

C. P. CODE (1908), **S. 44.**

make over the property to a receiver until the claims of the parties are finally decided. (*Tek Chand and Beckett, JJ.*) SALEHON SHAH *v.* ZAWAR HUSSAIN SHAH.
43 P.L.R. 467 = A.I.R. 1941 Lah. 343.

——**S. 144**—Construction and scope—"Party"—Meaning of—If confined to original party—Assignment of decree—Realization of decree by assignee—Restitution on reversal—Right of defendant as against original decree holder. *See* 1940 Dig., Col. 251. KADIRVELU CHETTIAR *v.* KEMPU CHETTIAR.
I.L.R. (1941) Mad 498 = 195 I.C. 127 = 14 R M. 131 = A.I.R. 1941 Mad. 315 = (1940) 2 M.L J. 877.

——**S. 144**—Construction—"Place the parties in the position which they would have occupied but for such a decree"—Meaning of. *See* 1940 Dig., Col. 251. ZAMINDAR OF SANNAKHIMIDI *v.* SUSI IAMALA PATTA MAHADEVI. 194 I C. 486 = 13 R.M. 782 = (1940) 2 M L.J 47.

——**S. 144**—Court-fee—Nature of order under for purposes of Court-fees. *See* C. P. CODE, SS 47 AND 144 AND COURT-FEES ACT, SCH. II, ART. 11.
1941 N.L.J. 459.

——**S. 144**—Mesne profits by way of restitution—Calculation—Ejectment suit against tenant—Tenant claiming occupancy right—Decree and possession by landlord—Decree reversed on appeal to Privy Council—Claim by tenant to mesne profits by way of restitution—Basis of assessment—Rent due by tenant—Deduction of—Interest. *See* 1940 Dig., Col. 252. VENKATAPPAYYA *v.* RAMASWAMI. I.L.R. (1941) Mad. 212 = 192 I.C. 607 = 13 R M. 575 = 1941 M.W N. 14 = 1941 O W N. 79 = 1941 R.D. 77 = 1941 A.W.R. (Rev.) 360 = 1941 O A. (Supp) 274 = 1941 A.L.W. 81 = A.I R 1941 Mad 36 = (1940) 2 M L J. 984 (F.B.).

——**S. 144**—*Mesne profits—Right to recover by way of restitution—Assignability—C. P. Code, S.* 146 *and O.* 21, *R.* 16.

A right to recover mesne profits by way of restitution under S. 144, C. P. Code, under a decree, is assignable. The assignee is competent to apply for restitution and recovery of mesne profits in the same way as his assignor. Whether O. 21, R. 16, C. P. Code, is strictly applicable or not, it would be open to the Court to recognise the transfer under S. 146, C. P. Code, and allow the transferee to apply for restitution. (*Venkataramana Rao and Horwill, JJ.*) SATYANARAYANA *v.* RANGAYYA. 1941 M W.N. 216 = 53 L.W. 283 = A.I.R. 1941 Mad. 480 = (1941) 1 M.L.J. 469.

——**S. 144**—'Parties'—Meaning of—Assignee and attaching creditor of party. *See* 1940 Dig., Col. 252. MANGAL SINGH LAKHBIR SINGH *v.* JAGGAT RAM.
191 I.C. 209 = 13 R. Pesh. 31.

——**S. 144 and O. 21, R. 89**—*Scope—Restitution of deposit made under O.* 21, *R.* 89—*Order for if justified by S.* 144—*Right of suit.*

An order for refund of money deposited under O. 21, R. 89 is not justified by S. 144, C. P. Code, at any rate it is not an order which can be made on an application in restitution and probably not one which can be made even in a suit. (*Yorke, J.*) RAJA RAM *v.* MAHOMED TAQI KHAN. 1941 O.A. (Supp.) 771 = 1941 A.L.W. 910 = 1941 A.W.R. (H.C.) 278.

——**S. 144 and Sch. II**—*Scope—Restitution proceedings—Reference to arbitration—Competency.*

Sch. II of the C. P. Code does not apply to restitution proceedings and the Court has no jurisdiction to refer such a matter to arbitration. (*Collister and Baipai, JJ.*) RAM GOPAL *v.* SHANTI LAL.
1941 A.W.R. (H.C.) 302 = 1941 A.L.W. 977 = 1941 O.A. (Supp.) 844 (1) = 1941 A.L.J. 596.

C. P. CODE (1908), **S. 148.**

——**S. 144**—*Scope—Restitution—Right to interest—Rate.*

Where after execution, the amount due under a decree is reduced in appeal, the amount that the judgment-debtor can recover is not only the excess amount paid by him but also an additional amount by way of interest or an additional amount by way of damages which the Court is empowered by S. 144 to grant. As regards the rate of interest, the Court rate must always be taken as the rate that fairly compensates litigants in the absence of special reasons to the contrary. (*Stone, C.J. and Clarke, J.*) SURAJMAL *v.* BAXIRAM.
1941 N.L.J. 94 = A.I.R 1941 Nag. 195.

——**S. 145**—*Scope*—Supurtdar—*Liability to produce property entrusted—Satisfaction of decree, if puts an end to—Order against* supurtdar—*In whose interest could be passed.*

Where a decree in a suit in which the property is attached and entrusted to a *supurtdar* prior to decree, is wholly satisfied and the property is returned to the judgment-debtor, the *supurtdar* cannot be made liable for its return on the application of persons not parties to the suit and in respect of attachment in a different suit, Courts can act in the interests of the parties or suitors in particular cases. (*Clarke, J.*) SETH HEMRAJ SINGH *v.* ANOOP SINGH. 196 I.C. 140 = 14 R.N. 82 = 1941 N.L.J. 514 = A.I.R. 1941 Nag. 339.

——**S. 146 and O. 21, R. 16**—*Applicability and scope—Assignee of future decree—Right to apply for execution after decree is passed.*

A transferee to whom a future decree (and nothing else) has been expressly assigned can execute the decree subsequently passed. The transferee can apply for execution under S 146, C. P. Code, though not under O. 21, R. 16, C. P. Code, which cannot apply to a case where there is no decree in existence at the time of the assignment. O. 21, R. 16 does not, however, prohibit an application by a transferee who obtains an assignment of a decree before it is actually passed. The rule is not all-inclusive in this matter. (*Pandrang Row and King, JJ.*) MAHANANDI REDDI *v.* VENKATAPPA.
54 L.W. 429 = (1941) 2 M.L.J. 631.

——**S. 146**—Applicability—Ejectment suit—Partition decree pending such suit—Property involved in ejectment suit allotted to son of lessor (plaintiff)—Decree for ejectment—Appeal by defendant—Application by son to implead him as party in appeal—Competency. *See* 1940 Dig., Col. 254. RATNASABAPATHI PILLAI *v.* GOPALA IYER. 193 I.C. 637 = 13 R.M. 705 = (1940) 2 M.L.J. 349.

——**S. 146**—Applicability—Right to recover mesne profits by way of restitution—Transfer of—Application by transferee—Power of Court to allow. *See* C. P. CODE, S. 144. 53 L.W. 283 = (1941) 1 M.L.J. 469.

——**Ss. 148 and 151**—*Applicability—Decree for money—Judgment-debtor to pay certain instalments and to get some concession on such payment—Default in payment—Power of Court to relieve against clause providing for payment on default—Equity—Rule.*

In a case where a judgment-debtor is to pay a certain amount of money, but there is a clause under which if he pays certain instalments promptly a certain concession would be made to him and a smaller sum would be accepted in full satisfaction of the debt, there is no case of penalty or forfeiture, and the party seeking to take advantage of the concession must carry out strictly the condition on which it is granted. This

C. P. CODE (1908), S. 148.

class of cases must be distinguished from the class of cases where there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date, a larger sum should be made ; this latter condition is in the nature of a penalty, while in the former class of cases, it is not a penal clause and hence the Court has no power to grant relief from the obligation to abide strictly by the condition which is in the nature of a concession. The principle is the same whether the sum involved is large or small, and the fact that the default is only in respect of small margin is no ground for the grant of relief. There is no general principle of equity that the Court can relieve a party in default in respect of money payments whenever the Court thinks just. (*Davis, C.J. and Weston, J.*) SHAMSUDDIN DOST MAHOMED *v.* SHIVJI PREMJI.

I.L.R. (1941) Kar. 389 = A.I.R. 1941 Sind 196.

——**S. 148**—*Scope—Order directing payment of money within specified time—In default proceedings to stand dismissed—Failure to comply with, due to mistake of Court's officer—Application for extension of time—Power of Court to extend—S.* 151.

Where a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148, C. P. Code, after the date on which the proceedings would stand dismissed to extend the time in which the payment was to be made. But when the application for extension is not made under S.148 but under S. 151, C.P. Code, invoking the inherent powers of the Court, and the mistake which led to the failure to pay was not a mere mistaking of the party but the mistake of the Court's officer, the Court has inherent power to prevent the party from being damnified by the mistake of the Court's own officer and can extend the time for the ends of justice. (*Wadsworth, J.*) BALAIAH *v.* RAMAYYA.

53 L.W. 631 = 1941 M.W.N. 455 = A.I.R. 1941 Mad. 706 = (1941) 1 M.L.J. 638.

——**S. 149 and O. 7, R. 11**—*Appeal memo. insufficiently stamped—Grant of time to make up deficiency—Discretion of Court.*

It is not incumbent upon the Court to grant time to an appellant to make good the Court-fee on his memorandum of appeal on the analogy of O. 7, R. 11. S. 149 is the general rule, giving the Court a discretion to allow time for making up a deficiency of Court-fee while O. 7, R. 11 is a particular rule which applies in the case of plaints only. (*Almond, J.C. and Soofi, J.*) MUKARRAM KHAN *v* S. HARDIT SINGH.

196 I.C. 301 = 14 R. Pesh. 25 = A.I.R. 1941 Pesh. 69.

——**S. 149 and O. 33**—Discretion of Court—Application to sue *in forma pauperis* found *mala fide*—Extension of time. *See* 1940 Dig., Col. 255. OFFICIAL RECEIVER, AMRITSAR *v.* SOHAN LAL RAMJI DASS.

I.L.R. (1941) Lah. 652 = 191 I.C. 335 = 13 R.L. 286.

——**S. 149**—*Powers of Court—Order fixing time for payment of deficit Court-fee and providing that on default suit will stand dismissed—Jurisdiction to extend time—Refusal to extend—Revision.*

Where a Court passes a decree in a suit, and provides that the decree shall be subject to the condition of plaintiff's paying the deficit Court-fee by a certain date failing which the suit will stand dismissed with costs, there is a final order which cannot be subsequently altered or amended except with regard to clerical errors or on review. The Court has no jurisdiction to extend time under S. 149, C. P. Code, for payment of the deficit Court-fee, whether the application for extension of time is made before or after the expiry of the time fixed for payment. The suit stands dismissed under the

C. P. CODE (1908), S. 151.

order already made. If the Court refuses to grant time and holds that the suit already stands dismissed, it is not without jurisdiction, and cannot be interfered with in revision. (*Chatterji and Mercaith, JJ.*) RAMLAKHAN PANDEY *v.* TRIBENI DAS. **1941 P.W.N. 516.**

——**S 149 and O. 7, R. 11**—Relative scope of. *See* 1940 Dig., Col. 255. SHIVA CHARAN LAL *v.* BEHARI LAL. **A.I.R. 1941 Oudh 30.**

——**S. 149**—Scope—Grant of time for payment of deficit Court-fee after limitation—Effect of. *See* 1940 Dig., Col. 255. VENUGOPAL PILLAI *v.* THIRUGNANAVALLI AMMAL. **194 I.C. 840 = 14 R M. 109 = (1940) 2 M.L.J. 427.**

——**S.151**—*Amendment—Scope—Amendment of proceedings and documents—Competency.*

When there was a serious dispute as to what was the subject-matter of the mortgage proceedings for amendment of the relevant documents in the case are not appropriate. A case of misdescription can be dealt with by amending the plaint and decree but not a dispute as to the identity of the properties which are the subject-matter of the mortgage. (*Harries, C.J. and Fazl Ali, J.*) SHYAMAKANT LAL *v.* RAM LAL.

193 I.C. 748 = 13 R.P. 617 = 7 B.R. 636 = 22 Pat.L.T. 267 = A.I.R. 1941 Pat. 399

——**Ss. 151 and 152**—Amendment of decree—Application for—Forum—Appeal dismissed under O. 41, R. 11, C. P. Code. *See* C. P. CODE, O. 41, R. 11 AND SS. 151 AND 152. **1941 O.W.N. 1.**

——**S. 151**—Amendment of decree—When could be had under. *See* C. P. CODE, SS 152 AND 151.

1941 O.W.N. 1239.

—— **S. 151**—*Appeal—Order of restitution under—Appealability.*

If a party is ordered to make restitution under S. 151, C. P. Code, he must have a right of appeal The proceedings are analogous to proceedings under S. 144, C. P. Code, and hence the order is appealable. The right of appeal which is available under S. 144, C. P. Code, is not lost under S. 151 (*King, J.*) BALI REDDI *v.* NAGI REDDI. **1941 M.W.N. 255 (1) = 53 L.W. 356 = A.I.R. 1941 Mad. 564 = (1941) 1 M.L.J. 407.**

——**S. 151**—*Applicability—Application challenging decree as not executable—Decree already executed and satisfied—Proper remedy.*

Objections as to the validity of a decree and to its executability should be raised at the time when the decree is made a rule of Court and at the time when the decree is put into execution. After the decree has been fully satisfied and possession of the property under terms of the decree has actually been delivered to the decree-holder, no such objection can properly be raised by means of an application under S 151, C. P. Code. The appropriate remedy of the applicant, if so advised is by a regular suit in the Civil Court and not by an application invoking the inherent powers of the Court. (*Bennett and Ghulam Hasan, JJ.*) TULSA DEVI *v.* SURAJ NARAIN. **195 I.C. 610 = 14 R.O. 100 = 1941 O.W.N. 965 = 1941 O.A. 678 = 1941 O.L.R. 601 = 1941 A.L.W. 815 = 1941 A.W.R. (C.C.) 275 = A.I.R. 1941 Oudh 587.**

——**S. 151**—*Applicability—Preliminary partition decree—Application to proclaim share.*

A person obtaining a preliminary decree for partition is not entitled to ask the Court under S. 151, C. P. Code, to direct the making of a proclamation about his share. No ground for action under S. 151 arises where a remedy is provided by the Code itself. A preliminary partition decree is of a declaratory nature and it is implicit in it that further proceedings are required to com-

C. P. CODE (1908), S. 151.

plete the partition. (*Bennett, J.*) SUKHPAL DASS *v.* KEDARNATH. **194 I.C 175=1941 O.L R. 423=13 R.O. 562=1941 A.L.W. 560=1941 O W.N. 718=1941 O.A. 478=1941 A.W.R. (C C.) 183=A.I.R 1941 Oudh 383.**

——**S. 151**—Inherent jurisdiction—Limits to the exercise of. *See* EVIDENCE ACT, S. 135 AND C. P. CODE, S. 151. **1941 A.L J. 345.**

——**S 151 and O. 45, R. 13 (2)(d)**—Inherent power of High Court—Income of property in suit accruing after decree, lying in deposit in High Court pending appeal—Order for its preservation—If may be passed after and before application for leave to appeal to Privy Council is filed. *See* C. P. CODE, O. 45, R. 13 (2)(*d*) AND S. 151. **45 C.W.N. 1023.**

——**S. 151**—Inherent powers—Exercise of—Existence of other remedy—If a bar. *See* 1940 Dig., Col. 256. BADRI PRASAD *v.* AMBIKA PRASAD. **16 Luck. 294=1941 O.L.R. 115=192 I.C. 332=13 R.O. 349= A.I.R. 1941 Oudh 91.**

——**S. 151**—*Inherent powers—Exercise of—Other remedy available—Order under, if justified.*

When a remedy by way of appeal is open to an aggrieved party, an order under S. 151. C. P. Code, is not justified. (*Sathe, J.M.*) AMJAD ALI *v.* MAHESHWAR NATH. **1941 R.D. 429=1941 A.W.R. (Rev.) 481=1941 O.A. (Supp.) 440.**

——**S. 151**—Inherent powers—Extension of time for payment—Order fixing time for payment and providing for dismissal on default of payment—Failure to comply due to mistake of Court's officer—Power to extend time. *See* C. P. CODE, S. 148. **(1941) 1 M L.J. 638.**

——**S. 151**—*Inherent power—Fraud on Court—Interference.*

The weight of authority in the Calcutta High Court supports the inherent jurisdiction of the Court to interfere in cases involving a fraud on the Court, although there is a remedy by suit and it is the most appropriate remedy. (*Henderson, J.*) AKINA BIBI *v.* MAHOMAD ALI SHAHA. **I.L.R. (1941) 1 Cal. 405=196 I.C 269=14 R.C. 202=74 C.L.J. 397=45 C.W.N. 392=A.I.R. 1941 Cal. 336.**

——**S. 151**—Inherent powers—Mortgage suit—Sale of mortgaged property to satisfy prior claim—Surplus sale proceeds—Final decree entitling mortgagee to recover surplus sale proceeds—Power of Court to pass. *See* C. P. CODE, O. 34, R. 5 (3). **7 Cut. L.T. 49.**

——**S. 151**—*Inherent powers—Stay — Criminal complaint filed by defendant in Court of anotker Province—Injunction against defendant restraining him from proceeding with complaint—Power of High Court to grant.*

The High Court has jurisdiction under S. 151, C. P. Code, to grant an injunction *in personam* against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of the High Court, if in the exercise of its discretion the High Court thinks proper to do so. But this is a jurisdiction which should be exercised with extreme caution. (*Blackwell, J.*) KANHAIYALAL HARKARANDAS *v.* MOHANLAL RAMVALLABH. **194 I.C. 814=14 R.B. 9=43 Bom L R. 287=A.I R. 1941 Bom. 219.**

——**S. 151**—Inherent powers—Suit for possession of properties alleged to be allotted to plaintiff or in the alternative for partition—Plea that properties are self-acquisitions—Order for interim maintenance—If justified. *See* 1940 Dig., Col. 257. LATCHANNA DORAVARU *v.* MALLU DORAVARU. **13 R.M. 634=193 I.C. 175=A.I R. 1941 Mad. 55=(1940) 2 M.L.J. 572.**

C. P. CODE (1908), S. 151.

——**S. 151**—Injunction—Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court—Power to grant. *See* C. P CODE, SS. 10 AND 151. **I.L.R. (1941) 1 Cal 490.**

——**S. 151 and O. 41, R. 20**—*Joinder of parties—Power of High Court—Addition of party to appeal after limitation.*

Apart from O. 41, R. 20, C. P. Code, the High Court has ample power under S. 151, C. P. Code, to add a party to an appeal even after the expiry of the period of limitation prescribed for appeals, if, in the circumstances of the particular case before it, it thinks fit to do so. Where a person's name was omitted from the array of parties to an appeal by the mistake caused by an error in the certified copy of the judgment of the lower appellate Court, which had been supplied to the appellant and which did not contain his name, it is a fit case for the High Court to grant the application of the appellant to add him as a party and condone the delay under S. 5 of the Limitation Act, although the clerk of the appellant's counsel could have discovered the mistake if he had compared the list of parties in the copy of the judgment with that in the copy of the decree. (*Tek Chand and Beckett, JJ.*) SHANTI LAL *v.* F. HIRA LAL SHEO NARAIN. **43 P.L.R. 471=A.I.R. 1941 Lah. 402.**

——**S. 151 and O. 41, Rr. 23 and 25**—*Remand under S. 151—When justified.*

The power of an appellate Court to remand is not circumscribed within the Rr. 23 and 25 of O. 41, C. P. Code. An order of remand under S. 151, C. P. Code, would be a proper order, if it is made by the appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. (*Ghulam Hasan, J.*) RAM DHANI *v.* NAGAR MAL. **1941 O.A. 503=1941 O.W.N. 754=194 I.C. 755=14 R.O. 36=1941 A.W.R. (C.C.) 205=1941 R D. 578=1941 A.L.W. 592=1941 O.L.R. 525=A.I.R. 1941 Oudh 561.**

——**S. 151**—*Remand under—When justified.*

S. 151, C. P. Code, should seldom be resorted to for the purpose of making a remand. The trial would have to be so radically defective as not to amount to a trial at all before its provisions could be availed of for such a purpose. (*Bose, J.*) ANANDRAO BALIRAM *v.* PARWATIBAI. **1941 N L.J. 519=A.I.R. 1941 Nag. 308.**

——**S. 151**—Scope of. *See* 1940 Dig., Col. 258. JAGANNATH SINGH *v.* DRIGPAL SINGH. **1941 A.L.J. (Supp.) 10.**

——**S. 151**—Scope—Party having appropriate remedy under specific provision in Code but failing to avail himself of same—Right to invoke inherent powers. *See* 1940 Dig., Col. 258. RATNASABAPATHI PILLAI *v.* GOPALA IYER. **193 I.C. 637=13 R.M. 705=(1940) 2 M.L.J. 349.**

——**S. 151**—Scope—Power of Court to relieve against condition in decree to pay instalments promptly—Clause giving concession to judgment debtor only on regular payment—Effect of—If penal. *See* C. P. CODE, SS. 148 AND 151. **I.L R. (1941) Kar. 389.**

——**S. 151**—*Stay of execution—Powers—Claimant to attached property filing declaratory suit under Specific Relief Act—Sale of attached property, if can be stayed.*

Where a claimant to attached property withdraws his claim petition and later files a declaratory suit under the Specific Relief Act to declare that the decree in execution

C. P. CODE (1908), S. 151.

of which the property was attached is not binding on the estate of the judgment debtor of whom the plaintiff claimed to be sole legal representative, it is not open to the Court trying the case to stay the execution sale under that decree. The sale cannot affect the plaintiff's right, and if he succeeds then his interests in the property would be deemed not to have been disposed of by the sale. S. 151. C.P. Code, cannot be invoked, for it is not necessary in the ends of justice, or to prevent the abuse of the process of the Court, to stay execution when the right. title and interest cannot be affected by the sale. (*Mosely, J.*) NARAYANAN CHETTYAR *v.* MA SAW HLA. **1940 Rang.L.R. 749 = 192 I.C. 582 = 13 R.R. 185 = A.I.R. 1941 Rang. 60.**

——**S. 151**—Stay of suit—Application for—Plea of jurisdiction involving difficult questions—If can be dealt with. *See* 1940 Dig., Col. 258. ABDUL SHAKOOR *v.* ALI MAHOMED EBRAHIM SHAKOOR.
195 I.C. 257 = 14 R.C. 63 = A.I.R. 1941 Cal. 236.

——**S. 151**—*Stay of suit—Inherent power.*

In the case which was instituted by *A* in the first instance the defendant *B* did not object to the valuation of the suit at Rs. 300 put upon it by the plaintiff but later when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter. put a valuation of Rs. 1,200 on to the suit and virtually created a situation in which conflicting decisions may be given by two different Courts. The Court in which the subsequent suit was filed by *B* refused to stay it under S. 10 pending the previous suit on the ground that the Court in which the suit was previously instituted by *A* had no pecuniary jurisdiction to try the suit.

Held, that the order under S. 10 refusing to stay the subsequent suit was not subject to revision and though the powers conferred by S. 151 should not be exercised lightly the case was eminently one in which they should be exercised in order to avoid an idle multiplicity of suits by ordering the subsequent suit to be stayed pending the decision of the previous suit. (*Almond, J.*) WAQF MASJID *v.* SARDAR KHAN. **194 I.C. 268 = 13 R. Pesh. 77 = A.I.R. 1941 Pesh. 34.**

——**S. 152**—*Amendment—Forum—Merger of trial Court's decree in that of the appellate Court.*

Ordinarily the trial Court has no jurisdiction left in cases where the decree of that Court has merged in the decree of the appellate Court. But the trial Court may under S. 152, C.P. Code, amend such a decree in cases where the correction is merely of a clerical or arithmetical mistake. (*Bennet, J.*) KHAIRATI KHAN *v.* MUNNEY KHAN. **193 I.C. 53 = 1941 A.W.R. (C.C.) 104 = 1941 O.L.R. 252 = 1941 A.L.W. 200 = 13 R.O. 429 = 1941 O.W.N. 270 = 1941 O.A. 217.**

——**S. 152**—*Amendment of decree—Powers of Court.*

Where the alleged mistake is not clerical or arithmetical or has not arisen from an accidental slip or omission, the Court has no jurisdiction under S 152 to correct it. In those cases the remedy of the aggrieved party is to appeal, or to apply to the Court by way of review. Ss. 151 and 152 cannot be invoked to correct erroneous judgment or decree such as where the Judge instead of passing a decree in Form No. 9 in Appendix D, C. P. Code, deliberately passes a decree in a different form. Moreover, in such a case the error cannot be said to be due to accidental omission or slip. (*Tek Chand, J.*) RAM RAKHA MAL *v.* DINA NATH. **A.I.R. 1941 Lah. 419.**

——**S. 152**—*Amendment—Powers of Court—Limits—Correction after Court had become* functus officio—

C. P. CODE (1908), S. 152.

When justified—Lapse of time, if a bar to correction.

Although after the case has been decided and the decree has been satisfied, the Court becomes *functus officio*, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval. Lapse of time however considerable, is no bar to the correction of errors either under S. 151 or 152, C. P. Code. (*Ghulam Hasan, J.*) SANWALEY RAI *v.* SANT RAI. **193 I.C. 727 = 1941 A.L.W. 359 (1) = 1941 O.L.R. 319 = 13 R.O. 495 = 1941 R.D. 505 = 1941 O.W N. 474 = 1941 O A 312 = 1941 A.W.R. (Rev.) 281 = A.I.R. 1941 Oudh 344.**

——**Ss. 152 and 151**—*Amendment under S.* 152—*When lies—S.* 151, *when applicable.*

In the case of an amendment under S. 152, C. P. Code, the Court has only to see whether decree contains any clerical or arithmetical mistake or any error arising from any accidental slip or omission. In the absence of any such thing amendment could not be had. Under S. 151 amendment could not be obtained unless it is necessary for the ends of justice or to prevent abuse of the process of the Court and when a remedy by way of appeal or cross objection is open and is not availed of, resort to S. 151 could not be had. (*Gulam Hasan and Agarwal, JJ.*) TAJAMMUL HUSAIN KHAN *v.* AMIRUDDIN. **1941 O.A. 951 = 1941 A.W.R. (Rev.) 1078 = 1941 O.W.N. 1239.**

——**S. 152**—*Applicability—Mistake in deed repeated in plaint and decree in suit on deed—Amendment.*

S. 152, C. P. Code, is not restricted to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court. The section applies also to cases where the mistake occurred in the earlier document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction. (*Patanjali Sastri, J.*) RANGA RAO NAIDU *v.* SETH BALAKSONLAL JANKI PRASAD. **54 L W 344 = 1941 M.W.N. 828 = A.I R. 1941 Mad. 940 (1) = (1941) 2 M.L.J. 452.**

——**S 152**—Jurisdiction—Appeal—Abatement in part—Decree on merits as against surviving respondents—Amendment of decree—Forum—Trial Court or appellate Court. *See* 1940 Dig., Col. 259. ZULEKA BI *v.* KULSUM BI. **A.I.R. 1941 Mad. 123 = (1940) 2 M.L.J. 393.**

——**S. 152**—*Mistake of a clerical nature—Redemption suit—Decree—Entire amount paid—Decree for half of the property by mistake—Correction.*

Where a suit for redemption was decreed and the entire amount due on the mortgage paid and the mortgage extinguished, by a mistake the decree was drawn up with reference to only half the property, but the mortgagee obtained possession over the whole, the mistake was held to be one of a clerical nature arising from an accidental slip or omission and that it could be corrected even after a lapse of many years. (*Ghulam Hasan, J.*) SANWALEY RAI *v.* SANT RAI.
193 I.C. 727 = 13 R.O. 495 = 1941 A.L.W. 359 (1) = 1941 O.L.R. 319 = 1941 R.D 505 = 1941 O.W.N. 474 = 1941 O.A. 312 = 1941 A.W.R. (Rev.) 281 = A.I.R. 1941 Oudh 344.

——**S. 152**—*Order amending or refusing to amend judgment—Appeal—Revision.*

An order passed under S. 151 or S. 152 allowing or refusing application to amend a judgment, decree or order is not appealable under the Code. The only remedy in such cases is by way of revision. (*Tek*

C. P. CODE (1908), S. 152.

Chand, J.) RAM RAKHA MAL *v.* DINA NATH.
A.I.R. 1941 Lah. 419.

——**Ss. 152 and 153**—Scope—Mortgage decree—Amendment application—Question as to identity of property mortgaged in mortgage suit—If can be dealt with. *See* BENGAL ESTATES PARTITION ACT, S. 99.
22 Pat L.T. 267.

——**Ss 152 and 153**—Scope—Powers of Court—Mortgage—Subsequent partition—Mortgagor allotted other properties than those mortgaged—Suit on mortgage ignoring partition—Decree and sale—Obstruction to delivery—Application by decree holder purchaser for amendment of plaint and decree and execution petition, sale proclamation and sale certificate—Competency—Power of Court. *See* BENGAL ESTATES PARTITION ACT, S. 99.
22 Pat.L.T. 267.

FIRST SCHEDULE.

——**O. 1, R. 3 and O. 2, R. 3**—Suit on mortgage by transferee of mortgagee rights—Mortgagor and original mortgagee made parties—Suit against mortgagee, if premature, or bad for multifariousness. *See* 1940 Dig., Col. 260. KHAT KHATA NAND *v.* SURAJPAL SINGH.
16 Luck. 113 = A.I.R. 1941 Oudh 56.

——**O. 1, R. 8**—*Applicability—Suit by Shamilat Committee—Nature of the body.*

A Shamilat Committee is not a legally constituted corporation either by prescription or by any other operation of law. It is a kind of representative body of the khewatdars of a village. Before a suit in respect of the lands in the khewat could be brought all the khewatdars must join together for that purpose. The course to be followed is set out in O. 1, R. 8, C. P. Code. (*Davies.*) GHAZI *v.* SHAMLAT COMMITTEE. **1941 A.M.L.J. 14.**

——**O. 1, R. 8** — *Applicability — Suits under S. 92.*

O 1, R. 8, C. P. Code, is not applicable to suits under S. 92, C. P. Code ; it cannot therefore be said that the procedure laid down in O. 1, R. 8 must be followed in suits under S. 92. (*Broomfield and Macklin, JJ.*) BAPUGOUDA YADGOUDA *v.* VINAYAK SADASHIV.
196 I.C. 826 = 43 Bom.L.R. 706 = A.I.R. 1941 Bom. 317.

——**O. 1, R. 8**—*Representative suit—Suit on behalf of inhabitants of contiguous villages to restrain discharge of surface water from defendant's mouza—Maintainability.*

A representative suit on behalf of the inhabitants of a group of contiguous villages the object of which is to restrain the discharge of surplus rain water from the defendant's mouza to the plaintiffs' lands in those villages which are at a lower level, is maintainable under the provisions of O. 1, R. 8, C P. Code. It is not necessary for the plaintiffs to sue the defendants in their representative capacity. (*Biswas, J.*) NATABAR SASMAL *v.* KRISHNA CHANDRA. **74 C.L.J. 95.**

——**O. 1, R. 8**—*Representative suit—Plaintiffs not described in cause title in representative capacity—Effect of.*

Per *Khundkar, J.*—Where on the application of the plaintiffs an order is recorded permitting them to sue under O. 1, R. 8, C. P. Code, and the plaint contains a sufficient indication of the fact that the plaintiffs are bringing the suit in a representative capacity, the suit is a properly constituted representative suit, although in the cause title the plaintiffs are not described in their representative capacity. (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL
46 C.W.N. 59.

——**O. 1, R. 10 and S. 151**—*Benamidar plaintiff's death—Real owner, if can be joined.*

It is open to the real owner to apply to be joined in a suit brought by the *benamidar*, after the latter's death.

C. P. CODE (1908), O. 1, R. 10.

He can be added either under O. 1, R. 10 or S. 151, C. P. Code. He can be joined at any stage provided the suit brought by the *benamidar* is still alive and provided of course no injustice or inconvenience is caused to the other side. (*Bose, J.*) SETH THAKURDAS *v.* DEGDULAL. **196 I.C. 25 = 14 R.N. 72 = 1941 N.L.J. 293 = A.I.R. 1941 Nag. 178.**

——**O. 1, R. 10**—Discretion of Court—Addition as party to suit representative of person against whom suit has abated. *See* 1940 Dig., Col. 263. MAHOMEDALLY TAYEBALLY *v.* SAFIABAI. **67 I.A. 406 = I.L.R. (1940) Kar. (P.C.) 410 = 191 I.C. 113 = 13 R.P.C. 113 = 53 L.W. 1 = 45 C.W.N. 226 = 7 B.R. 210 = 1941 A.W.R. (P.C.) 1 = 43 P.L.R. 63 = I.L.R. (1941) Bom. 8 = 73 C.L.J. 214 = 1941 O.W.N. 73 = 1941 P.W.N. 316 = 1941 M.W.N. 729 = 1941 A.L.W. 567 = 1941 O.A. 119 = 43 Bom L.R. 388 = (1941) 1 M.L.J. 594 (P.C.).**

——**O. 1, R. 10 and Government of India Act (1925), S. 205 (2)**—*Dispute between private parties—Validity of provincial statute in issue—Proper parties—Addition of the Advocate-General as party in High Court—Propriety—Advocate General, if can claim right of appeal to Federal Court.*

Per *Gwyer, C. J.*—It can but rarely happen, in cases between private persons involving the constitutional validity of a statute, that an Advocate-General is a 'necessary' party. He is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all questions involved in such cases, and where the executive authority of the province is likely to be affected by the decision. It by no means follows that because the Advocate-General of a province has been permitted to be placed on record as an intervener he is also entitled to prefer an independent appeal to the Federal Court.

Per *Sulaiman, J.*—In a suit between a landholder and his tenant, the Provincial Government cannot be consjdered a necessary party at all. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public and the Provincial Government would be indirectly interested in such an adjudication. Where the Provincial Government has been made a party in the High Court in the absence of any restriction in the language of S. 205 of the Government of India Act and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, it cannot be held that the Provincial Government who were a party in the High Court have no right of appeal at all to the Federal Court.

Per *Varadachariar, J.*—The Indian C. P. Code does not contemplate an 'intervention' by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with a view to give them a hearing, the Court would fail to give full effect to the language of S. 205 (2) of the Constitution Act, if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot reasonably be denied when, even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim being heard. (*Gwyer, C. J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM.
I.L.R. (1941) Kar. (F.C.) 72 = 72 C.L.J. 550 = 1941 A.L.J. 170 = 1941 R.D. 121 = 3 F.L.J. 97 =

C. P. CODE (1908), O. 1, R. 10.

192 I.C. 138=1941 O.L.R. 121=7 B.R. 433=58 L.W. 397=13 R.F.C. 15=1941 A.L.W. 201=1941 M.W.N. 581=22 Pat.L.T. 578=45 C.W.N. (F R.) 27=1941 A.W R. (Rev.) 109=1941 O.A. 159=1941 O.W.N 297=1941 A.W.R. (F.C.) 3=A.I.R. 1941 F.C. 16=(1941) 1 M.L J. (Supp.) 65.

——**O. 1, R. 10**—*Power of Court—Mortgage suit—Preliminary decree—Impleading of parties subsequent to—Legality—Attaching decree-holder withdrawing surplus sale proceeds subsequent to preliminary decree—If can be impleaded and bound by final decree.*

O. 1, R. 10, C. P. Code, gives complete power to the Court to add any necessary party at any stage of the proceedings; and parties may be added even after the preliminary decree in a mortgage suit. Where mortgaged property is sold for arrears of revenue, and subsequent to the preliminary decree in the suit, a money decree-holder who has previously attached the surplus sale proceeds to which the mortgagee is entitled under S. 73, T. P. Act, withdraws it from the collectorate, the attaching decree-holder who so withdraws the money can be made a party to the mortgage suit, and a final decree can be passed against him entitling the mortgagee plaintiff to recover from him the money which he has withdrawn from out of the surplus sale proceeds. It is not necessary that he should have been impleaded before the preliminary decree, for the attachment would not confer any right on the decree holder, and it would not also prevail against the mortgagee's claim to the surplus sale proceeds under S. 73, T. P. Act. The mortgagee would therefore not be bound to implead the attaching decree-holder before he actually withdrew the money. (*Chatterji, J.*) KUNJA BEHARI MISRA *v.* BENUDHAR PANDA. **7 Cut.L.T. 49.**

——**O. 1, R. 10**—*Powers of Court—Transposition of parties—Suit for dissolution of partnership and accounts—Death of sole plaintiff—Application by defendant to transpose him as plaintiff and to make plaintiff's heirs defendants—Competency.*

Under O. 1, R. 10, C. P. Code, the Court has jurisdiction in proper cases to transpose a defendant as a plaintiff. Where in a suit by a person for dissolution of partnership between him and the defendant and for accounts, the plaintiff dies, the Court, on an application by the defendant, can, under O. 1, R. 10, transpose him as plaintiff and to bring the heirs of the original plaintiff on the record as defendants to the suit. (*Chagla, J.*) DEVSEY KHETSEY *v.* HIRJI KHAIRAJ. **43 Bom L.R. 993.**

——**O. 1, R. 10 and Limitation Act, S. 22**—Power of Court under O. 1, R. 10—Limits—Suit by plaintiff as minor—*Bona fide* mistake as to age—Amendment—Applicability of S. 22, Limitation Act. *See* 1940 Dig., Col. 263. INDERPAL SINGH *v.* BHAGWATI SINGH. **16 Luck. 256=191 I C. 150=A.I.R. 1941 Oudh 43.**

——**O. 1, R. 10**—Procedure—Application by persons to be impleaded as additional plaintiffs—Duty of Court—Dismissal of application on dismissal of suit—Propriety of. *See* 1940 Dig., Col. 263. BALAVENKATARAMA CHETTIAR *v.* H. R. E. BOARD. **A.I.R 1941 Mad. 79=(1940) 2 M.L.J. 615.**

——**O. 1, R. 10**—Scope—Transposition of parties—When permissible—Promissory note in renewal of earlier one—Insufficiently stamped—Prior note not wiped off. *See* 1940 Dig., Col. 264. NARAYANA *v.* GURAMMA. **1941 M W N. 30=A.I R. 1941 Mad 364=(1940) 2 M.L.J. 918.**

——**O. 1, R. 13**—Applicability — Irregularity as to joinder of parties under United Provinces Tenancy Act.

C. P. CODE (1908), O. 2, R. 2.

See UNITED PROVINCES TENANCY ACT, SS. 294 AND 246. **1941 A.W.R. (Rev.) 687=1941 R.D. 733.**

——**O. 2, R. 2**—Applicability—Omission—If covers accidental omission—Suit for declaration of title in respect of lands in holding—Decree—Certain plots left out from suit—Subsequent suit for declaration of title, and for possession of plots left out—Bar. *See* 1940 Dig., Col. 265. RAM PRASAD SINGH *v.* RADHA PANDAY. **192 I.C. 527=13 R.P. 499=7 B.R. 478=A.I.R. 1941 Pat. 37.**

——**O. 2, R. 2**—*Applicability—Part assignment of debt—Suit by assignee—If barred.*

O. 2, R. 2, C. P. Code, has the effect of barring a particular plaintiff from splitting up his cause of action. In the case of a part assignment of a debt, the assignment itself gives the cause of action and the assignee is, therefore, not prevented from maintaining a suit on the actionable claim assigned to him. (*Dalip Singh and Sale, JJ.*) RAM KRISHEN MOHAN LAL *v.* GURDIAL MAL SAQAR MAL. **43 P.L R. 439=A I.R. 1941 Lah. 337**

——**O. 2, R. 2**—*Applicability—Test—Suit for specific sum of money and suit for rendition of accounts—Causes of action, if different.*

In order to ascertain whether a suit is barred by the provisions of O. 2, R. 2, C. P. Code, it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit. Where in the earlier suit what had to be proved was the fact that the defendants had received certain sums of money from the military department on behalf of the plaintiff in respect of bills which had been submitted by the latter and in the later suit what had to be proved was the terms of a sub-contract between the plaintiff and the defendant and the liability of the defendant to render account, it was held that the cause of action in the two suits was different and that hence the provisions of O. 2, R. 2 did not operate as a bar. (*Collister, J.*) RADHAKISHEN *v.* IKRAMUDDIN. **1941 A.L.J. 288=194 I.C. 586=1941 A.L.W. 490=14 R.A. 2=1941 R.D. 364=1941 O A (Supp.) 334=1941 O W.N. 676=1941 A.W.R. (H.C.) 169=A.I.R. 1941 All. 217.**

——**O. 2, R. 2**—*Bar of suit—Ignorance of existence of right—Second suit—If barred.*

Where the plaintiff was unaware of her assets and liabilities in respect of 1339 and 1340 fasli at the time of the institution of the prior suit in respect of arrears of revenue for 1337 fasli, it was held that a second suit in respect of 1339 and 1340 was not barred by O. 2, R. 2. (*Ghulam Hasan, J.*) BHAGWAN DASS *v.* TAJUNNISSA BIBI. **194 I.C. 363=1941 R.D. 562=13 R.O. 585=1941 O L.R. 452=1941 A.L.W. 528=1941 O.W.N. 681=1941 O A. 465=1941 A.W.R. (Rev.) 411.**

——**O. 2, R. 2**—*Bar of suit—Suit for rent regarding some plots—Subsequent suit regarding other plots.*

A suit for arrears of rent or for determination of rent on some plots is no bar to subsequent suits as regards other plots as the cause of action need not be in any way the same. (*Harper, S.M. and Shirreff, J.M.*) LAL NAR SINGH PRATAP BAHADUR SINGH *v.* BINDHA DIN. **1941 O.A. (Supp.) 861=1941 A.W.R. (Rev.) 1052.**

——**O. 2, R. 2**—*Cause of action different.*

O. 2, R. 2 (3), C. P. Code, has no application where the cause of action in the subsequent suit is not the same as that in the earlier suit. A suit should include the whole claim with respect to one and the same cause of action, but need not include every cause of action or every claim which the plaintiff may have had against

C. P. CODE (1908), O. 2, R. 2.

the defendant at the time. (*Tek Chand and Sale, JJ.*) SHUJA-UD-DIN *v.* SIRAJ-UD-DIN. **195 I.C. 81 = 14 R.L. 30 = 43 P.L.R. 44 = A.I.R. 1941 Lah. 139.**

——**O 2, R. 2**—Mortgage—Suit for interest alone—Subsequent suit for principal and interest—Maintainability. *See* 1940 Dig., Col. 266. NIDHAN SINGH *v.* PREM SINGH **194 I.C. 524 = 13 R L. 543.**

——**O 2 R. 2**—Scope—Contract for sale of immovable property—Subsequent sale in derogation of—Suit for specific performance by prior vendee—Subsequent suit for possession—If barred. *See* C.P. CODE, SS. 16, 99 AND O. 2, RR. 2, 3 AND 4. **43 Bom.L.R. 293.**

——**O. 2. R. 2**—*Scope of.*

O. 2, R. 2 is not directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions. (*Roberts, C.J. and Mosely, J.*) U SIN *v.* MA MA LAY.

1941 Rang. L.R. 14 = 194 I.C. 482 = 13 R.R. 311 = A I R. 1941 Rang. 118.

——**O. 2, R. 2**—Scope—Prior suit for cancellation of lease—Decree—Subsequent suit for mesne profits—Maintainability. *See* 1940 Dig., Col. 266. VENUGOPAL PILLAI *v.* THIRUGNANAVALLI AMMAL.

194 I.C. 840 = 14 R.M. 109 = (1940) 2 M.L.J. 427.

——**O. 2, R. 2 and S. 11, Expl. IV**—Title sujt for possession dismissed—Subsequent suit for redemption of mortgage—If barred. *See* 1940 Dig., Col 267. KALI NATH SHAHA *v.* MANINDRA NATH DAS.

191 I.C. 398 = 13 R.C. 226.

——**O. 2, R. 2 (3)**—Bar of suit—When arises—Person entitled to possession suing only for mesne profits Second suit for mesne profits—If lies. *See* 1940 Dig., Col. 267. SAGHIR HASAN *v.* TAYAB HASAN.

I.L.R. (1940) All. 781 = 192 I.C. 677 = 13 R.A. 356.

——**O 2, R. 3**—Scope—If controlled by Ss 3 and 4 Limitation Act. *See* LIMITATION ACT, SS. 3 AND 4.

(1941) 2 M L.J. 244.

——**O. 2, R. 3**—Scope—Suit on mortgage by assignee of mortgage—Prayer for mortgage decree—Alternative prayer for decree against assignor—Misjoinder. *See* C. P. CODE, S. 99 AND O. 2, R. 3. **22 Pat L.T. 196**

——**O. 2, R. 3**—Suit for redemption of mortgage with possession—Claim for rent paid by mortgagor to mortgagee's use—If can be joined. *See* 1940 Dig., Col. 267. SUBEDAR MIAN *v.* SHEO SHANKAR MISSIR.

1940 P.W N. 1028.

——**O. 2, R. 3**—*Suit to set aside alienation by karta of joint Hindu family—All alienees made parties—Suit if bad for misjoinder of causes of action.*

Where a member of a joint Hindu family sues to set aside the alienations made by the karta of the family ranging over a number of years and all the alienees are made defendants, the various sets of defendants have a community of interest in the sense that they all derive their title from one and the same person (*i.e.*) the karta, and the cause of action against them is the same as it would have been against the karta, if he were alive, and hence the suit is not bad for misjoinder of causes of action. (*Collister, J.*) INDER BAHADUR SINGH *v.* SITA RAM. **I.L.R. (1941) All. 370 = 195 I.C. 145 = 14 R.A. 21 = 1941 O.A. (Supp.) 233 = 1941 A.L.J. 260 = 1941 A.L.W. 324 = 1941 O.W.N. 457 = 1941 A W R. (H.C.) 124 = A.I.R. 1941 All. 209.**

——**O. 2, R. 4**—Scope—Suit for specific performance of contract of sale of immovable property—Joinder of claim for possession also—Vendor and subsequent vendees made parties—Leave of Court—If necessary. *See* C. P. CODE, SS. 16, 99 AND O. 2, RR 2, 3 AND 4.

43 Bom.L.R. 293.

C. P. CODE (1908), O. 3, R. 4.

——**O. 2, R. 6**—*Proper procedure to be adopted by Court proceeding under.*

It was not the intention of the legislature, that where the Court proceeds under O. 2, R. 6, C. P. Code, the plaintiff should be required to file separate plaints. The proper order to pass in such a case is that the plaintiffs should be given an opportunity so to amend his plaint that the allegations against each set of defendants in respect of the various alienations shall be separately set out in order that separate issues may be framed in respect of each transaction, thus enabling the Court to try the suit in sections, each section forming part of the same proceeding and when this has been done, the Court will proceed with the trial of the suit. (*Collister, J.*) INDER BAHADUR SINGH *v.* SITA RAM.

I.L.R. (1941) All. 370 = 195 I.C. 145 = 14 R.A. 21 = 1941 O.A. (Supp.) 233 = 1941 A.L.J 260 = 1941 A.L.W. 324 = 1941 O.W.N. 457 = 1941 A.W.R. (H.C.) 124 = A.I.R. 1941 All. 209.

——**O. 3, R. 1**—*'Any law'—Meaning—If refers to other parts of the Code.*

The words "except where otherwise expressly provided by any law for the time being in force" in O. 3, R. 1, C. P. Code, do not mean other parts of the Code but refer to laws other than the Code. (*Bose, J.*) K. C. MAJUMDAR *v.* SURAJ SINGH. **193 I.C. 707 = 13 R.N. 345 = 1941 N.L.J. 418 = A.I.R. 1941 Nag. 205.**

——**O. 3, R. 1 and O. 41, R. 1**—*Scope and applicability of—Presentation of plaint, if an 'act in any Court'—Presentation by unauthorized person—Curability—Stage.*

O. 3, R. 1, C. P. Code, contains a general provision relating to procedure in Courts and is as much applicable to the presentation of suits as to that of appeals and applications for execution. O. 41, R. 1 is in fact a combination of the provisions of S. 26 and O. 3, R. 1. The presentation of every document in Court must therefore be governed by O. 3, R. 1. The presentation of a plaint, memorandum of appeal, or an application to the munsarim of a Court is undoubtedly an 'act in any Court' so that it is imperative that presentation should be made by the party in person or by his recognized agent or by pleader. Though the presentation of a plaint by a person not duly authorized is an irregularity curable at the discretion of Court, when no attempt has been made to get it cured in the trial Court, it is too late to get it cured in appeal. (*Thomas, C. J. and Zia-ul-Hasan, J.*) ALL INDIA BARAI MAHASABHA *v.* JANGI LAL.

191 I.C. 821 = 1941 A.W.R. (C.C.) 10 = 1941 O.L.R. 32 = 13 R.O 296 = 1940 O A. 1206 = 1940 O W.N. 1253 = A.I.R. 1941 Oudh 169

——**O. 3, R. 4**—"*Acting*"—*Handing over appeal to clerk of Court—If amounts to.*

The mechanical act of handing over an appeal to the clerk of Court or another officer appointed for receiving appeals does not amount to "acting" as contemplated by O. 3, R. 4. It is only a ministerial work and similar in nature to the payment of process-fee, etc., which the clerks of counsel usually do. Consequently another counsel can present an appeal on behalf of the counsel duly authorized under O. 3, R. 4 without a document in writing authorising him to do so. (*Almond, J.C and Mir Ahmad, J.*) GHULAM SARWAR *v.* NABI BAKHSH.

192 I.C. 833 = 13 R. Pesh. 47 = A.I.R. 1941 Pesh. 1.

——**O. 3, R. 4 (2)**—*Scope of appointment of pleader—Power to consent to setting aside* ex parte *decree—Fresh appointment if necessary.*

An application to set aside an *ex parte* decree or dismissal order is part of the proceedings in a suit and

C. P. CODE (1908), O. 5, R. 17.

so in the same way to oppose or consent to such an application is also part of the proceedings in a suit. Hence ordinarily a pleader appointed for the purposes of suit has power to consent to the restoration of the suit dismissed for default. He does not require a fresh power or appointment for that purpose. (*Ba U, J.*) U OAK *v.* MA KHIN. **1941 Rang. L.R. 254= A.I.R. 1941 Rang. 314.**

——**O. 5, R. 17**—Scope—Proper service under—Proof—Peon sending summons through maid servant—Latter not examined—Effect of—Proper service—If can be inferred. *See* 1940 Dig., Col. 268. SNEHALATA DEVI *v.* JANARDAN PRASAD SINGH. **191 I.C 288= 13 R.P. 292=7 B.R. 168**

——**O. 6**—*Obscure pleadings — Clarification—Duty of Court.*

Where a portion of the written statement is too vague and too general to indicate what is meant by the defendant and though no attempt is made on behalf of the plaintiff to seek a clarification of the plea contained therein, it is the duty of the Court to call upon the defendant to furnish definite particulars of the plea. The practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. The law imposes a duty on the Judge to clarify the pleadings. (*Thomas, C.J. and Ghulam Hasan, J.*) FAQIR BUX *v.* THAKUR PRASAD. **194 I.C. 588=14 R.O. 6=1941 O W.N. 801= 1941 A. L.W 640=1941 O A. 519= 1941 A.W.R. (C.C.) 222= A.I.R. 1941 Oudh 457.**

——**O. 6, R. 4**—*Fraud—Absence of pleadings—Relief on evidence disclosing fraud.*

Where a person relies on the fraud of another, it is his duty to say so in his pleadings. In the absence of any pleading, even if there is evidence of fraud, the Court would not be able to consider it. (*Clarke, J.*) ANDOLI UDAIBHAN *v.* JAMNABAI. **1941 N.L.J. 230.**

——**O. 6, R. 7**—Pleadings—New and different ground of exemption from limitation—If permissible. *See* 1940 Dig., Col. 268. RAJ BAHADUR *v.* RAJA RAM. **191 I.C. 305=13 R.O. 224= A.I.R. 1941 Oudh 111.**

——**O. 6, R. 17**—*Addition to pleadings—Objection for first time in appeal.*

It is within the power of the Court to allow parties to add to their pleadings and where this is done without any objection by the parties, it is too late in the day for one of the parties to raise objections to it in appeal for the first time. (*Yorke and Agarwal, JJ.*) MAHOMED EJAZ RASUL *v.* SAIYID ALI MAHOMED. **194 I.C. 615=1941 O.A. 506=14 R O. 18= 1941 R.D 431=1941 A L.W. 613= 1941 A.W.R. (Rev.) 518=1941 O.L.R. 512= 1941 O.W N. 768=A.I.R. 1941 Oudh 498.**

——**O. 6, R. 17**—*Amendment of plaint—Grounds.*

A plaintiff has a right to amend his plaint in any manner he likes and so long as amendments prayed for are not contrary to law, or are likely to lead to injustice they should be granted. (*Ganganath and Dar, JJ.*) MOHRI KUNWAR *v* KESHRI CHAND **I.L.R. (1941) All. 558=195 I.C. 758= 14 R.A. 78=1941 A.L.W. 550=1941 A.L.J. 376= 1941 A.W R (H.C.) 188=1941 O.W.N. 704= 1941 O.A. (Supp.) 394=1941 R.D. 394= A.I.R. 1941 All. 298.**

——**O. 6, R. 17**—Amendment—Prayer for—Procedure to be followed. *See* 1940 Dig., Col. 269. EUSOOF KARWA *v.* MRS. NIEMEYER. **194 I.C. 177= 13 R.R. 275=A.I.R. 1941 Rang. 37.**

C. P. CODE (1908), O. 6, R. 17.

——**O. 6, R. 17**—*Cause of action—Elucidation, not alteration—Suit on promissory note by deceased brother of joint Hindu family against survivor—Amendment that debt was for family benefit—If can be allowed.*

Where suit on a promissory note executed by the deceased elder of the two brothers of joint Hindu family was brought against the survivor on the ground that the defendant had only acknowledged the debt of the defendant and an amendment, that the debt in question was borrowed for the benefit of the joint Hindu family was sought to be made in the plaint, it was held that the amendment did not alter the cause of action upon which the plaintiff came into Court but merely elucidated the reasons on which the liability was sought to be enforced and that it should be allowed even though on the date of the amendment the suit was barred by limitation. (*Ghulam Hasan, J.*) SAMPAT SHUKUL *v.* SUBKARAN TEWARI. **1941 O.W.N. 1112=1941 A.L W. 928= 1941 O.A. 827=196 I.C. 511=14 R.O. 187= 1941 A.W.R. (C.C.). 319=1941 O.L.R. 699.**

——**O. 6, R. 17**—Change in the nature of suit—Amended claim based on prior loan—Original claim based on pronote in renewal of original loan—Amended suit by plaintiff as executrix—Character of suit if altered—Liability of executrix for costs. *See* 1940 Dig, Col. 270. EUSOOF KARWA *v.* MRS. NIEMEYER. **194 I.C. 177=13 R.R. 275=A.I.R. 1941 Rang. 37.**

——**O. 6, R. 17**—*Conditional order—Acceptance of cost by opposite party—Right to challenge amendment.*

Where an amendment of the plaint is ordered on condition of payment of costs to the opposite side and the opposite side has accepted such costs without demur, it is not thereafter open to that party to challenge the order. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76=1941 N.L.J. 371= A.I.R. 1941 Nag. 273.**

——**O. 6, R. 17**—*Late stage—New but not inconsistent case—Amendment, necessitated by defendant's plea—Permissibility.*

The plaintiff brought an action on the last day of limitation to recover a certain sum on the basis of stamped acknowledgment executed by the defendant in the plaintiff's account book. The defendant admitted execution of acknowledgment but denied receipt of cash consideration and pleaded that suit was not maintainable as based on mere acknowledgment and that if suit was maintainable previous transactions between the parties should be reopened as the acknowlegdment was executed on taking account of those transactions. As the defendant denied cash consideration the plaintiff sought to amend the plaint and to base his claim on the original transaction. The amended claim was however barred on the date of the application for amendment which was filed immediately after the defendant's written statement denying cash consideration.

Held, that the plaintiff was entitled to the amendment which though it introduced a new case did not introduce an inconsistent case. Even if it could be said that the amendment was sought at a late stage and that it sought to introduce a new and inconsistent cause of action, the special circumstances (defendant himself in his written statement having asked for reopening the previous transactions) of the case justified the amendment of the plaint. (*Clarke, J.*) SETH MANGILAL *v.* ZAM SINGH. **196 I.C. 190=14 R.N. 85= 1941 N.L.J. 340=A.I.R. 1941 Nag. 289.**

——**O. 6, R. 17**—*Mistake—No injustice done and nobody misled—Suit in the name of a deity when property is bequeathed to temple—Amendment, if justified.*

Where a suit is wrongly instituted in the name of the deity when the property is bequeathed to the temple, but

C. P. CODE (1908), O. 6, R. 17.

the irregularity had neither occasioned any injustice nor misled any of the parties to the suit and had not resulted in any of the questions at issue being improperly tried, it would not be right to dismiss the suit altogether and amendment would meet the ends of justice. (*Stone, C. J. and Bose, J.*) SHRI MAHADEOJI *v.* BALDEO PRASAD. **1941 N.L.J. 184 = A.I.R. 1941 Nag. 181.**

——**O 6, R. 17**—Power of Court—Order directing party to amend his plaint—If justified—Revision—Interference *See* 1940 Dig., Col. 270. BHAGWAT PRASAD *v.* FANISHDEO TEWARI.

1941 A.W.R. (Supp.) 3 = 1941 O.A. (Supp.) 60 = A I R. 1941 Pat. 44.

——**O. 6, R. 17**—*Powers of Court—Leave to amend written statement in appeal—Amendment introducing new and inconsistent case of* jus tertii *in suit for possession—Permissibility.*

It is indisputable that leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Although mere delay would not be a ground for refusing leave to amend, where the amendment is being proposed with the object of introducing an entirely new and inconsistent case, it cannot be allowed. It might be possible for a defendant to raise an inconsistent or an alternative case when he files his written statement, in the beginning, but he cannot be permitted to advance new positions at the time of arguments before the trial Court or ask for the written statement to be amended before the appellate Court. Leave to amend a written statement so as to set up a plea of *jus tertii*, in answer to the plaintiff's claim for recovery of possession of property, ought not therefore to be granted on an application preferred to the appellate Court. (*Abdur Rahman, J.*) SUBBAYYA *v.* CHANDRAYYA.

A.I.R. 1941 Mad. 811 = (1941) 2 M.L J. 442.

——**O. 6, R. 17 and S. 115**—Power to allow amendment—Object of—Amendment, changing nature of suit—Interference in revision. *See* 1940 Dig., Col. 271. LACHMIN *v.* BHAIRON BAKHSH SINGH.

16 Luck. 65.

——**O. 6, R. 17**—Refusal of amendment—Revision if lies. *See* C. P. CODE, S. 115 AND O. 6, R. 17—CASE DECIDED. **1941 N.L.J. 340.**

——**O. 6, R. 17**—*Scope—Amendment enlarging subject-matter of claim—Permissibility.*

In many cases where the plaint is allowed to be amended the subject-matter of the claim is necessarily enlarged and the defendant can hardly be heard to say that it is unjust that the plaint should be allowed to be amended simply because it will result in his having to pay the just dues of the plaintiff. Hence an amendment of plaint by which the subject-matter of the claim is enlarged by including the right to enforce the mortgage bond against the properties which the plaintiffs were entitled in law to enforce by the right of subrogation which they possessed and to which they had expressly referred in their written statement in an earlier suit is justified. (*Harries, C.J. and Manohar Lall, J.*) TIKA SAO *v.* HARI LAL.

195 I.C. 428 = 7 B.R. 924 = 14 R.P. 122 = A.I R. 1941 Pat. 276.

——**O. 6, R. 17**—Second appeal—Amendment of plaint—Suit for sale on mortgage—Finding that mortgage is opposed to statute and unenforceable—Amendment to include prayer for possession on the basis of acquisit onof title as owner by prescription—Permissibility. *See* 1940 Dig., Col. 271. MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS. **1940 P.W.N. 986.**

——**O. 6, R. 18**—*Plaint not amended within period allowed y Court—Effect—Liability of suit to dismissal.*

C. P. CODE (1908), O. 7, R. 11.

Failure to amend a plaint within the period allowed by the Court does not render the suit liable to dismissal but merely operates to prevent the plaintiff at any subsequent period being permitted to amend his plaint. (*Mitchell, F.C.*) RAHMAT-ULLAH *v.* KARIMU. **20 Lah.L.T. 145.**

——**O. 7, R. 10**—*Court returning plaint for presentation to proper Court—Power of such Court or of appellate Court to fix time within which plaint should be refiled.*

When a Court returns a plaint for being presented to the proper Court under O 7, R. 10, C. P. Code, neither such Court nor the appellate Court to which an appeal is filed from the order of that Court has power to fix a date or otherwise allow time within which the plaint is to be refiled. It is for the Court in which it is so presented to consider whether the plaint is within time, and whether, having regard to the provisions of the Limitation Act, the plaintiff is entitled to the deduction of any time in computing limitation. (*Biswas and Roxburgh, JJ.*) SURENDRA NATH *v.* JATINDRA NATH. **45 C.W.N. 524.**

——**O. 7, R. 10**—Jurisdiction – Order returning plaint—Condition precedent for payment of costs before presentation of plaint to proper Court—Power of Court to impose. *See* C. P. CODE, S. 35 AND O. 7, R. 10.

54 L.W. 315 = (1941) 2 M.L.J. 450.

——**O. 7, R. 10**—Order under — Competency—Court originally not having but subsequently invested with jurisdiction—If can return plaint for presentation to itself. *See* 1940 Dig., Col. 272. ABDULLA KHAN *v.* TIRBHUAN DUTT SINGH. **16 Luck. 402 = 13 R.O. 265 = 191 I.C. 708 = 1941 A W.R. (C C.) 3 = 1941 O.L.R. 9 = A.I.R. 1941 Oudh 161.**

——**O. 7, R. 10**—*Return of plaint—Representation to proper Court—Date of institution.*

If a plaint is returned under R. 10, O. 7, C. P. Code and is presented to another Court in the same condition in which it is returned, it must be deemed to have been instituted on the date on which it was originally filed in the first Court and the date of institution does not alter with the change in the Court. (*Harper, S M. and Sathe, J.M.*) GOBARDHAN SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, MAHEWA ESTATES.

1941 O.W N 713 = 1941 O.A. (Supp.) 365 (2) = 1941 R.D. 412 = 1941 A W R. (Rev.) 435 = 1941 A.L.J. (Supp.) 92.

——**O. 7, R. 10**—Return of plaint—When to be made and when not to be made. *See* 1940 Dig., Col. 272. MANGIA *v.* SAKIA.

I.L.R. (1941) Nag 96 = 191 I.C. 200 = 13 R.N. 164.

——**O. 7, R 11**—Applicability—Application to sue *in forma pauperis*. *See* 1940 Dig., Col. 272. OFFICIAL RECEIVER, AMRITSAR *v.* SOHAN LAL RAMJI DASS, **I.L.R. (1941) Lah. 652 = 191 I.C. 335 = 13 R L. 286.**

——**O. 7, R. 11** — Applicability—Memoranda of appeal. *See* 1940 Dig., Col. 272. GAJADHAR BHAGAT *v.* MOTI CHAND. **22 Pat.L.T. 549 = A.I R. 1941 Pat 108.**

——**O. 7, R. 11**—*Applicability—Suit by one indeterminate body against another similar body of the same community.*

Where a suit was by one indeterminate body of one community against a similar body of the same community, and no attempt was made to explain to the Court the true position of the respective bodies, it was held that the plaint was bad and should be rejected under O. 7, R. 11, C. P. Code. (*Davis.*) ROOP CHAND *v.* ONKAR LAL. **1941 A.M L.J. 15.**

——**O 7, R. 11**—Costs—Appeal—Rejection for non-payment of additional Court-fee within time fixed—

C. P. CODE (1908), O. 7, R. 11.

Costs of preliminary hearing in order for additional Court-fee—Right of respondent. *See* BOMBAY HIGH COURT RULES (A.S.), R. 130. **43 Bom.L.R. 475.**

——**O. 7, R. 11**—*Procedure—Failure to pay additional court-fee—Correct order to pass—Dismissal of suit—Propriety of.*

Under O. 7, R. 11, C. P. Code, where the plaintiff fails to pay the additional court-fee, required of him within the time fixed, the correct order is to reject the plaint and not to dismiss the suit, though there is very little difference between an order rejecting a plaint and an order dismissing the suit. (*Davis, C.J. and Lobo, J.*) FAZILAT KHATUN *v.* RAHIM BUX.

I.L.R. (1941) Kar. 102 = A.I.R. 1941 Sind 154.

——**O. 7, R. 11**—*Return of plaint—When justified and when not.*

When once a plaint has been presented, that is final and unless it is rejected or returned according to O. 7, R. 11, C. P. Code, it is to be immediately registered and a copy of it forwarded with notice to defendant. Return of plaint for amendments without notice to defendants is not proper inasmuch as the defendant is denied any benefit that might accrue to him from the mistake of the plaintiff. (*Davies.*) SHIAM SUNDER *v.* HARI KISHEN. **1940 A.M.L.J. 129.**

——**O. 7, R. 11**—Scope of—Order dismissing suit against some defendants—Finding that suit cannot proceed against them for want of sanction of Provincial Governor—If decree—Plaint—If to be rejected as a whole. *See* C. P. CODE, S. 115.

1941 P.W.N. 25.

——**O. 8, R. 1 (2) (Oudh)**—*Production of document—Duty of defendants—Production on day of hearing—Rejection—Propriety.*

According to O. 8, R. 1 (2) (Oudh) it is the bounden duty of the defendants to file a list of the documents to be relied upon on the date of the written statement and to summon the documents at any rate for the date of issues. If they are unable to procure the documents by that date they could ask leave of the Court to produce them at a later stage. Not doing any of these things where a defendant seeks to file two documents on the date fixed for evidence, the trial Court has perfect discretion to disallow the production of those documents. (*Ghulam Hasan, J.*) MATA DIN *v.* IMDAD KHAN. **1941 O.A. 886 = 1941 A.W.R. (Rev.) 1005 = 1941 O.W.N. 1179.**

——**O. 8, R. 5**—*Applicability—Admission of execution of bond for a particular sum on taking accounts.*

Where in a suit the defendant has admitted that he executed a bond for certain sum on certain date on taking accounts and has admitted that he agreed to pay the amount on certain date, this is not a case, which falls under O. 8, R. 5 of an implied admission. This is an example of an express admission. (*Stone, C. J. and Vivian Bose, J.*) UDHAO NANAJI *v.* NARAYAN VITHOBA. **194 I.C. 120 = 13 R.N. 356 = 1941 N.L.J. 134 = A.I.R. 1941 Nag. 95.**

——**O. 8, R. 5**—*Denial by necessary implication—Statement, that allegation needs no reply.*

There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang.L.R. 101 = 193 I.C. 114 = 13 R.R. 228 = 4 F.L.J. (H.C.) 114 = A.I.R. 1941 Rang. 49.**

——**O. 8, R. 6**—*Right to set off—Suit by receiver appointed under S. 69-A, T. P. Act—Prior debt due to defendant from mortgagor—If can be set off.*

C. P. CODE (1908), O. 9, R. 3.

If the defendant is sued by the agent he cannot set off a debt due from the principal, unless it can be shown that the agent has assented to such a set off. A receiver appointed under S. 69-A of the T. P. Act is an agent of the mortgagor, and if he sues the defendant to recover a sum of money on the basis of a new contract entered into by him, the defendant cannot seek to set off against the plaintiff's claim a debt incurred by the mortgagor prior to the date of his appointment. Such a debt is not legally recoverable by the defendant from the plaintiff—it is recoverable from the plaintiff's principal who is not a party to the suit. (*Derbyshire, C.J. and Mukherjea, J.*) BANERJEE & CO. *v.* WILFRED JOHN YOUNIE. **195 I.C. 141 = 14 R.C. 50 = 45 C.W.N. 169 = A.I.R. 1941 Cal. 308.**

——**O. 8, R. 6**—Scope—Suit by landlord for rent—Counter-claim by defendant-tenant for damages for dispossession—Propriety — Failure to pay Court-fee on counter-claim—Right of defendant to relief. *See* 1940 Dig., Col. 274. JOWALA PRASAD *v.* HARIHAR PRASAD. **192 I.C. 776 = 7 B.R. 490 = 13 R.P. 523 = A.I.R. 1941 Pat. 106.**

——**O. 8, R. 6**—*Set-off and counter-claim—Withdrawal of plaint—Effect.*

In the case of a regular set-off, such as is contemplated by O. 8, R. 6, C. P. Code, if the plaintiff's claim breaks down for any reason including withdrawal then the defendant would be entitled to have his set-off considered by the same Court and he could be given a decree for a set-off in the same suit, but where his claim is not a regular set-off but is a counter-claim, then, if the counter-claim lies in the Small Cause Court he cannot agitate it in the regular Court. (*Clarke, J.*) JAMNADAS *v.* BEHARILAL. **196 I.C. 544 = 14 R.N. 110 = 1941 N.L.J. 382 = A.I.R. 941 Nag. 258.**

——**O. 8, R. 6**—Set-off under and set off in liquidation proceedings—Difference between. *See* COMPANY—WINDING UP—SET-OFF. **1941 O.W.N. 548.**

——**O. 9, R. 2**—*Powers of Court—Plaintiff not depositing full process-fee for service on all defendants—Court, if bound to serve some defendants only with process-fee at its disposal—Defendants not served and absent on date fixed for hearing—Dismissal of suit—If without jurisdiction.*

If a plaintiff does not deposit sufficient process-fees for service on all the defendants and fails to deposit the balance of fee before the date fixed for the hearing of the suit, the Court will be justified in dismissing the suit for default. The fact that the defendants are not present on the date of hearing makes no difference, because their absence is due to the non-payment of the process-fee. It is not open to the plaintiff to contend that the Court should serve at least the defendants for whose service the money paid will be sufficient. If the plaintiff wishes the Court to issue process to some of them he must specify which of them he desires to serve. It is not for the Court to decide which of the defendants are to be served, because the plaintiff might afterwards complain that the Court had exercised an unwise discretion by serving unsubstantial defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position. (*Agarwala, J.*) BHUNESHWARI KUER *v.* SAMA KUER. **194 I.C. 47 = 13 R.P. 650 = 7 B.R. 678 = A.I.R. 1941 Pat. 402.**

——**O. 9, R. 3**—*Applicability—Date fixed for proof of service—No steps taken and plaintiff failing to appear—Dismissal for default—Legality.*

O. 9, R. 3, C. P. Code, has no application unless a date has been fixed for the appearance of the defendant and neither party appears when the suit is called on for

C. P. CODE (1908), O. 9, R. 3.

hearing. Where a date is fixed merely for proof service on the defendant if the proof is not forthcoming on the date so fixed, an order dismissing the suit on that date for default on the ground that the plaintiff does not appeal and has not taken steps, is illegal. (*Varma and Rowland, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* SAKALPAT TEWARY. **196 I.C. 592 = 14 R.P. 212 = 8 B.R. 45 = 22 Pat.L.T. 952.**

——**O. 9, R. 3 and O. 22, R. 4**—*Dismissal of suit under O. 9, R. 3—Death of defendant prior to—Restoration and substitution—Time for.*

Where after a suit was dismissed under O. 9, R. 3, it was found that the defendant had died a day earlier and an application for restoration and substitution was made more than 30 days after the dismissal but within 90 days of the death of the defendant and it was allowed in the lower Court, it was *held* that in the circumstances of the case there was no reason to interfere in revision with the order passed. (*Shirreff, J.M.*) UMMAT-UL-HABIB BEGUM *v.* IMTIAZ BEGAM. **1941 O.A. (Supp.) 609 = 1941 R.D. 662 (2) = 1941 A.W.R. (Rev.) 669.**

——**O. 9, R. 8**—*Non-appearance of plaintiff—Day fixed for filing written statement—Dismissal if justified.*

On the date fixed for the filing of written statement there is no necessity for the plaintiff to be present. A dismissal for his absence on that date is illegal. (*Davies.*) BISAL SINGH *v.* BAJ MAL. **1941 A.M.L.J. 39.**

——**O. 9, R. 9**—*Dismissal for default—Procedure to be followed.*

It is not right to say that orders of dismissal in default should not be passed till the end of the day when the Court rises when only there can be a default. Litigants are ordinarily required to attend the Court at 10 A.M. and when they fail to do so without sufficient cause, there is no reason why they should not be penalised. To allow them to attend at any time of the day before the Court rises, might make it impossible to carry on the work of the Court properly, by putting it in the power of litigants to obstruct it. (*Bennett and Agarwal, JJ.*) BAIJNATH *v.* IQTIDAR FATIMA. **1941 O.W.N. 1045 = 1941 A.W.R. (Rev.) 775 = 196 I.C. 257 = 1941 O.L.R. 664 = 14 R.O. 145 = 1941 R.D. 796 = 1941 O.A. 743.**

——**O. 9, R. 9 and S. 151**—Dismissal in default—When should be ordered—Dismissal early in the day and under misapprehension—Restoration under inherent powers. *See* 1940 Dig., Col. 275. BADRI PRASAD *v.* AMBIKA PRASAD. **16 Luck. 294 = 13 R.O. 349 = 192 I.C. 332 = 1941 O.L.R. 115 = A.I.R. 1941 Oudh 91.**

——**O. 9, R. 9**—*Pauper application—Dismissal for default—Restoration—Grounds.*

When an application to sue as pauper is dismissed for default and an application for restoration is made on the same day and it is shown that the applicant was present in Court that day, though absent when case called, restoration of the application is justified. (*Bennett and Ghulam Hasan, JJ.*) BAIJNATH *v.* RAM NARAIN. **194 I.C. 354 = 13 R.O. 587 = 1941 O.L.R. 448 = 1941 A.W.R. (C.C.) 170 = 1941 O.W.N. 678 = 1941 O.A. 427 = A.I.R. 1941 Oudh 367.**

——**O. 9, R. 9**—Scope of—Application under O. 21, R. 13—Dismissal on failure to satisfy condition imposed—Subsequent application to restore prior application—Competency — Dismissal—Appeal against order of dismissal—Competency—C. P. Code, O. 43, R. 1. *See* 1940 Dig., Col. 276. VENKATACHARIAR *v.* FAIZUD-

C. P. CODE (1908), O. 10, R. 2.

DEEN SAHIB. **A.I.R. 1941 Mad. 17 = (1940) 2 M.L.J. 374.**

——**O. 9, R. 13**—*Application under—Opportunity to other side to contest—Necessity.*

Where an application for restoration is made under O. 9, R. 13 an opportunity should be given to the other side to contest it, before it is sanctioned. (*Harper, S. M. and Sathe, J.M.*) JAGDISH PAL KUNWAR *v.* BAIJ NATH. **1941 R.D. 418 (2) = 1941 O.A. (Supp.) 484 = 1941 A.W.R. (Rev.) 553.**

——**O. 9, R. 13**—Construction and scope—Duty of Court—Express finding as to sufficient cause or want of due service—Court if bound to record—Failure to record—If justifies interference in revision—Order—If without jurisdiction. *See* 1940 Dig., Col. 277. VIRESAM *v.* ADINARAYANA. **A.I.R. 1941 Mad. 114 = (1940) 2 M.L.J. 977.**

——**O. 9, R. 13**—Power of Court under—Order for deposit of costs or security for decree amount pending trial of application—Legality. *See* 1940 Dig., Col. 277. NARAYANAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **191 I.C. 880 = 13 R.M. 533 (1) = (1940) 1 M.L.J. 710.**

——**O. 9, R. 13 and O. 23, R. 1**—Scope—Suit against several defendants—One remaining *ex parte*—Plaintiff withdrawing against others and getting *ex parte* decree against one only—Subsequent setting aside of *ex parte* decree—Right of plaintiff to proceed against others—Procedure. *See* 1940 Dig., Col. 278. RAJAGOPALA RAO *v.* BHANOJI RAO. **192 I.C. 799 = 13 R.M. 614 = (1940) 1 M.L.J. 811.**

——**O. 9, R. 13**—*Sufficient cause—Non-receipt of intimation from attorney.*

Where an application under O. 9, R. 13 is allowed and on defendant's failure to file a written statement within the time fixed by the Court the suit is again decreed *ex parte*, the defendant's failure to receive information as to the result of his prior application from his attorney is not a sufficient cause within the meaning of O. 9, R. 13 for setting aside the *ex parte* decree when the failure is due to the defendant's own deliberate action in not seeing that informations were sent to him. The defendant's position however would be stronger if he could show either that the intimation had not been sent by his attorney or had been wrongly addressed and therefore not delivered. (*Panckridge, J.*) GOPAL KRISHNA NABAKISHORE *v.* CHINTAHARAN. **A.I.R. 1941 Cal. 254.**

——**O. 10, Rr. 1 and 2**—*Scope of—Suit for declaration that mortgagor had no interest in property mortgaged and that plaintiff was absolutely entitled to same—Issues framed—Court examining mortgagee's pleader and recording his statement that he did not know how mortgagor acquired title—Propriety of.*

In a suit against the mortgagor and the mortgagee for a declaration that the mortgagor had no interest in the mortgaged property and that the plaintiff was absolutely entitled to the same, the Court framed the issues and on the same date examined the mortgagee's counsel and recorded his statement to the effect that he did not know how the mortgagor acquired title to the mortgaged property.

Held, that the statement by the counsel fell under O. 10, R. 1 and not under O. 10, R. 2 and that the same could not be recorded even under O. 10, R. 1. (*Davis, C.J. and Lobo, J.*) VASUMAL *v.* KARAM CHAND. **I.L.R. (1941) Kar. 146 = 194 I.C. 81 = 13 R.S. 243 = A.I.R. 1941 Sind 41.**

——**O. 10, R. 2**—*Scope and object of—Duty of Court—Examination of defendant to obviate recording of plaintiff's evidence—Legality of.*

C. P. CODE (1908), O. 11, R. 1.

The power given by O. 10, R. 2 to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. 18. On the death of the widow of the last male-holder the plaintiff sued for a declaration that he was entitled to the last male holder's estate as next reversioner. On the date fixed for hearing the Court in supersession of the provisions of O. 18 adopted the extraordinary procedure of examining the defendant and recording his admission as to the plaintiff's relation with the last male holder with a view to obviate the recording of evidence and thereby expedite the disposal of the suit. After the record of aforesaid admission both parties closed their case without adducing any evidence and the Court decreed the suit.

Held, that the procedure was illegal and amounted to a misuse of the provisions of O. 10, R. 2 since the examination of defendant could not be said to be necessary in order to obtain information on any material question relating to the suit. The burden was on the plaintiff to establish by evidence that the estate of the last male-holder had vested in him, that he was the reversioner after the widow's death entitled to sue, and this burden could not be said to have been discharged by the defendant's statement admitting the plaintiff's relation with the last male-holder. The fact that it was nobody's case that there existed any reversioners nearer than the plaintiff was immaterial and the plaintiff was bound to go into the witness-box and prove his title as next reversioner. (*Davis, C. J. and Lobo, J.*) VASUMAL *v.* KARAM CHAND. **I.L.R. (1941) Kar. 146 = 194 I.C. 81 = 13 R.S. 243 = A.I.R. 1941 Sind 41.**

——O. 11, R. 1 and O. 3, R. 1—*Party ordered to answer interrogatories—If can answer through recognised agent.*

O. 3, R. 1 governs O. 11, R. 1, C. P. Code. The former order is a general one and has general application. Therefore, unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought to be applied. If a party to a suit is ordered to answer interrogatories, he is not bound to answer personally in the absence of a special direction to that effect, and he can answer through some recognised agent, who knows the facts. In other words, an affidavit need not be sworn to by the party himself and this can be done by a recognised agent. (*Bose, J.*) K. C. MAJUMDAR *v.* SURAJ SINGH. **193 I.C. 707 = 13 R.N. 345 = 1941 N.L.J. 418 = A.I.R. 1941 Nag. 205.**

——O. 11, R. 14—*Discretion of Court — Order directing defendant to apply for certified copies of income-tax returns and profit and loss statements and produce them at plaintiff's cost—Legality—Income-tax Act, S. 54.*

An order under O. 11, R. 14, C. P. Code, is a discretionary order, and the power should be exercised with great caution. Further the rule deals only with existing documents and documents which at the time of the application are in the possession or power of the party against whom the order is sought to be made. On an application by the plaintiff in a suit, the lower Court ordered the defendant to apply for a certificate copy of his income-tax returns and profit and loss statements with particulars submitted by him to the income-tax department and to produce them at the plaintiff's costs.

Held, (1) that there being no document in existence, it could not be in the power of the defendant; (2) that the Court was prohibited from ordering a defendant to produce his income-tax returns in view of S. 54 of the Income-tax Act; (3) and that the order was therefore contrary to law and should be set aside. (*Mockett, J.*) VELAYUDHAM PILLAI *v.* SUBRAMANIA PILLAI. **I.L.R. (1941) Mad. 716 = 1941 I.T.R. 275 = 1941 M.W.N. 569 = 53 L.W. 543 = A.I.R. 1941 Mad. 709 = (1941) 1 M.L.J. 617.**

C. P. CODE (1908), O. 16, R. 1.

——O. 13, R. 2—*Sufficient cause—Delay in filing documents—Illness and subsequent death of defendant's father.*

Where owing to the illness and subsequent death of his father the defendant is not able to file the documents in support of his case and produces them after some delay, it is sufficient cause to permit the documents being produced even at a third hearing. (*Shirreff, J.M. and Sathe, J.M.*) RAMDAYAL *v.* JOTI PRASAD. **1941 O.A. (Supp.) 830 = 1941 A.W.R. (Rev.) 986 = 1941 R.D. 939.**

——O. 13, R. 10—*Requisitioning under—Use as part of evidence—Procedure.*

The record of a case does not become part of the evidence merely by being requisitioned in a subsequent case under O. 13, R. 10, C. P. Code. Any original statement or other document on the record of the previous case which is relied upon in a subsequent case must be duly proved according to the provisions of the Evidence Act before it can be utilised as part of the evidence in the later case. (*Harper, S. M. and Sathe, J.M.*) DINA *v.* GIRWAR SINGH. **1941 O.A. (Supp.) 371 = 1941 R.D. 390 = 1941 A.W.R. (Rev.) 441.**

——O. 13, R. 10 (1)—*Power of Court under—Limits—Admission of document concerned—Proper procedure.*

The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection, the trial Court comes across an important document which in its opinion throws important light on the question at issue or is of material assistance in ascertaining the truth, it is open to it to bring it on record and prove it according to law, before using it as evidence in the case. Mere summoning of the record does not, however, render the entire record *ipso facto* evidence in the case. (*Bennett and Ghulam Hasan, JJ.*) GOKUL PRASAD *v.* MAHADEI. **194 I.C. 195 = 13 R.O. 563 = 1941 O.L.R. 425 = 1941 A.L.W. 520 = 1941 O.W.N. 643 = 1941 O.A. 412 = 1941 A.W.R. (C.C) 166 = A.I.R. 1941 Oudh 341.**

——O. 14, R. 1—*Failure to frame issue—If fatal to suit.*

The failure to frame an issue is not necessarily fatal to a suit, provided substantial justice has been done. Where the plea of the applicability of S. 41, T. P. Act, is raised in the defence, arguments are addressed to the Court and the matter has been before the parties during the case, the Court is justified in applying the principles of S. 41, T.P. Act, even though no issue was framed on that point. (*Almond, J.C. and Soofi, J.*) HIRA SINGH *v.* MAHOMED AFZALKHAN. **196 I.C. 17 = 14 R. Pesh. 22 = A.I.R. 1941 Pesh. 59.**

——O. 16, R. 1 (Lahore Amendment)—*Examination of witnesses not mentioned in list—Discretion of Court.*

O. 16, R. 1 is a technical one and in the absence of any prejudice to either party, Court is not justified in refusing to examine the witnesses on the ground that they were not mentioned in the list. The rule gives the Court discretion to allow witnesses to be examined even if they are not mentioned in the list if it is satisfied that

C. P. CODE (1908), O. 17, R. 1.

there are sufficient reasons for doing so. The rule should not be applied mechanically. (*Bhide and Din Mahomed, JJ.*) KARIM BAKHSH *v.* THAKAR DASS RAM LAL.
193 I.C. 166=13 R.L. 436=A.I.R. 1941 Lah. 38.

——**O. 17, R. 1**—*Discretion of Court—Defendants summoning no evidence and applying for adjournment on pretext of illness—Court rejecting application—If justified.*

Where the defendant who was present in Court summoned no evidence and applied for adjournment on the pretext of being ill and the Court rejected the application on the ground that the defendant was shamming,

Held, that the discretion in refusing adjournment was properly exercised and could not be interfered with. (*Davis, C. J. and Lobo, J.*) VASUMAL *v.* KARAM CHAND. **I.L.R. (1941) Kar. 146=194 I.C. 81=13 R.S. 243=A.I.R. 1941 Sind 41.**

——**O. 17, R. 1**—*Prayer for adjournment—Depositing of case* sine die—*Effect.*

Where a Court deposits a case *sine die* at the request of plaintiff for an adjournment, it does not amount to dismissal of the case and it can be revived on the application of the plaintiff. (*Sathe, J.M.*) MATBAR *v.* BHAGWAN DASS. **1941 R.D. 176=1941 O.A. (Supp.) 164=1941 A.W.R. (Rev.) 230.**

——**O. 17, R. 1 and O. 33, R. 8**—*Suit* in forma pauperis—*Trial—Plaintiff not ready—Grant of adjournment conditional on paying day costs within next hearing—Costs not paid—Power of Court to dismiss suit—Pauper, if exempted from payment of adjournment costs.*

In a suit filed *in forma pauperis*, the plaintiff was not ready at the date of the hearing and on his application the Court adjourned the case directing as a condition precedent that the plaintiff should pay day costs to the defendants within the next hearing date. By the adjourned date, the plaintiff had not paid the costs. On a contention as to the propriety of attaching such a condition and the procedure to be adopted on breach thereof,

Held, the Court has jurisdiction under O. 17, R. 1, C. P. Code, to pass an order of adjournment conditional on payment of costs by the plaintiff on failure of which the suit should straightaway be dismissed. 8 M.L.J. 189=21 Mad. 403 and A.I.R. 1928 Mad. 786, Foll.

Held, further, that under O. 33, R. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance. 6 Rang. 561, Foll. 47 Bom. 104, Not Foll. (*Krishnaswami Ayyangar, J.*) RAJU CHETTIAR *v.* RAMAKKAL. **53 L.W. 206=1941 M.W.N. 303=A.I.R. 1941 Mad. 437=(1941) 1 M.L.J. 305.**

——**O. 17, Rr. 2 and 3**—Applicability and scope—Issues framed and suit adjourned for production of evidence by parties—Plaintiff failing to appear—Procedure—Disposal of merits — Propriety—Discretion of Court—Judicial exercise. *See* 1940 Dig., Col. 280. RUKMANSA RAJANSA *v.* SHANKAR GOUDA BASANGOUDA. **I.L.R. (1941) Bom. 150=193 I.C. 768=13 R.B. 348=A.I.R. 1941 Bom. 83.**

——**O. 17, R. 2 (2) (Allahabad)**—*Applicability—Disposal under—Restoration, if possible.*

Where after the filing of certain documents by defendants the case is adjourned to another day for arguments and for certain rebutting evidence to be produced by the plaintiffs if they chose to, and on the adjourned day the plaintiffs fail to appear and the Court disposes of the case on the evidence available, the disposal is one under para. (2) of R. 2 (2) of O. 17, C. P. Code (Allahabad) on the merits. There can be no restoration application

C. P. CODE (1908), O. 20, R. 5.

in such a case. (*Sathe, A.M.*) RAM LAL *v.* KHIALI. **1941 O.A. (Supp.) 787=1941 A.W.R. (Rev.) 913=1941 R.D. 922.**

——**O. 17, R. 3 and O. 6, R. 17**—*Adjournment for amendment on condition precedent—Condition not fulfilled—Effect.*

Where a case is adjourned for the filing of an amendment on a condition precedent and the condition is not fulfilled it must be taken that the adjournment was not given and the amendment as not filed, even if it is in fact filed. (*Davies.*) HEERA LAL *v.* CHAMPA LAL. **1941 A.M.L.J. 33.**

——**O. 17, R. 3**—*Decision when one under—Remedy open.*

Where a case is adjourned to another date at the request of defendants to enable him to produce certain witnesses and on the adjourned date the defendant is absent but the plaintiff is however present and the Court after recording the evidence produced by him proceeds to dispose of the case on the merits and writes a considered judgment, the order must be held to be one under O. 17, R. 3 and not under either the first or second paragraph of R. 2 of O. 17. The only remedy the defendants can have against such an order is by way of appeal and not by way of a restoration application. (*Shirreff, J.M. and Sathe, A.M.*) SURYAPAL SINGH *v.* BAKHARI. **(1941) A.W.R. (Rev.) 1096=1941 O.A. (Supp.) 889.**

——**O. 18, R. 18**—*Opinion formed on local inspection—When to be accepted in place of evidence.*

It cannot be said that in an ordinary case the opinion of the Judge formed on a local inspection under O. 18, R. 18 could take the place of evidence. But where the parties agree to accept the opinion of the Judge on that point, and for that reason lead no evidence, in such special circumstances, the opinion of the Judge could be accepted in place of evidence. (*Clarke, J.*) MUNICIPAL COMMITTEE, BILASPUR *v.* WAMANRAO VINAYAKRAO. **1941 N.L.J. 403=A.I.R. 1941 Nag. 292.**

——**O. 20, R. 1**—*Applicability—Proceedings under Punjab Land Revenue Act.*

O. 20, R. 1, C. P. Code, does not apply to proceedings of revenue officers under the Punjab Land Revenue Act, and there is no provision of law which requires orders of Revenue Officers under that Act to be pronounced formally in open Court on a specified day. (*Mitchell, F.C.*) TAJ MAHOMED *v.* NUKH RAM. **20 Lah. L.T. 115.**

——**O. 20, R. 3 and Oudh Rules, Ch. II, R. 97—.** *Order for costs on dismissal—Subsequent direction as to taxation of costs of witnesses not examined—Validity—If contravenes O. 20, R. 3.*

Where after an order of dismissal with costs, the Court by giving directions to the office to tax the costs of witnesses who have not been examined as required by Oudh Rules, Ch. II, R. 6 cannot be deemed to be altering or adding to the judgment pronounced already by it. The rule itself does not say when the direction is to be given. Such a direction *suo motu* or on application is not ineffective if given after order of dismissal. (*Ghulam Hasan, J.*) MAHABAL PRASAD *v.* LACHMI CHAND. **1941 A.W.R. (C.C.) 361=1941 O.A. 950=1941 O.W.N. 1265.**

——**O. 20, R. 5**—*Procedure—Court disposing of suit on one issue only—Duty to record findings on all relevant issues.*

The Subordinate Courts in all appealable cases should pronounce their decision on all the relevant issues so that if the superior Courts take a different view upon the issue which alone has been decided by the Subordinate Court, the parties litigant would be saved from the

C. P. CODE (1908), O. 20, R. 7.

harassment of a consequent remand. (*Fazl Ali and Manohar Lall, JJ.*) DEB PRASANNA MUKHERJEE *v.* LAKHI NARAIN MANDAL. **196 I.C. 641 = 14 R.P. 222 = 8 B.R. 67 = 1941 P.W.N. 565.**

——**O. 20, R. 7**—*Decree—Date from which it operates—Limitation for execution.*

The provisions of R. 7 of O. 20 of the C. P. Code, is mandatory. The date of the decree must correspond with the date of the judgment irrespective of the date when the decree is actually drawn up. The decree is to operate from the date of judgment though actually it may have been drawn up subsequent to judgment. Hence it must be executed within the time limited starting from the date of the judgment. (*Gulam Hasan, J.*) HARBANS SINGH *v.* RAM CHANDRA. **197 I.C. 12 = 1941 A.W.R. (Rev.) 1057 = 1941 O.A. 935 = 1941 O.W.N. 1232.**

——**O. 20, R. 18**—*Direction under—If indispensable.*

The direction to the Collector contemplated by R. 18 of O. 20, C. P. Code, is not indispensable. Hence where there has been a compromise decree in a partition case, mutation can be made, though the Civil Court has not given the necessary directions under O. 20, R. 18 to the Revenue Courts to take action. (*Shirreff, J.M.*) BAL MAKUND *v.* SHIVA KUMAR MISRA. **1941 R.D. 425 = 1941 A.W.R. (Rev.) 569 = 1941 O.A. (Supp.) 500.**

——**O. 21, R. 2**—Adjustment—Execution—Reference to arbitration—Award—Validity—Power of Court to give permission for reference and file award in execution—Sch. II. *See* 1940 Dig., Col. 283. ZUMAKLAL MOTIRAM *v.* FULCHAND TARACHAND. **192 I.C. 583 = 13 R.B. 259 = A.I.R. 1941 Bom. 20.**

——**O. 21, R. 2**—*Adjustment—Meaning of—Contract to be performed in future.*

If there is a completed contract which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of O. 21, R. 2, C. P. Code, although it is to be performed at some future date. If, on the other hand, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not. 37 P.L.R. 288. Appr. (*Young, C. J., Dalip Singh and Monroe, JJ.*) UDHAM SINGH *v.* ATMA SINGH. **I.L.R. (1941) Lah. 383 = 194 I.C. 1 = 1941 O.W.N. 815 = 13 R.L. 507 = 1941 R.D. 574 = 1941 O.A. (Supp.) 560 = 1941 A.L.W. 665 = 1941 A.W.R. (Rev.) 657 = 43 P.L.R. 192 = A.I.R. 1941 Lah. 149 (F.B.).**

——**O. 21, R. 2**—*Adjustment of rent decree—Deed appointing one of decree-holders manager of interest of eleven annas judgment-debtors—Other decree-holders and judgment-debtors not parties—Effect of.*

A deed by which one of the holders of a rent decree is appointed a manager of the interest of the eleven annas judgment-debtors and to which the other decree-holders as well as the remaining judgment-debtors are not parties, does not have the effect of an adjustment of the decree. It cannot be said that the other decree-holders became impliedly parties to the deed from the mere fact that they were paid some portion of the rents that subsequently fell due. (*Derbyshire, C.J and Mukherjea, J.*) JANANENDRA NARAYAN BAGCHI *v.* BHOLANATH MONDAL. **194 I.C. 764 = 14 R.C. 15 = 72 C.L.J. 443 = A.I.R. 1941 Cal. 252.**

——**O. 21, R. 2**—Applicability—Compromise relating to whole subject matter of mortgage suit before end of proceedings. *See* C. P. CODE, O. 23, R. 3 AND O. 21, R. 2. **A.I.R. 1941 Rang. 316.**

——**O. 21, R. 2**—Application to record part payment—Nature of—If "application." *See* LIMITATION ACT, ART. 182 (5). **43 Bom.L.R. 880.**

——**O. 21, R. 2**—Payment or adjustment—Inquiry as to, if contemplated. *See* 1940 Dig., Col. 285. BAIJ NATH *v.* BISHWANATH. **15 Luck. 712.**

——**O. 21, R. 2**—Scope—Mortgage—Final decree for sale—Agreement before preliminary decree that part of hypotheca should not be sold—If can be pleaded in execution. *See* C. P. CODE, S. 47 AND O 21, R. 2. **54 L.W. 157.**

——**O. 21, R. 2 (3)**—*Applicability—"Court executing the decree"—Assignee of decree—Application to Court which passed decree under O. 21, R. 16—If one for execution—Power of Court to recognise uncertified payment or adjustment.*

It cannot be said that the Court which passed the decree and which is hearing an application under O. 21, R. 16, C. P. Code, is not a Court executing the decree within the meaning of O. 21, R. 2 (3). An application by the assignee of a decree to the Court which passed the decree under R. 16 of O. 21, C. P. Code, is an application for execution of the decree and not merely an application for leave to execute the decree. The Court which passed the decree and which hears the application under R. 16 is hearing it as an executing Court and is accordingly bound by the prohibition in O. 21, R. 2 (3). It cannot therefore recognise or give effect to an uncertified payment or adjustment. (*Beaumont, C.J., Macklin and Sen, JJ.*) KRISHNA GOVIND PATIL *v.* MOOLCHAND KESHAVCHAND. **196 I.C. 1 = 14 R.B. 116 = 43 Bom. L.R. 751 = A.I.R. 1941 Bom. 302 (F.B.).**

——**O. 21, R. 5**—Decree not transferred through District Court—Effect. *See* 1940 Dig., Col. 286. BARKAT RAM *v.* BHAGWAN SINGH. **191 I.C. 612 = 13 R.L. 307.**

——**O. 21, R. 11 (2) (b)**—*Requirements of.*

All that O. 21, R. 11 (2) (*b*) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. An application not specifying addresses of judgment-debtors cannot, therefore, be said to be not in accordance with law. (*Bose, J.*) NATHMAL *v.* BALKRISHNA. **194 I.C. 641 = 14 R.N. 4 = 1941 N.L.J. 319 = A.I.R. 1941 Nag. 152.**

——**O. 21, R. 11 (2) (e)**—*Requirements of.*

All that O. 21, R. 11, sub-Cl. (*e*) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore application not specifying such dates is in accordance with law. (*Bose, J.*) NATHMAL *v* BALKRISHNA. **194 I.C. 641 = 14 R.N. 4 = 1941 N.L.J. 319 = A.I.R. 1941 Nag. 152.**

——**O. 21, R. 11 (2) (f)**—Construction and scope—"Results" of previous application—If mean completed results—Levy of execution—If operates as stay of further execution of decree. *See* 1940 Dig., Col. 287. MORARJEE GOKULDAS & CO. *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. **I.L.R. (1941) Bom. 89 = 13 R.B. 282 = 192 I.C. 698 = A.I.R. 1941 Bom. 37.**

——**O. 21, R. 11 (2) (h)**—*Particulars as to costs—Mistake in—Effect.*

If the decree-holder asks for more costs than are actually due to him, that might be another matter, but when he asks for something less, and the difference is of a trivial character, it cannot be held that the application is so vitiated as to be incapable of execution at all.

C. P. CODE (1908). O. 21, R. 11.

(*Bose, J.*) NATHMAL *v.* BALKRISHNA.
194 I.C. 641=14 R.N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

——**O. 21, Rr. 11 (2) (j), 12 and 13**—*Application not showing particulars of movables to be attached—If in accordance with law.*

O. 21, R. 11 (2) (*j*) states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor. It is clear from O. 21, Rr. 11 and 12 that the Code has drawn a distinction between movables in the possession of the judgment-debtor and movables belonging to him but not in his possession and immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of movables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Hence an application which does not specify particulars of movable to be attached is, therefore, in accordance with law. (*Bose, J.*) NATHMAL *v.* BALKRISHNA.
194 I.C. 641=14 R.N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

——**O. 21, R. 15**—*Applicability—Decree—Assignment jointly to several persons—Application for execution by one assignee only—Competency—If in accordance with law—Limitation Act, Art.* 182 (5).

O. 21, R. 15, C. P. Code, can be applied by way of analogy to a case where the right, title and interest of a judgment-creditor under a decree is assigned to more than one person jointly and severally and any one of such assignees can validly present an application for execution of the decree. Such an application presented by any one of the co-assignees is one in accordance with law and will save limitation under Art. 182 (5) of the Limitation Act. (*Divatia, J.*) SHANKAR HARI *v.* DAMODAR VYANKOJI.
43 Bom.L.R. 883.

——**O. 21, R. 15**—*Joint decree-holders—Payment to one—When binds others.*

The payment made by a judgment-debtor to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or other. But it would be binding on the person to whom it was paid, if he could give a valid discharge of his own share. (*Agarwal, J.*) INDERDAWAN SINGH *v.* JAIRAJ SINGH. **193 I.C. 568=1941 O.L.R. 296=1941 A.L.W. 442=13 R.O. 473=1941 O.W.N. 487=1941 O.A. 335=1941 A.W.R. (C.C.) 126=A.I.R. 1941 Oudh 336.**

——**O. 21, R. 15**—*Scope and object of—Joint decree—Application for execution by one decree-holder—Names of both decree-holders stated in proper column—Other decree-holder appearing in proceedings—If sufficient compliance with rule.*

The object of R. 15 of O. 21, C. P. Code, is clearly to enable the Court to protect the interest of a decree-holder who has not applied for execution when such an application has been made by a co-decree-holder. Where one of several decree-holders applies for execution and the others do not object, it is not for the judgment-debtor to plead that sufficient steps have not been taken to safeguard the interest of the other decree-holders. One of two decree-holders applied to execute the decree and in the appropriate column of the application, the names of both were mentioned. The other decree-holder actually appeared in the execution proceedings. The Court also took steps to protect the interest of the latter.

Held, that the execution application was maintainable and it could not be said to be not in compliance with O. 21, R. 15, C. P. Code. (*Agarwala, J.*) JAGDEO SINGH *v.* BABU LAL SHAH. **196 I.C. 609=14 R.P. 217=8 B.R. 59=1941 P.W.N. 183=A.I.R. 1941 Pat. 499.**

C. P. CODE (1908), O. 21, R. 16.

——**O. 21, R. 15 (1) and (2)**—Application for execution by one joint decree-holder—Form of. *See* 1940 Dig., Col. 288. WADERAO SHAHBAZ KHAN *v.* KAKALMAL. **193 I.C. 183=13 R.S. 211.**

——**O. 21, R. 16**—Applicability and scope—Assignment of future decree—Execution after decree is passed—Application by transferee—Competency. *See* C. P. CODE, S. 146 AND O. 21, R. 16. **54 L.W. 429=(1941) 2 M.L.J. 631.**

——**O. 21, R. 16**—Applicability—Mesne profits by way of restitution—Assignment of right to recover—Transferee's right to apply for restitution. *See* C. P. CODE, S. 144. **53 L.W. 283=(1941) 1 M.L.J. 469.**

——**O. 21, R. 16**—*Application under—Scope of enquiry—Objections to execution raised by judgment-debtor—If can be considered—Decree to be revived under O. 21, R. 22—Proper stage for hearing objections to execution.*

Where an application for execution of a decree is made by a transferee of the decree, he has to establish his title in the first instance under O. 21, R. 16, C. P. Code, he has to apply to the Court which passed the decree, and on the notice being issued on this application, the Court will decide if the applicant is the person entitled to execute the decree. The extent of his right and the conditions on which he may in fact proceed with the execution are not touched by this decision, because the Court does not at this stage decide how far the decree can be executed, or the objections, if any, to the decree being executed. It only decides that the decree may be executed as if the application were made on behalf of the decree-holder himself. On this notice being made absolute, the only right which the transferee acquires is the right to execute the decree in the same manner and subject to the same conditions as the decree-holder himself had. Any objections raised by the judgment-debtor or his legal representatives to the execution of the decree on the score of limitation or satisfaction of the decree, etc., cannot be considered at that stage. Where the decree in question has got to be revived under O. 21, R. 22, C. P. Code, the objections can only be considered and disposed of when the notice under O. 21, R. 22, C. P. Code, comes to be disposed of. (*Kania, J.*) BANK OF MARVI, LTD. *v.* R. P. WAGLE & CO. **43 Bom. L.R. 266=195 I.C. 727=14 R.B. 75=A.I.R. 1941 Bom. 190.**

——**O. 21, R. 16**—"*Operation of law*"—*Meaning of—Mortgage decree—Decree-holder adjudged insolvent by foreign Court—Receiver appointed by foreign Court—Right to execute decree without assignment in writing.*

The expression "by operation of law" in O. 21, R. 16, C. P. Code, means by operation of the appropriate law, but the law in force in a foreign system is not one which Courts in British India will recognise. No Court will recognise the transfer of immovable property situate within its own jurisdiction by the operation of a foreign system of law. The title to immovable property is always governed by the *lex loci*. To transfer a decree which operate upon immovable property in British India cannot be transferred by the operation of a system of law other than that of British India where the immovable property is situate. A mortgage decree was

C. P. CODE (1908), O. 21, R. 16.

passed in favour of *H.N.* against the respondents on 1st February, 1932, by a Court in Bombay. The decree directed payment to the plaintiff of a sum of RS. 13,000 by instalments and it was provided that in default of payment of any two instalments, the plaintiff could recover the whole amount by sale of the mortgaged properties. The plaintiff *H. N* was in 1936 declared insolvent by a Court in a foreign State, and the appellant was appointed receiver. The latter in his own name applied to the Bombay Court to execute the decree by sale of the mortgaged properties.

Held, that it would be wrong in principle to allow title to land in British India to depend on the state of some foreign law, and that the title of the receiver appointed by the foreign Court to execute the decree could not be recognised and that he could only enforce the decree by obtaining from the insolvent (*H.N.*) an assignment of the insolvent's interest in the decree in British India. (*Beaumont, C. J. and Macklin, J.*) HARILAL PANNALAL *v.* VISHNU RAMCHANDRA.
43 Bom. L.R. 724 = A.I.R. 1941 Bom. 381.

——**O. 21, R. 16**—*Right to execute—Decree for ejectment obtained by a karta—Partition—Allotment of plot concerned to a member who also became lambardar—Decree, if transferred by operation of law.*

Where a karta obtained a decree for ejectment under S. 44 of the Agra Tenancy Act and on a subsequent partition the plot in question was allotted to one of the members who also became a lambardar, it was *held*,

Per *Shirreff, S. M.*—That the decree had been transferred to that member by operation of law, the civil law having operated to make him proprietor of the village and the Revenue law having operated to make him a lambardar and that he could apply for execution of the ejectment decree.

Per *Sathe, J.M.*—That the partition did not entitle the member to execute the decree obtained by his predecessor without a formal assignment under O. 21, R. 16, C. P. Code. (*Shirreff, S.M. and Sathe, J.M.*) YASHWANT SINGH *v.* QUDDUSI. **1941 R.D. 605 = 1941 O.A. (Supp.) 576 = 1941 A.W.R. (Rev.) 619 = 1941 A.L.J. (Supp.) 111.**

——**O. 21, R. 16**—*Scope of—Relief open to assignee of decree.*

R. 16 of O. 21, C. P. Code, does not contemplate an order of substitution being made in favour of an assignee on the basis of a deed of assignment in place of the assignor. It gives the transferee the right to apply for execution of the decree directly without the necessity of obtaining a prior order for substitution in his favour. (*Yorke and Ghulam Hasan, JJ.*) AJODHIA NATH SETH, *In re*. **1941 O.W.N. 488 = 1941 O.A. 336 = 1941 A.L.W. 443 = 1941 A.W.R (C C.) 127 = A.I.R. 1941 Oudh 512.**

——**O. 21, R. 16, second proviso**—*Scope—Decree—Assignment—Agreement between assignee and one of several judgment-debtors that execution should be taken only as against other judgment debtors—If can be pleaded or set up.*

An agreement between one of several judgment-debtors and an assignee of the decree that the decree should be executed against the remaining judgment-debtors is an agreement in contravention of the express provisions of O. 21, R. 16, C. P. Code, second proviso and cannot be enforced or recognised by any Court. (*Burn and Mockett, JJ.*) NAINA MAHOMED ROWTHER *v.* PERIAPPA ROWTHER. **54 L.W. 144 = 1941 M.W.N. 949 = A.I.R. 1941 Mad. 745 = (1941) 2 M.L.J. 167.**

——**O. 21, R. 17**—Amendment—Powers of Court—Nature of amendment permissible under rule. *See* 1940

C. P. CODE (1908), O. 21, R. 19.

Dig., Col. 288. RAM RAN BIJAIYA PRASAD SINGH *v.* KESHO PRASAD SINGH. **191 I C. 492 = 13 R.P. 326 = 7 B.R. 206 = A.I.R. 1941 Pat. 635.**

——**O. 21, R. 18**—Right to obtain order under—Actual attachment of cross-decree—If necessary. *See* 1940 Dig., Col. 289. MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **67 I.A. 350 = I.L.R. (1941) Mad. 1 = I.L.R. (1940) Kar. (P.C.) 312 = 45 C.W.N. 281 = 1941 P.W.N 164 = 73 C L.J 96 = (1940) 2 M.L J. 677 (P.C.).**

——**O. 21, R. 18**—Right to set off cross-decrees—If defeated by attachment of cross-decree by third party. *See* 1940 Dig., Col. 289. MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **67 I.A. 350 = I L.R. (1941) Mad. 1 = I.L.R. (1940) Kar. (P.C). 312 = 45 C.W N. 281 = 1941 P.W N. 164 = 73 C.L.J. 96 = (1940) 2 M.L.J. 677 (P.C.).**

——**O. 21, R. 19**—*Applicability—Decree in favour of defendant against plaintiff personally and decree in favour of plaintiff against defendant as legal representative of another—Set-off.*

O. 21, R. 19 applies even to a case of a claim by a defendant against a plaintiff personally and a claim by the plaintiff against the defendant as legal representative of another deceased defendant. And the mere fact that there has to be some inquiry under S. 50 as to the extent of the property of the deceased in the hands of his legal representative or that the sum may be limited by the provisions of S. 50 does not take the case out of the scope of O. 21, R. 19. In his suit against a father and son the plaintiff obtained a money decree against the father while the son was awarded a decree for his costs. The execution applications by the son were dismissed on the ground that the amount due to the plaintiff from the son as legal representative of his deceased father was larger. No enquiry however under S. 50 was made as to the extent of the deceased father's assets in the hands of the son,

Held, that the order of dismissal was illegal. The Court should have ordered an inquiry as to the extent of the property of the deceased father in the hands of the son within the meaning of S. 50, against which the plaintiff could execute his decree. Then the sum recoverable by the plaintiff from the son would be set-off against the sum recoverable by the son from the plaintiff within the meaning of O. 21, R. 19 which applied to the case.

Held, further, that the plaintiff was entitled to demand a set-off and need not have filed his own execution application against the son as a legal representative of his deceased father of the money decree which the plaintiff held against the father inasmuch as the object of O. 21, R. 19 was to avoid multiplicity of proceedings. (*Davis, C.J. and Lobo, J.*) SOBHOMAL THAOOMAL *v.* DULAHDINOMAL TILUSINGH.
I.L.R. (1941) Kar. 129 = 193 I C. 783 = 13 R.S. 241 = A.I.R. 1941 Sind 49.

——**O. 21, R. 19**—Res judicata—*Cross-decrees for smaller and larger amounts—Court-fee due to Government from holder of larger decree—Execution by Government—Holder of smaller decree not allowed to set-off his decree—Subsequent execution by holder of larger decree—Claim to set-off by holder of smaller decree—If barred.*

Where a decree provides for the decree of sums by two parties one against the other, if the holder of the larger decree seeks to execute his decree without deducting the amount due to the other party, the latter party can claim a set-off. The fact that in a prior

C. P. CODE (1908), O. 21, R. 19.

application by the Government for execution in respect of Court fee due from the holder of the larger, the holder of the smaller decree fails to prove a right to adjust his decree against larger decree, will not prevent him from putting forward his claim to adjust his decree against the holder of the larger decree when the latter claims to execute his decree at a later date. (*Wadsworth and Patanjali Sastri, JJ.*) MARUTHUVAMALAI MOOPANAR *v.* AVADAIACHI. **1941 M.W.N. 482 = A.I.R. 1941 Mad. 662 = (1941) 1 M.L.J. 641.**

——— **O. 21, R. 19**—*Scope and applicability of—Claim to set off amount due jointly to a party and another—If can be allowed.*

O. 21, R. 19, C. P. Code, does not debar the judgment-debtor liable to pay a larger sum than that to which he is entitled from paying the larger sum and then seeking execution of his smaller amount. Where in an execution taken out against another the latter claims to set off costs due to him not individually but jointly with another, O. 21, R. 19 has no application. Nor is such person entitled to relief on the principle of justice, equity and good conscience. (*Agarwal, J.*) MAHOMED ABDULLAH *v.* KUNJ BEHARILAL. **1941 A.W.R. (C.C.) 364 = 1941 O.A. 954 = 1941 O.W.N. 1266.**

——— **O. 21, R. 19**—*Scope—Execution of lesser decree—Limitation—Starting point—Set-off—Claim by lesser decree-holder in execution by holder of larger decree—Limitation.*

Under O. 21, R. 19, C. P. Code, where a decree provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree. Hence limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to O. 21, R. 19, C. P. Code. The fact that more than three years have elapsed cannot prevent the holder of the lesser decree to claim set-off when the holder of the larger decree seeks to execute his decree. (*Wadsworth and Patanjali Sastri, JJ.*) MARUTHUVAMALAI MOOPANAR *v.* AVADAIACHI. **1941 M.W.N. 482 = A.I.R 1941 Mad. 662 = (1941) 1 M.L.J. 641.**

——— **O. 21, R. 22**—*Scope—Non-compliance—Effect on sale.*

O. 21, R. 22, C. P. Code, makes it obligatory on a decree-holder to serve notice of an application for execution on the legal representative of a party to the decree, or where the party to the decree has been declared insolvent, on the Official Receiver in insolvency. A sale held without notice required by O. 21, R. 22 is void. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) OFFICIAL RECEIVER, NELLORE *v.* VENKIAH. **53 L.W. 498 = 1941 M.W.N. 577 = A.I.R. 1941 Mad. 606 = (1941) 1 M.L.J. 569.**

——— **O. 21, R. 22**—*Scope—Non-service of notice under—Effect on sale—If void—C. P. Code, O. 21, R. 90.*

There is no doubt that where no notice under O. 21, R. 22, C. P. Code, has been issued or served, a sale in execution is wholly without jurisdiction. The mere issuing of a notice is not sufficient. The Court has to be satisfied that notice has been served on the person whom the Court regards as the proper recipient of the notice. If no notice is served at all, the sale is wholly ineffective. The failure to serve the notice is not a mere irregularity in the publication or conduct of the sale. A sale without the notice is in the eye of the law a nullity. (*Harries, C.J. and Fazl Ali, J.*) DURGA SINGH *v.* SUGAMBAR SINGH. **194 I.C. 372 = 13 R.P. 708 =**

C. P. CODE (1908), O. 21, R. 43.

7 B.R. 753 = 22 Pat.L.T. 520 = 1941 P.W.N. 529 = A.I.R. 1941 Pat. 481.

——— **O. 21, Rr. 35 and 36**—*Symbolical possession—Effect of—If interrupts adverse possession of judgment-debtor—Transferee pending suit—If bound by such possession—Rule of* lis pendens.

The delivery of symbolical possession of land in execution of a decree for possession amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned. It breaks the continuity of the adverse possession of the judgment-debtor in spite of the technical irregularities, if any, committed in the delivery of possession. A transferee of the land during the pendency of the suit, being a representative of the judgment-debtor, is under the rule of *lis pendens* as much bound by the symbolical possession delivered as the judgment-debtor himself. (*Din Mahomed, J.*) MAHOMED SAADAT ALI KHAN *v.* PUNJAB NATIONAL BANK, LTD. **I.L.R (1941) Lah. 428 = 43 P.L.R. 555 = A.I.R. 1941 Lah. 357.**

——— **O. 21, R. 35 (2)**—*Delivery of possession—Conditions precedent.*

The conditions precedent for effecting delivery of possession under O. 21, R. 35 (2) are the affixing of the warrant to the property and the beat of drum. The omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. (*Almond, J.C. and Mir Ahmad, J.*) RAMESHRI *v.* VAISHNO DITTI. **193 I.C. 819 = 13 R. Pesh. 68 = A.I.R. 1941 Pesh. 25.**

——— **O. 21, R. 42**—*Jurisdiction of Court—Investigation of claims and objections—Proper procedure.*

The Court has no jurisdiction on an application under O. 21, R. 42, C. P. Code, to enter into an investigation of claims and objections to the proposed attachment at the stage the application is made. The only question then before the Court is one between the decree-holder and the judgment-debtor, and if the property to be attached is specified by the decree-holder in his application as the property of the judgment-debtor, the Court is bound to make an order for attachment as if the attachment was being asked for in the ordinary course of execution of a decree for the payment of money, leaving it to the parties concerned to prefer such claims or objections after the attachment as were open to them under the provisions of O. 21, R. 58 or otherwise. The Court cannot apply to an application under O. 21, R. 42 the considerations which would govern an application for attachment before judgment. (*Biswas and Roxburgh, JJ.*) JAGAT TARINI DASSI *v.* SAROJ RANJAN. **I.L.R. (1941) 1 Cal. 363 = 196 I.C. 247 = 74 C.L.J. 169 = 14 R.C. 195 = 45 C.W.N. 323 = A.I.R. 1941 Cal. 357.**

——— **O. 21, R. 42**—Nature of application—Order passed after investigation of claims and objections—Appeal. *See* C. P. CODE, S. 47—APPEAL. **I.L.R (1941) 1 Cal. 363 = 45 C.W.N. 323 = A.I.R. 1941 Cal. 357.**

——— **O. 21, R. 43 and Penal Code Ss. 114 and 353**—*Roving commission for seizure of property—Legality—Resistance—If an offence under S. 353, read with S. 114, I. P. Code.*

A roving commisson for seizure of property belonging to the judgment-debtors wherever it may be found is not contemplated by the Code of Civil Procedure and is entirely illegal. Where such a warrant for attachment of movable property is resisted there is no offence committed under S. 353 read with S. 114, I. P Code. (*Mosely, J.*) HARI PRASAD *v.* BAILIFF SMALL CAUSES COURT, RANGOON. **1941 Rang.L.R. 592 = A.I.R. 1941 Rang. 347.**

C. P. CODE (1908), O. 21, R. 45.

——**O. 21, R. 45 (2) and (3)**—*Attachment of crops—Rights of judgment-debtor to cut and store—Removal of crops—Offence—Obstruction to attaching officer—Effect of—Penal Code, Ss.* 186 *and* 379.

A judgment-debtor is at liberty, notwithstanding the attachment, to cut and gather the produce and store the same in default of any conditions imposed or orders passed by the Civil Court, in view of O. 21, R. 45 (2). C. P. Code. But he is not entitled to take the crops away as is shown by sub-R. (3) of O. 21, R. 45. If after attachment, and after the crops have passed into the custody of the Court peon, the judgment-debtor and his men not only cut and gather the produce but also take them away, they would be guilty of theft. If in the course of such removal they obstruct the Court peon in the discharge of his duty of holding the crop, they would be also liable under S. 186, I. P. Code. (*Dhavle, J.*) MAHABIR SAH *v.* EMPEROR. **192 I.C. 177 = 7 B.R 326 = 42 Cr.L.J 251 = 13 R.P. 447 = 1940 P.W.N. 980 = 22 Pat.L T. 662 = A.I.R. 1941 Pat. 136.**

——**O. 21, R. 46 and S. 64**—*Effect of attachment under O.* 21, *R.* 64—*Proceedings for liquidation of debt after attachment—Competency—Rights of attaching creditor decree-holder purchaser, if affected.*

After attachment and before its purchase in Court-auction by the decree-holder of certain mortgagee rights, the mortgagor applied for liquidation of his debts under C. P. Debt Conciliation Act. As the mortgagee did not appear, though noticed, the debt was discharged. In a suit on the mortgage by the auction-purchaser of the mortgagee rights ignoring the discharge of the debt as not binding in as much as it was made during the subsistence of the attachment—it was held that O. 21, R. 46 did not vest the attaching creditor with any right, title or interest in the debt except the negative right to see that it was not paid (except into Court) without an order of the Court and that the attachment could not prevent a conciliation of the debt between the creditor and the debtor before the Board. It was further held that both S. 64 and O. 21, R. 64 were limited so far as the debt was concerned, to its payment and not to its settlement, and that the statutory extinction of the debt in the interval could not be prevented. (*Stone, C.J. and Bose, J.*) BHURA *v.* SADDULAL. **1941 N.L.J. 593.**

——**O. 21, R. 46**—*Garnishee—Parties knowing appointment of receiver to receive payment not informing Court and getting order passed by settlement—Payment by garnishee—If discharges him.*

Where both the parties to a garnishee proceeding had known the appointment of a receiver to receive the payment but neither of them informed the Court and got an order passed by settlement the payment by the garnishee in pursuance of such order does not discharge him. (*Lort Williams, J.*) ANIL CHANDRA MITRA *v.* INDIAN ECONOMIC INSURANCE CO., LTD. **I.L.R. (1941) 2 Cal. 221 = A.I.R. 1941 Cal. 579.**

——**O. 21, R. 46**—*Garnishee order—Court's order to pay—If necessary ingredient.*

An order to pay by the Court is a necessary ingredient of every garnishee order. Where the payment was a voluntary payment and was so expressed in the settlement between the parties, subject to an agreement to refund the money in the event of rejection of the claim, or any dispute arising out of the claim,

Held, that the payment did not discharge the garnishee. (*Lort Williams, J.*) ANIL CHANDRA MITRA *v.* INDIAN ECONOMIC INSURANCE CO., LTD. **I.L.R. (1941) 2 Cal. 221 = A.I.R. 1941 Cal. 579.**

C. P. CODE (1908), O. 21, R. 48.

——**O. 21, Rr. 46 and 47**—*Scope and applicability—Judgment-debtor owning share in property in the possession of stranger.*

Rule 46 must be read with Rr. 43 and 47. R. 46 applies even if the ownership of the judgment-debtor is fractional instead of being integral. Consequently, where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, R. 46 as well as R. 47 must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property of the judgment debtor's share which is intended to be attached. (*Niyogi, J.*) GOVINDRAM *v.* HARASAYA. **193 I.C. 788 = 13 R.N. 347 = 1941 N.L.J. 361 = A.I.R. 1941 Nag. 157.**

——**O. 21, Rr 46-A and 49**—*Debt due to firm from customer—Decree against partners in individual capacities—Garnishee order in respect of that debt in execution—Legality.*

Garnishee proceedings cannot be taken under O. 21, R. 46-A, C. P. Code, in respect of a debt which cannot be attached under O. 21, R. 46. A debt due to a firm from a customer is the property of the firm within the meaning of O. 21, R. 49 and it cannot be attached in execution of a decree obtained not against the firm or the partners *as such* but against one or some of them in his or their individual capacities. A garnishee order in respect of that debt made in execution of such a decree is, therefore, illegal. (*Mitter and Kundkar, JJ.*) KURSEONG HYDRO ELECTRIC SUPPLY CO., LTD. *v.* LAKSHMI NARAYAN. **I.L.R. (1941) 1 Cal. 389 = 196 I.C. 513 = 45 C.W.N. 333 = A.I.R. 1941 Cal. 364.**

——**O. 21, R. 48**—*Attachment under—When complete and effective—Postponement of remission of salary by disbursing officer—If renders attachment not effective till then.*

As soon as the notice of the order issued by the Court under O. 21, R. 48, C. P. Code, is served on the disbursing officer and accepted by him, the attachment becomes complete and effective. His postponement of the remission of the salary to the Court, to a later date, cannot mean that there was no effective attachment till then. (*Ghulam Hasan, J.*) ELSIE C. GRIFFIN EDWARD *v.* W.A.C. HOWARD. **193 I.C. 38 = 1941 A.W.R. (C.C.) 66 = 1941 O.L.R. 247 = 1941 A.L.W. 99 = 13 R.O. 424 = 1941 O.W.N. 115 = 1941 O A. 138 = A.I.R. 1941 Oudh 277.**

——**O. 21, R. 48**—Duty of Court—Ascertainment of attachable portion of salary—Necessity for obtaining material from disbursing officer and then attaching definite amount. *See* 1940 Dig., Col. 292. BHAGWAN DASS RAMPRASAD *v.* SECRETARY OF STATE **193 I.C. 360 = 7 B.R. 598 = 13 R.P. 584 = A.I.R. 1941 Pat. 157.**

——**O. 21, R. 48**—*Scope—If subject to S.* 60 (*i*)—*Attachment of salary exempt from attachment—Legality—Waiver of exemption by judgment-debtor—Effect—Right of disbursing officer to object—Agreement by judgment-debtor to deduct part of unattachable salary—If opposed to S.* 23, *Contract Act and S.* 6 (*f*), *T.P. Act—Public policy—C. P. Code, O.* 21, *R.* 58.

A public officer whose salary is exempt from attachment under S. 60 (i), C. P. Code, cannot contract himself out of this statutory provision. This exemption cannot be waived, because there is a question of public interest and policy involved. The privilege being one conferred for reasons of public policy, it cannot be waived. If the public officer whose salary is attached in contra-

C. P. CODE (1908), O. 21, R. 49.

vention of S. 60 (i), C. P. Code, submits to the attachment or agrees to a deduction of a part of the salary which is below the minimum prescribed by S 60 (*i*), C.P. Code, the disbursing officer can object to the attachment and apply to the Court to vacate the order of attachment, and the Court can give effect to the objection. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Where an order is made against Government or a public body, and when the law imposes liability in case the order is not obeyed, it would be unreasonable and unjust to hold that it is not open to Government or to the public body, as the case may be, to move the Court and contend that the order is not justified by the law, and there must be inherent power in the Court to consider such an application. A creditor got a decree for Rs. 236 against a postal peon drawing a salary of Rs. 41 per month, and had him arrested in execution In order to escape from such arrest he agreed with his creditor that a sum of Rs. 6 per mensem should be deducted from his pay until the debt was paid. The executing Court, acting on this agreement, made an order under O. 21, R. 48, C. P. Code, This was objected to by the Postmaster-General, but the objection was overruled on the ground that the exemption could be waived and that the Postmaster-General had no *locus standi* to contest the order of attachment.

Held, (1) that O. 21, R. 48, C. P. Code, was expressly subject to S. 60 (1); (2) that the agreement between the creditor and the judgment-debtor (public servant) was obnoxious to the provisions of S. 6 (*f*) of the T. P. Act, as it was to all intents and purposes a transfer of the judgment-debtor's salary as it fell due in the future; (3) that the agreement must also be regarded as void under S. 23 of the Contract Act; (4) that the objection by the Postmaster-General would fall under O. 21, R. 58, C. P. Code; it could not be said that he had no grievance and it must therefore be held that had a *locus standi* to make the objection application; (5) that the legislature having fixed the amount of salary to be exempted in the interests of public policy, it was not for the Courts to say that it was sufficient to reserve a lesser amount; and (6) that the attachment of the salary and the transfer thereof were both illegal and opposed to public policy. (*Broomfield and Divatia, JJ.*) POSTMASTER-GENERAL, BOMBAY *v.* CHENMAL MAYA CHAND.

I.L.R. (1941) Bom. 415 = 43 Bom.L.R. 758 = A.I.R. 1941 Bom. 389.

——**O. 21, R. 49 (2)**—Rights of judgment-creditor of partner who has overdrawn—Priority of partners to reimbursement—Appointment of receiver—Effect. *See* 1940 Dig., Col. 293. PANMAL *v.* DHANALAL.

192 I.C. 329 = 13 R N 239 = A.I.R 1941 Nag. 63

——**O. 21, R. 50 and O. 30, R. 10**—*Applicability—Joint Hindu family firm.*

O. 21, R. 50 and O. 30, R. 10, C. P. Code, are applicable to a joint Hindu family business or trading firm also. (*Fazl Ali and Varma, JJ.*) ALEKH CHANDRA SAHU *v.* KRISHNA CHANDRA GAJAPATI NARAYAN.

20 Pat. 755 = 22 Pat.L.T. 682 = 7 Cut.L T. 21 = A.I.R. 1941 Pat. 596.

——**O. 21, R 50**—*Jurisdiction of Court—Suit under O. 30—Enquiry as to whether party to suit is liable as partner because he held himself out as such—Power of Court.*

O. 21, R. 50 (2) is not limited to a finding of fact as to whether a person is or is not a partner. A Court has under O. 21, R. 50 jurisdiction to inquire and decide whether a party to the suit under O. 30 is liable as a partner within the meaning of O. 21, R. 50 (2) because he held himself out to the plaintiff as such. (*Davis, C. J. and Lobo, J.*) MOHANLAL *v.* PARMANAND HOTCHAND.

I.L.R. (1941) Kar. 69 = 192 I.C. 276 = 13 R.S. 184 = A.I.R. 1941 Sind 8.

——**O. 21, R. 50 (2)**—Procedure—Application for leave under—Prior application for execution—If condition precedent. *See* 1940 Dig., Col. 293. COOVERJI VARJAN *v.* COOVERBAI NAGSEY. **191 I.C. 129.**

——**O. 21, R. 52**—*Applicability—Immovable property—If excluded.*

O. 21, R. 52, C. P. Code, is only a mode of attachment of property in the custody of the Court. It does not deal with the leave necessary to be obtained for proceeding under R. 52. The rule is not confined to property other than immovable property, and it cannot be held that when the property is immovable the procedure prescribed by R. 54 of O. 21, may be adopted without proceeding under O. 21, R. 52. (*Kania, J.*) CENTRAL BANK OF INDIA, LTD. *v.* PRABHAKAR ANANDRAO.

43 Bom.L.R. 995.

——**O. 21, R. 52**—*Scope—If permissive—Right of decree holder to proceed under R 54 merely after obtaining leave under R. 52.*

The words used in O. 21, R. 52 cannot be read as permissive. They are imperative for the judgment-creditor. He has to apply for attaching the property in the custody of the Court, such as property in the hands of a receiver; while making the application, he may put before the Court sufficient grounds to prevent the Court from making the ordinary order prescribed by the rule or limit the operation of such order to a named property or a named period. The Court has jurisdiction to place such restrictions or limitations. O. 21, R. 52 cannot, however, be read as permitting the judgment-creditor to proceed under O. 21, R. 54, merely after he obtains leave to proceed to execute the decree on the ground that the property is in possession of a Court officer. (*Kania, J.*) CENTRAL BANK OF INDIA, LTD. *v.* PRABHAKAR ANANDRAO. **43 Bom.L.R 995.**

——**O. 21, R. 53**—*Adjustment of decree—Compromise presented to appellate Court.*

A compromise between parties can be regarded as an adjustment of a decree although it is presented to the Court of appeal instead of being presented to the original Court in the course of execution proceedings. (*Tek Chand and Beckett, JJ.*) SHANTI LAL *v.* F. HIRA LAL SHEO NARAIN.

43 P.L.R. 471 = A I.R. 1941 Lah. 402.

——**O. 21, R. 53**—*Partnership suit—Preliminary decree for accounts—Saleability in execution at instance of attaching decree-holder.*

A preliminary decree for accounts in a partnership action is not saleable at the instance of a creditor who has attached it, though it is attachable. (*Agarwala and Rowland, JJ.*) KHIMJI POONJA & CO. *v.* RATANSHI HIRJI.

19 Pat. 935 = 192 I.C. 408 = 13 R.P. 468 = 1940 P.W.N. 1042 = 7 B.R. 465 = 21 Pat.L.T. 728 = A.I R. 1941 Pat. 43.

——**O. 21, R. 53 (1) (b)**—Scope and object of the request. *See* 1940 Dig., Col. 294. MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR.

67 I A. 350 = I.L.R. (1941) Mad. 1 = I.L.R. (1940) Kar. (P.C.) 312 = 45 C.W.N 281 = 1941 P.W.N. 164 = 73 C.L.J. 96 = (1940) 2 M.L J. 677 (P.C.).

——**O. 21, R. 53 (3) and Bengal Public Demands Recovery Act, S. 19 (3)**—Attaching decree-holder—Representative character—Limits—Analogous position of certificate-holder under S. 19 (3) of the Public Demands Recovery Act—Right to adjust the decree,

C P CODE (1908), O. 21, R. 54.

See 1940 Dig., Col. 294. RADHAKISSEN *v.* DURGA PRASAD. **67 I.A. 360 = I.L.R. (1940) 2 Cal. 493 = I.L.R. (1940) Kar. (P.C.) 321 = 73 C.L.J. 106 = (1940) 2 M.L.J. 952 (P.C.).**

——**O. 21, R. 54**—Attachment of immovable property—Service of prohibitory order—If necessary to complete the attachment—Procedure required by O. 21, R. 54. *See* 1940 Dig., Col. 295. KARAN SINGH *v.* RAM SAHAI. **I.L.R (1941) All. 39 = 13 R.A. 389 = 192 I.C. 787 = 1940 A.L.J. 894 = A.I.R. 1941 All. 41.**

——**O. 21, R. 55**—Attachment of money—How long subsists. *See* 1938 Dig., Col. 296. HARSHI KESH *v.* GHULAM HAIDAR KHAN. **16 Luck. 76.**

——**O. 21, R. 57**—Applicability—Attachment before judgment. *See* 1940 Dig., Col. 296. PRIBHOMAL *v.* KISHNOMAL. **192 I.C. 576 = 13 R S. 193 = A.I.R. 1941 Sind 13.**

——**O. 21, R. 57**—Applicability—Rejection of execution application under O. 21, R. 17—If dismissal terminating attachment. *See* 1940 Dig., Col. 297 SATH APPA CHETTIAR *v.* CHOCKALINGAM CHETTIAR. **193 I.C. 204 = 13 R.M. 636.**

——**O. 21, R. 57**—*Scope—Application for attachment—Order of attachment—Subsequent dismissal for non-payment of process fee and for non-prosecution—Effect on attachment—Order continuing attachment—Validity—Subsequent alienation by judgment-debtor—If void against decree-holder.*

An order dismissing an execution application for non-payment of process-fees and for non-prosecution falls under O. 21, R. 57, C. P. Code and the attachment therefore terminates in spite of the fact that the Court orders that the attachment will continue. The order continuing the attachment in such a case is illegal and invalid. There is no legal and valid attachment after that dismissal, and if the judgment-debtor alienates the property, the alienation would not be void by reason of the attachment, because the attachment has ceased. The fact that the Court passed the order of dismissal under a misapprehension because the execution application only contained a prayer for attachment and not any prayer for sale does not make the order of dismissal any the less binding on the decree holder. If it is not set aside by appeal or review, it stands as a final order and binds the decree-holder and would operate as *res judicata*, in subsequent applications for execution. (*Divatia, J.*) VIJAYADAS HANUMANDAS *v.* SHEKHARAPPA ANANTAPPA. **43 Bom L.R. 727 = A.I.R. 1941 Bom. 395.**

——**O. 21, R. 58**—Applicability—Attachment of salary of public servant whose salary is exempt from attachment—Objection by disbursing officer to legality—Maintainabiiity. *See* C. P. CODE, O. 21. R. 48. **43 Bom L.R. 758.**

——**O. 21, R. 58**—Applicability—Objection to attachment by legal representative of judgment debtor—Plea that property is his own property and not assets of deceased—Order rejecting—If appealable—Separate suit—Competency. *See* C. P. CODE, S. 47. **I.L.R. (1941) Kar. 211.**

——**O. 21, R. 58**—Applicability—Objection to attachment and sale on the ground that property is wakf property held by judgment debtor as muta walli—Order on—Appeal—Maintainability—Separate suit—If lies. *See* C. P. CODE, S. 47. **I.L.R. (1941) Kar. 474.**

——**O. 21, R. 58**—Applicability—Objection to attachment by transferee of transferee from judgment-debtor—If falls under S. 47—Order on objections—Appeal. *See* C. P. CODE, S. 47. **194 I.C. 45 = 7 B.R. 680.**

C. P. CODE (1908), O. 2 , R. 63.

——**O. 21, R. 58**—Applicability—Objection to sale by judgment-debtor—Plea that property put up for sale is *ghatwali* tenure and hence not saleable—Order on—Appeal. *See* C. P. CODE, S. 47. **7 B.R. 148.**

——**O. 21, Rr. 58 and 63**—Effect of order under R. 58—Withdrawal of attachment—Necessity for suit under R 63. *See* 1940 Dig., Col. 298. HIDAYAT-UL-NISSA *v.* JALALUDDIN. **191 I.C. 742 = 13 R.O. 278 = 1941 O.L.R. 29 = A.I.R. 1941 Oudh 95.**

——**O. 21, Rr. 58 and 90**—*Third party objecting to sale of his property for debt of another—Proper remedy.*

A third party objecting to the sale of his property for the judgment-debt of another person cannot disregard R. 58 of O. 21, and apply after the sale under R. 90 of that order, treating the case as one of irregularity in publishing or conducting the sale. (*Sir George Rankin.*) JAGAT NARAYAN SINGH *v.* KHARTAR SINGH. **20 Pat. 791 = 195 I.C. 73 = 1941 O.W.N. 949 = 1941 O.A. 699 = 1941 P.W.N. 498 = 1941 O.L.R. 560 = 1941 A.W.R. (P.C.) 66 = 45 C.W.N. 1019 = 7 B.R. 915 = 14 R.P.C. 5 = 22 Pat.L.T. 755 = 1941 A.L.W. 810 = 43 Bom.L.R. 860 = 54 L.W. 484 = 74 C.L.J. 163 = 43 P.L.R. 676 = A.I.R. 1941 P.C. 45 = (1941) 2 M.L.J. 227 (P.C.).**

——**O. 21, R. 63**—*Claim petition objecting to attachment 'not pressed and dismissed'—Subsequent suit for declaration—Limitation.*

Where a claim petition falling within the purview of O. 21, R. 58, objecting to an attachment is dismissed as not pressed, the order is one "against" the claimant even though there has been no investigation of the claim and an adjudication on the merits. It is necessary for such a claimant to file a suit within one year of such order as provided under O. 21, R. 63 if he wishes to reopen the matter. 35 M.L.J. 335 : 41 Mad. 985 (F.B.), Rel. on; 48 M.L.J. 616; A.I.R. 1925 Mad. 265; 110 I. C. 511 and (1940) 2 M.L.J. 402, Overr.; 1919 M.W.N. 805; 48 M. L.J. 467 : 45 Mad. 827; 68 M.L.J. 518: 58 Mad. 936 and 41 M.L.J. 198, Dist. (*Leach, C.J., Krishnaswami Aiyangar and Happell, JJ.*) CANNANORE BANK, LTD. *v.* MADHAVI. **54 L.W. 671 = (1941) 2 M.L.J. 956 (F.B.).**

——**O. 21, R. 63**—Construction—"Subject to the result of such suit"—Meaning of. *See* LIMITATION ACT, ART. 182 (5). **54 L.W. 45.**

——**O. 21, R. 63**—Court-fees—Suit by defeated claimant—Prayer for declaration of title and injunction to restrain delivery of possession to defendant or any illegal act by defendant to suit property—Court-fee—If liable to *ad valorem* court-fee. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. II ART. 17 (1). **193 I.C. 782 = 7 B.R. 640**

——**O. 21, R. 63**—*Effect of order—If conclusive against judgment-debtor.*

Per *Nasim Ali, J.*—An order in a claim case is conclusive as against the party against whom it is made and is conclusive only as regards the properties which are the subject-matter of the claim case. Where a claim is allowed but the judgment-debtor is not a party in the claim case, it cannot be said that the order in the claim case is against the judgment-debtor. (*Syed Nasim Ali and Pal, JJ.*) RADHARANI DASSI *v.* BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**O. 21, R. 63**—*Parties to suit—Suit by attaching decree-holder—Judgment-debtor, if necessary party.*

Per *Nasim Ali, J.*—Where a claim is allowed the attaching decree-holder is the person against whom the order in the claim case is made. He is, therefore, en-

C. P. CODE (1908), O. 21, R. 63.

titled in a suit under O. 21, R. 63, C. P. Code, to establish the right which he claims to the property attached. In such a suit the judgment-debtor may not be a necessary party. But whether he is a proper party in such a suit would depend upon the pleadings. (*Syed Nasim Ali and Pal, JJ.*) RADHARANI DASSI *v.* BINODAMOYEE DASSI. **74 C.L.J. 180.**

——**O. 21. R. 63**—Right of suit—Decree-holder consenting to claim being allowed—Subsequent suit to declare property liable to attachment as belonging to judgment-debtor being held benami by claimant—Maintainability. *See* 1940 Dig, Col. 300. RAMRUP RAI *v.* MAHADEO LAL NATHMAL. **191 I.C. 542 = 13 R.P. 333 = 7 B.R. 226.**

——**O. 21, R. 63**—*Scope—Suit after sale by defeated claimant—Effect on sale—If set aside—Formal order setting aside sale not made—Right of decree-holder to execute decree afresh—Duty of executing Court.*

Where after a claim to attached property under O. 21, R. 58, C. P. Code, is rejected the attached property is put up for sale and purchased by the decree-holder and full satisfaction of the decree is entered, and subsequently a suit brought by the defeated claimant under O. 21, R. 63 is decreed, the decree holder and the judgment-debtor both being parties to such suit, the effect of the decree obtained by the claimant is to set aside the sale, and no formal order to that effect is required. When the order passed in execution proceedings is subsequently set aside, the foundation upon which the sale stands in favour of the decree holder purchaser disappears and the sale *ipso facto* stands vacated, no formal order by the executing Court being necessary to set aside the sale. The decree holder auction purchaser should in such cases be allowed to execute his decree afresh, provided there is a total failure of consideration, that is to say, he loses by the suit the entire property purchased by him in auction. The absence of a formal order of the executing Court setting aside the sale is no bar, and it is the duty of the executing Court in the exercise of its inherent powers to grant relief. (*Manohar Lall and Chatterji, JJ.*) MT. BIBI UMATUL RASUL *v.* MT. LAKHO KUER.

20 Pat. 261 = 195 I C. 395 = 7 B.R. 921 = 14 R.P. 119 = 22 Pat.L.T. 955 = A.I.R. 1941 Pat. 405.

——**O. 21, R. 63**—*Scope of suit—Validity of decree under execution—Claimant, if can question.*

Per *Mitter, J.*—The claimant cannot be allowed in a suit under O. 21, R. 63, C. P. Code, to question the validity of the decree under execution to which he was not a party and by which he is not *directly* affected. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM.

74 C.L.J. 261.

——**O. 21, R. 63 (b) and (c) (1) (Rang.)**—*Scope and object of—Garnishee, if can question his liability after order under O 21, R. 63 (c) (1).*

R. 63 (*b*) of O. 21, C. P. Code (Rangoon High Court) is designed to give the garnishee ample opportunity of disputing his liability to pay the amount or disputing his liability to pay anything or of showing that the amount of the debt is less than that mentioned in the notice. When a garnishee fails to appear in answer to the notice under R. 63 (*b*) and an order under R. 63 (*c*) (1) is made, it is the final determination of the question as to the liability of the garnishee to pay the debt and as to the fact that the debt is not less than the amount mentioned in the notice of attachment and hence the garnishee is not entitled to raise those questions thereafter. (*Mya Bu, J.*) SINGER SEWING MACHINE CO. *v.* SURATH SINGH. **1941 Rang L.R. 177 = 195 I.C. 520 = 14 R.R. 43 = A.I.R. 1941 Rang. 197.**

C. P. CODE (1908), O. 21, R. 72.

——**O. 21, R. 63-H (Patna amendment)**—*Garnishee proceedings in execution of decree of Small Cause Court—Appeal—Maintainability.*

O. 21, R. 63-H, C. P. Code (Patna Amendment) does not confer a right of appeal in garnishee matters where no appeal ordinarily lies, *e.g*, in execution of a decree of a Small Cause Court in that Court itself. The remedy of the garnishee is by way of a motion to the High Court. (*Agarwala, J.*) JAGADISH CHANDRA DEO *v.* RAI PADA DHAL. **196 I.C. 66 = 7 B.R. 993 = 14 R.P. 175 = 22 Pat. L.T. 396 = A.I.R. 1941 Pat. 458.**

——**O. 21, R. 64**—*Discretion—Valuation of property—Executing Court—If bound to value property and order sale of only part—Judgment-debtor not asking for exercise of discretion—If can raise objection in second appeal.*

Under O. 21, R. 64, C. P. Code, it is not incumbent upon the executing Court to value the property to be sold except in cases where the Bihar Money-Lenders Act applies, and to order a sale of part only of the property, if the proceeds of such part would, in the opinion of the Court, be sufficient to satisfy the decree. The Court has no doubt a discretion to order the sale of part only of the property. Where the Court is not asked to act under O. 21, R. 64, by exercising its discretion to sell part only of the property attached, it is not open to the judgment-debtor to raise that point in second appeal and complain that the executing Court has failed to exercise its discretion and therefore the case should be remanded. The High Court will not in second appeal entertain a new point for the first time, where that involves any further investigation of facts. (*Harries, C. J. and Chatterji, J.*) BADRI NARAIN SINGH *v.* CHANDER MAULESHWAR PRASAD NARAIN SINGH.

22 Pat.L.T. 855.

——**O. 21, R. 66 (Lahore)**—Sale proclamation—Value of property given by party—Duty of Court to include. *See* 1940 Dig., Col. 302. BARKAT RAM *v.* BHAGWAN SINGH. **191 I C. 612 = 13 R.L. 307.**

——**O. 21, Rr. 69 and 90**—*Sale held on date not specified in sale proclamation and to which it was not adjourned—If nullity.*

An execution sale could not be held on the date specified in the sale proclamation. On that date the Court stayed the sale until further orders and directed the matter to be put up before it on a later date, when the Court vacated the stay order and fixed a date for sale. As the bid was too low on the date so fixed, the sale was held on the following day.

Held, that the sale was not a nullity out and out, but that there was undoubtedly a material irregularity which would entitle the judgment-debtor to get the sale set aside in an appropriate proceeding under O. 21, R. 90, C. P. Code. (*Mukherjea and Roxburgh, JJ.*) ASALATA BOSE *v.* MANINDRA NATH.

45 C.W.N. 987.

——**O. 21, Rr. 71, 86 and 87**—Scope—Default of purchaser in paying balance of sale price—Re sale—Application for—When to be made—Delay caused in re sale—Deficit sale price—Liability of purchaser—If affected—Right of decree-holder to order against defaulting purchaser—Limitation Act, Art. 181. *See* 1940 Dig., Col. 302. SIVASUBRAMANIAM CHETTIAR *v.* MURUGESA MUDALIAR. **193 I.C. 225 = 13 R.M. 646 = (1940) 1 M.L.J. 537.**

——**O. 21, R 72**—*Scope—Purchase in contravention of—If void—Remedy of judgment-debtor.*

A purchase made by a decree-holder in violation of O. 21, R. 72, C P. Code, is no doubt a fraud upon the Court, but such purchase is only voidable and not void;

C. P. CODE (1908), O. 21, R. 72.

in other words it is valid until set aside on an application under Cl. (3) of O. 21, R. 72, C. P. Code. If no such application is filed within the time limited, the purchaser is entitled to realise his rights under the sale; and it is not open to the judgment-debtor to plead O. 21, R. 72 in bar of a suit for possession irrespective of limitation and of the Court which tries that suit. (*Somayya, J.*) VALLIAPPA CHETTIAR *v.* MUTHU KOUNDAR.

1941 M.W.N. 988=(1941) 2 M.L.J. 943.

——O. 21, R. 72 (1) (as amended)—*Decree-holder's right to bid.*

Under O. 21, R. 72 (1), C. P. Code, as amended in January 1936, the decree-holder is entitled to bid for and purchase the property in the absence of an express order to the contrary by the Court. (*Chatterji and Meredith, JJ.*) DHIRENDRA NATH CHANDRA *v.* BIMALANANDA TARKATHIRTHA. **196 I.C. 728=8 B.R. 94.**

——O. 21, R. 84—Bid on behalf of temple—Failure to deposit 25 per cent.—Deficit on resale—Nature of liability. *See* 1939 Dig., Col. 272. LOKMAN *v.* MOTILAL. **I.L.R. (1941) Nag. 485.**

——O. 21, Rr. 84 and 71—Sale when complete—Deposit when to be made—'Forthwith', meaning of—Resale if can be held on same day. *See* 1939 Dig., Col. 273. LOKMAN *v.* MOTILAL. **I.L.R. (1941) Nag. 485.**

——O. 21, R. 86—Default of payment by purchaser—Sale, if nullity. *See* 1940 Dig., Col. 303. ANNAPURNA DASI *v.* BAZLEY KARIM. **193 I C. 390=13 R.O. 389=A.I.R. 1941 Cal. 85.**

——O. 21, R. 88—Object of—Powers of executing Court acting under. *See* 1940 Dig., Col. 303. MUNNALAL *v.* GOPILAL. **I.L.R. (1941) Nag. 150=191 I.C. 217=13 R.N. 190.**

——O. 21, R. 89—*Applicability—Sale by Registrar under decree on original side of Calcutta High Court—Application to set aside.*

In an application to set aside a sale by the Registrar held under a decree on the original side of the Calcutta High Court the duty of the High Court is to apply the provisions of O. 21, R. 89 so far as the rules in Chapter 27, Original Side Rules and Orders will permit. The mortgagor mortgaged his undivided share in the joint property. In a subsequent partition the southern portion of the joint property was allotted to his share. The mortgagee obtained a decree on the original side of the Calcutta High Court and the southern portion was sold by the Registrar at a price admittedly exceeding the reserve price. The property sold was however subsequently scheduled by the Calcutta Improvement Trust for acquisition at a price exceeding thirty per cent. of the price at which it was sold. The judgment-debtor after the expiry of 30 days from the date of the sale and also after the lapse of 14 days from the issue of the sale certificate to the auction-purchaser under the original side rules applied to have the sale set aside on the ground of inadequacy of sale price. The terms of O. 21, R. 89 (1) (*a*) or (*b*) were not complied with.

Held, that the liberty to make the application was a concession to the judgment debtor, and in the case of a mortgagor it was a still greater concession, for the period of redemption was extended and therefore it was not unreasonable to call for strict compliance with the provisions of the rules. The judgment-debtor having disregarded the rules both under the Code and under the original side rules was in the circumstances of the case not entitled to help under the inherent powers of the Court. Nor could he be said to have any valid cause for complaint inasmuch as he mortgaged the property while it was unpartitioned and the sale price had exceeded the valuation both by the Commissioner of partition and the Registrar's surveyor.

Held, further, that the auction-purchaser's rights

C. P. CODE (1908), O. 21, R. 89

could not be lightly set aside by enforcing an agreement between the judgment-debtor and the decree holder by which the decree-holder's claim and costs were to be satisfied out of the compensation awarded by the Improvement Trust. (*McNair, J.*) BHABASUNDARI *v.* GOPESWAR AUDDY. **I.L.R. (1941) 1 Cal. 147=196 I.C. 523=45 C W.N. 873=A.I.R. 1941 Cal. 159.**

——O. 21, R. 89—Construction—Application under Rr. 89 and 90—Competency—Subsequent withdrawal of prayer for relief under R. 90—Effect—Application under R. 89—When deemed to be made—Limitation. *See* 1940 Dig., Col. 304. RUGHNATH *v.* HARIRAM.

192 I.C. 10=13 R S. 180.

——O. 21, R. 89 and S. 115—*Dismissal of application under O. 21, R. 89 after consideration—Jurisdiction if exercised.*

If a Court considers on the merits an application under O. 21, R. 89, C. P. Code, there is no failure to exercise jurisdiction even if the prayer is rejected. The exercise of jurisdiction would then be a consideration of the application made and the decision on it whether the relief claimed was granted or not. (*Hamilton, J.*) BALA PRASAD *v.* MAKHAN LAL RAM SARUP.

1941 R.D. 555=1941 A.W R. (H.C.) 227=1941 O.A. (Supp.) 522=1941 A.L J. 406=1941 A.L.W. 679=1941 O.W.N. 835.

——O. 21, Rr. 89 and 92—*Judgment-debtor adjudicated prior to confirmation of execution sale—Decree-holder failing to prove his debt in insolvency—Effect on sale.*

Where prior to the confirmation of an execution sale the judgment-debtor is adjudicated insolvent and the decree holder fails to prove his debt in insolvency and the judgment-debtor obtains his discharge in due course, the failure of the decree-holder to prove his debts in insolvency could not have the effect of setting aside the sale. (*Agarwala, J.*) SURAJ BALI *v.* GANGA PERSHAD. **194 I.C. 605=1941 O.W.N. 833=13 R.O. 15=1941 O.L.R. 510=1941 A.W.R. (C.C.) 234=1941 O.A. 539=A.I.R. 1941 Oudh 505.**

——O. 21, R. 89—Refund of deposit under—If can be ordered on application under S. 144. *See* C. P. CODE, S. 144 AND O. 21, R. 89.

1941 A.W.R. (H.C.) 278.

——O. 21, R. 89—*Right to apply—Person acquiring interest in property under contract of sale by judgment-debtor pending attachment—Application to set aside sale on deposit—Maintainability.*

A third party who has acquired an interest in the property sold by reason of a contract of sale made by the judgment-debtor pending attachment is competent to apply to set aside the sale under O. 21, R. 89 C. P. Code. Such a person is not seeking to enforce any claim against the auction-purchaser to his detriment, and S. 44, C. P. Code, should not be invoked to disentitle the applicant to apply. He having acquired an interest in the property by virtue of the contract of sale, should be allowed to deposit the amount required under O. 21, R. 89, C. P. Code, if he applies within 30 days of the sale. It cannot be said that he has no *locus standi* to apply. (*Manohar Lall, J.*) MUNDRIKA SINGH *v.* NAND LAL SINGH. **191 I C. 689=7 B.R. 240=13 R.P. 338=A.I.R. 1941 Pat. 204.**

——O. 21, R, 89—Right to apply—Purchaser from judgment-debtor subsequent to sale—Application by—Competency. *See* 1940 Dig., Col. 305. RUGHNATH *v.* HARIRAM. **192 I.C. 10=13 R.S. 180.**

——O. 21, R. 89—Scope and intention—Deposit by judgment-debtor—Conditions of validity. *See* 1940 Dig., Col. 305. RAGHUNATH *v.* HARIRAM.

192 I.C. 10=13 R.S. 180.

C. P. CODE (1908), O. 21, R. 90.

——O. 21, R. 90—*Applicability and scope—If exhaustive.*

R. 90 of O. 21 which taken with the three sub-rules of R. 92 gives the general ground on which the executing Court, (and that Court alone is specifically empowered and required to set aside a sale) is confined to 'the ground of a material irregularity or fraud in publishing or conducting it." As regards material irregularities or fraud committed otherwise than in publishing or conducting an execution sale, fraud would, generally speaking, make the sale voidable only, and if the question should arise in the conditions laid down in S. 47, C. P. Code, it would be under this section, and under this section alone, that the sale would be set aside. (*Dhavle and Meredith, JJ.*) BHANKUMAR CHAND *v.* LACHMIKANTA RAI. **A.I.R. 1941 Pat. 566.**

——O. 21, R. 90—*Applicability*—"*Any person whose interests are affected by the sale*"—*Person claiming by title adverse to and paramount to that of judgment-debtor—Right to apply.*

Persons claiming by title adverse to and paramount to that of the judgment-debtor are not persons whose interests are affected by the sale within the meaning of O. 21, R. 90, C.P. Code, and such persons are not therefore entitled to maintain an application under O. 21. R. 90 to set aside the sale. The undivided share of the judgment-debtor in certain properties was attached in execution of a decree against him. After the attachment in pursuance of an agreement between the judgment-debtor and his co-sharer to refer the matter to arbitration, there was an award by which the properties were divided into three shares and some of the items which formed the subject of the attachment exclusively fell to the shares of the co sharers of the judgment-debtor. Subsequently the execution sale took place and the co-sharers applied under O. 21, R. 90, C. P. Code, to set aside the sale in regard to the properties which fell exclusively to their shares.

Held, that the co sharers were not in any way affected by the sale, which was only of the right, title and interest of the judgment-debtor, *i.e.*, his undivided interest in certain items; if the purchaser wanted to realise the fruits of his purchase, he would have to file a suit for partition and separate possession of the share purchased by him and it would then be open to the co-sharers to resist his claim and hence they were not in any way hurt by the execution sale. The sale so far as the co-sharers were concerned was a nullity and there was no question of setting it aside under O. 21, R. 90. (*Venkataramana Rao, J.*) CHERRUPPAN *v.* SANKARA AIYAR. **54 L W. 95=1941 M.W.N. 663= A.I.R. 1941 Mad. 680=(1941) 2 M.L.J. 63.**

——O. 21, R. 90—*Applicability—Application for resale under O. 21, R. 86—If falls under R. 90.*

An application for setting aside a sale and for re-sale under O. 21, R. 86, C. P. Code, on the ground that the decree holder purchaser has defaulted to pay into Court the surplus sale price after deducting the decree amount due to him, cannot be regarded as an application under O. 21, R. 90, C. P. Code. (*Harries, C.J. and Fazl Ali, J.*) MAHABIR PRASAD *v.* JUGAL KISHORE PRASAD. **195 I.C. 837 = 14 R.P. 159=7 B.R. 975= 22 Pat.L.T. 313= A.I.R. 1941 Pat. 447.**

——O. 21, R. 90—*Applicability—Material irregularity—Sale without service of notice under O. 21, R. 22—Nullity.*

The omission to issue or serve the notice contemplated by O. 21, R. 22, C. P. Code, is not a mere irregularity in publishing and conducting a sale falling under O. 21, R. 90. There can be no sale without such notice, and if a sale is held under such circumstances, it is a nullity being a case of no sale at all in the eye of law. A separate suit therefore lies to declare the sale void and ineffective. (*Harries, C.J. and Fazl Ali, J.*) DURGA SINGH *v.* SUGAMBAR SINGH. **194 I.C. 372=13 R.P. 708=7 B.R. 753= 22 Pat.L.T. 520=1941 P.W.N. 529= A.I.R. 1941 Pat. 481**

——O. 21, R. 90—Applicability—Objection as to saleability of property. *See* 1938 Dig., Col. 339. MAROTI *v.* KISANLAL. **I.L.R. (1941) Nag. 381.**

——O. 21, R. 90—Applicability—Sale in execution of decree for arrears of rent under Madras Estates Land Act—Setting aside—Power of Revenue Court—Madras Estates Land Act, Ss. 132 and 194. *See* 1940 Dig., Col. 305. SURYANARAYANA *v.* SOBHANADRI APPARAO PAHADUR. **A.I.R. 1941 Mad. 72= (1940) 2 M.L.J. 584.**

——O. 21, R. 90—Applicability—Void sale—If to be set aside. *See* LIMITATION ACT, ART. 166. **A.I.R. 1941 Pat. 566.**

——O. 21, R. 90—*Right to apply—Sale of melwaram interest—Application by owner of kudiwaram interest to set aside—Maintainability.*

The holder of a Kudivaram interest in land has no *locus standi* to apply under O. 21, R. 90, C. P. Code, to set aside a sale where it is of the melwaram interest only. (*Abdur Rahman, J.*) VEERABHADRA PILLAI *v.* O. A. NARAYANASWAMI IYER. **196 I.C. 98= 14 R.M. 251=1941 M.W.N. 483= A.I.R. 1941 Mad. 653=(1941) 1 M.L.J. 831.**

——O. 21, R. 90—Scope—Sale of interest of Hindu coparcener in joint family property—Want of specification of interest—If invalidates proclamation or sale. *See* C. P. CODE, S. 60 (*m*) **(1941) 2 M.L.J. 550.**

——O. 21, R. 90—*Security—Order for after issue of notice to respondent—Jurisdiction of Court.*

In an application to set aside a sale under O. 21, R. 90, C. P. Code, the Court can demand security only before admitting the application and not afterwards. The issue of notice to the respondent must be held to be an admission of the application, and an order for security after that stage is without jurisdiction. Therefore the Court is not justified in dismissing the application for failure to comply with the order for security. (*Pandrang Row and King, JJ.*) CHIDAMBARAM PANDARAM *v.* LAKSHMINARAYANA CHETTIAR. **53 L.W. 719= 1941 M.W N. 624=A.I.R. 1941 Mad. 652= (1941) 2 M.L.J. 109.**

——O. 21, R. 90 (as amended by Patna High Court)—*Setting aside sale—Grounds—Objection under S. 16 of Bihar Money-Lenders Act not taken before sale—Whether can be allowed subsequently.*

Where before the conclusion of a sale the Bihar Money-Lenders Act of 1938 had come into force but no application was made to the Court under Ss. 16 and 17 of that Act and no objection was taken to the sale proceeding on the old proclamation of sale, an application under O. 21, R. 90, C. P. Code, cannot be admitted on the ground that the Court did not proceed with the sale as directed by Ss. 16 and 17 of the Bihar Act, as such a ground could have been put forward before the sale. When it is not open to the judgment-debtor to raise the matter in the Court below he cannot raise it in appeal before the High Court. (*Harries, C.J. and Manohar Lall, J.*) CHANDRA SEKHAR DHAR MISRA *v.* BHAGWAN DAS. **193 I.C. 124=7 B.R. 580=13 R.P. 546= A.I.R. 1941 Pat. 440.**

——O. 21, R. 90—*Setting aside sale—Right of judgment-debtor.*

In order to entitle the judgment-debtor to have the sale set aside, it has to be established that there has been some illegality or irregularity in the publication and

C. P. CODE (1908), O. 21' R. 90.

conduct of the sale which has resulted in the property being sold at an inadequate price to the prejudice of the judgment debtor. (*Harries, C.J. and Manohar Lall, J.*) CHANDRA SEKHAR DHAR MISRA *v.* BHAGWAN DAS. **193 I.C. 124=7 B.R. 580=13 R.P. 546= A.I.R. 1941 Pat. 440.**

——**O. 21, R. 90**—"Whose interests are affected by the sale"—Meaning of—Insolvent judgment debtor—Right of to apply to set aside sale. *See* 1940 Dig., Col. 307. MANTHIRI GOUNDAN *v.* ARUNACHALAM GOUNDAN. **194 I.C. 795=14 R.M. 82= (1940) 1 M.L.J. 711.**

——**O. 21, R. 90 (Madras Amendment of 1937), Proviso 1**—Construction and scope—If *ultra vires*—Order for security before admission of application—Opportunity to applicant to show cause before order—Necessity. *See* 1940 Dig., Col. 306. SEETA RAMANJANEYALU *v.* RAMMAYYA. **I.L.R. (1941) Mad 203= 192 I.C. 448=13 R.M. 554 (2)= A.I.R. 1941 Mad. 28=(1940) 2 M.L.J. 972 (F.B.).**

——**O. 21, R. 92**—*Scope—Sale in execution—Purchase by stranger—Subsequent cancellation of decree in appeal—Power af executing Court to confirm sale.*

There is no provision in the Code of Civil Procedure for the cancellation of a sale in execution merely because of the cancellation of the decree in execution of which it has been held, and though it be in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property merely because the decree under which the sale was held has been cancelled in appeal. Consequently the executing Court has power to confirm the sale notwithstanding that on the date of the confirmation the decree had been set aside on appeal and had ceased to have a judicial existence. (*Wadsworth, J.*) AMBUJAMMAL *v.* THANGAVELU CHETTIAR. **53 L.W. 167= 1941 M.W.N. 299=A.I.R. 1941 Mad. 399= (1941) 1 M.L.J. 193.**

——**O. 21, R. 93**—*Judgment-debtor proved to have no title to property sold—Right of purchaser to sue for purchase money.*

An auction-purchaser at Court sale is not entitled to maintain a suit for the recovery of purchase money in the event of the judgment-debtor being proved not to have any title to the property sold. His remedy is confined within the limits of O. 21, R. 93. (*Almond, J. C. and Mir Ahmad, J.*) MIRZA JAN *v.* GHULAM RAZA. **194 I.C. 565=14 R. Pesh. 1= A.I.R. 1941 Pesh. 41.**

——**O. 21, R. 93**—Limitation—Starting point—Auction purchase—Application by, for refund of poundage and interest—Starting point of limitation—Original order setting aside sale or appellate order. *See* LIMITATION ACT, ARTS. 181 AND 182. **(1941) 2 M.L.J. 121.**

——**O. 21, R. 94**—Mistake in the matter of the number of the house sold—Parties not misled—Agitation after eleven years—Relief if can be given. *See* 1940 Dig., Col. 308. KALYAN DAS *v.* BRIJ KISHORE. **193 I C. 495=13 R.A. 412=A.I.R. 1941 All. 9.**

——**O. 21, Rr. 95 and 97**—*Right to apply under—Limitation—Failure to apply under R. 97, if can affect period of limitation to apply under R. 95.*

R. 97 of O. 21, C. P. Code, merely gives the auction-purchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under Art. 167, Limitation Act; but if he fails to so apply, that

C. P. CODE (1908), O. 22, R. 1.

does not take away his right to apply again under R. 95 for delivery of the property, in which case he must apply within three years of the date of sale becoming absolute, under Art. 181. Art. 167 cannot take away the right to apply under R. 95 of O. 21, C. P. Code. (*Pollock, J.*) GANPAT SINGH *v.* RAMGOPAL. **1941 N.L.J. 494= A.I.R. 1941 Nag. 322.**

——**O. 21, Rr. 97 and 103**—Dismissal of application under R. 97 of O. 21—Appealability—Scope of R. 103 of O. 21. *See* 1940 Dig., Col. 308. BAHADUR KHAN *v.* BARI TALA. **192 I.C. 709=13 R.A. 358.**

——**O. 21, R. 100**—*Applicability—Delivery of symbolical possession to decree holder—Dispossession under the rule—What may not amount to.*

O. 21, R. 100 does not apply where symbolical possession is given to a decree-holder. Where a decree-holder in execution of his decree brings to sale the property jointly owned by the judgment-debtor and a third party and purchases the same, a requisition by the decree-holder on the tenant of the judgment-debtor and third party to pay rent to him cannot amount to dispossession of the third party within the meaning of O. 21, R. 100. Even if the third party can be said to be dispossessed he would be dispossessed by the tenant and not the decree-holder and hence even then O. 21, R. 100 cannot be attracted. (*Roberts, C.J. and Dunkley, J.*) MA AYE TIN *v.* ELLERMAN'S ARRACAN RICE AND TRADING CO., LTD. **A.I.R. 1941 Rang. 298.**

——**O. 21, R. 100**—Application under—Maintainability—Difference between R. 100 and S. 108 (10) of Oudh Rent Act. *See* OUDH RENT ACT, S 108 (10) AND C, P. CODE, O. 21, R. 100. **1941 R.D. 263.**

——**O. 21, R. 131**—Construction—'Charge', if confined to charge created by act of parties. *See* 1940 Dig., Col. 309. RAM CHANDRA *v.* RAM LAL. **I.L.R. (1940) All. 681=191 I.C. 745= 13 R.A. 266.**

——**O. 22**—Applicability — Arbitration—Reference by parties of family disputes—Death of one party—If puts an end to arbitration proceedings. *See* 1940 Dig., Col. 309. VENKATACHELLAM *v.* SURYANARAYANAMURTHY. **A.I.R. 1941 Mad. 129= (1940) 2 M.L.J. 520.**

——**O. 22, R. 1**—*Survival of right to sue—Test—Suit for account in respect of defendant's management of plaintiff's property during his minority—Death of defendant—Suit, if can be continued against the legal representatives—Limits to the application of the maxim 'actio personalis moritur cum persona'.*

There are certain types of wrongs which, though a remedy for them is available against the wrongdoer during his lifetime, does not permit of a remedy against his representatives after his death. By English law an executor represents the debts and the property of his testator but not his person. And that in general, is true of the position of a legal representative in India. Generally the only cases, apart from cases of contract in which a remedy for a wrongful act can be pursued against the estate of a deceased person is one in which the wrong consists of the appropriation by the deceased of property, or the value of property belonging to another. To those special types of wrongs which have produced for the wrongdoer either property or money which has accrued to his estate, the English law has refused to apply the maxim of *actio personalis moritur cum persona'*. These principles are applicable to India as well. Wherever it is found that a deceased person has by his wrong diverted either property or the proceeds of the property belonging to some one else into his own estate, recourse can be had to that estate, through his legal representatives when he is dead, to recover it—sub-

C. P. CODE (908). O. 22. R. 2.

ject, of course, to the limitation that any decree obtained will be limited to the assets of the deceased wrongdoer's estate. Further wherever a relationship based on contract, quasi contract or fiduciary relationship or some obligation to perform a duty, is found to exist that also is alone sufficient to entitle a remedy to be pursued against the legal representatives of the wrongdoer. Where a plaint charged the defendant with having disposed of various parts of the plaintiff's estate during his minority and of monies derived from the estate by putting them into his own pocket, and then went on to ask for an account it was *held* that the plaint contained a distinct allegation that the defendant owed a duty to the plaintiff and that in breach of that duty, he appropriated to himself either the property of the minor or else its value and that on the death of the defendant the suit did not abate and the right to sue survived. (*Braund, J.*) GHULAM RASHID *v.* MOHAMMAD ABDUL RAB. **195 I.C. 618=14 R.A. 64=1941 A.W.R. (H.C.) 89=1941 O.A. (Supp.) 149=1941 A.L.W. 84=1941 A L.J. 93=A.I.R. 1941 All. 187.**

——**O. 22, Rr. 2 and 3**—*Applicability—Test—Legal representative already on record—Application for substitution—If necessary*;

In order to determine whether R. 2 or R. 3 of O. 22, C. P. Code, applies, it is necessary to see whether or not the right to sue survives to the surviving plaintiff or plaintiffs alone. There is nothing in R. 2 to support the contention that it does not apply where the legal representative is on the record not as such but in his individual capacity. When the legal representative is already on the record and the right to sue survives to the remaining plaintiff, the case comes within R. 2 and not within R. 3 and no application for substitution is necessary. (*Harries, C.J. and Chatterji, J*) BHUDEB CHANDRA ROY *v.* BHIKSHANKAR PATTANIK. **196 I.C. 837.**

——**O. 22, R. 3**—*Death of party—Number of heirs taking definite share in the inheritance—One of them not added—Abatement if* in toto.

Where on the death of an appellant leaving a number of heirs taking definite share in the inheritance, one of them is not added as a party within the time, the whole appeal cannot abate but only as regards the share of the person not added. (*Ghulam Hasan and Agarwal, JJ.*) TAJAMMUL HASAIN *v.* AMIRUDDIN. **1941 O.A. 951=1941 A.W.R. (Rev.) 1078=1941 O.W.N. 1239.**

——**O. 22, Rr. 3, 4 and 11**—*Death of one of appellants—Legal representative not brought on record—Decision jointly affecting all appellants—Appeal, if abates against all.*

Where a suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so is decreed, the decision jointly affects all the defendants and if in appeal by them one of them dies and his legal representative is not brought on record within time, the appeal does not abate against all the appellants. (*Mir Ahmad and Sooft, JJ.*) MASHAHUR *v.* SUBHAN DIN. **194 I.C. 365=13 R. Pesh. 79=A.I.R. 1941 Pesh. 36.**

——**O. 22 R. 3**—*Mortgage suit—Death of mortgagee—Legatee applying to be brought on record—Probate if necessary.*

If a mortgagee dies pending his suit to bring the mortgaged property to sale, a person claiming under his will can be brought on the record as a legal representative without taking out probate first. It would, however, be necessary for him either to take out probate or obtain a succession certificate before proceeding to take out a personal decree, if this becomes necessary. (*Beckett, J.*) DAULAT RAM *v.* MEERO. **194 I.C 585=14 R.L. 2=43 P.L R. 16=A I.R. 1941 Lah. 142.**

C. P. CODE (1908), O. 22, R. 3.

——**O. 22, R. 3**—*Representative suit—Death of one of the representors—Procedure to be followed.*

In a representative suit when one of the plaintiffs dies, the duty of the parties is to bring this fact to the notice of the Court and ask for directions. Generally a new name would be suggested and the Court will agree to the substitution of this name in the place of the deceased. Where it is stated that the plaintiffs severally represent the whole community, a decree in favour of one would bind the whole community and in the case of death of one of them, a decree against the remaining representative will not be infructuous, and hence the suit will not abate as a whole on the death of one of the representatives. (*Davies.*) GANGA DHAR *v.* MUNICIPAL COMMITTEE, AJMER. **1940 A.M.L.J. 63.**

——**O 22, R. 3**—*Scope—Suit on behalf of deity—All* shebaits *parties to suit—Death of one pending suit—Decree without effecting substitution in time limited—Validity—Abatement—If caused.*

Where in a suit on behalf of a deity by the *shebaits*, all the *shebaits* are on the record at the time the plaint is presented, the suit is properly constituted. If after the suit and before the decree is made one of the *shebaits* dies, and no substitute is made within the time limited by law, there can be no question of abatement. The deity is sufficiently and substantially represented by the remaining *shebaits*, who are parties to the decree passed and the decree is a good decree. It cannot be held that the suit abates. (*Agarwala and Meredith, JJ.*) SADHU CHARAN PARIJA *v.* KRISHNAMANI DEI. **7 Cut.L.T. 87.**

——**O. 22, R. 3**—*Suit by* A *and mutwalli for declaration that certain mosque was wakf—Mutwalli dying pending appeal—*A *managing mosque since his death—*A, *if could be treated as legal representative.*

In a suit by *A* and a mutwalli of a mosque for declaration that the mosque was wakf a decree was passed. During the pendency of the appeal the mutwalli died. Since the death of the mutwalli, *A* had been managing the mosque and the properties and performing the same duties as the deceased mutwalli was alleged to have performed in his lifetime.

Held, that *A* could be treated as a legal representative for prosecuting the appeal. (*Tekchand and Dalip Singh, JJ.*) MT. KAMMON *v.* ALLAH BAKHSH. **193 I.C. 323=13 R.L. 447=A.I.R. 1941 Lah. 36.**

——**O. 22, Rr. 3 and 9 and S. 2 (11)**—*Suit by Hindu widow to recover mortgage debt due to husband—Reversioners, if legal representatives—Death of widow pending suit—Reversioners not applying for substitution—Abatement of suit—Fresh suit by them or by purchaser of their interest—Maintainability.*

A Hindu widow suing to recover a mortgage debt due to her husband sues as a representative of her husband's estate. If she dies pending the suit, the right to sue survives and devolves on the reversioners who are her legal representatives within the meaning of S. 2 (11), C. P. Code, inasmuch as the estate vests in them on her death. If the reversioners do not apply to be substituted in time, the suit abates under O. 22, R. 3 (2) and they are, therefore, debarred from instituting a fresh suit on the mortgage under O. 22, R. 9. A purchaser of their interest is under the same disability. (*Sen, J.*) ABDUL RAHAMAN MIA *v.* BALAIPADO SETT. **I.L.R. (1941) 1 Cal. 137=195 I.C. 728=14 R.C. 131=45 C.W.N. 105=A.I.R. 1941 Cal. 347.**

C. P. CODE (1908), O. 22, R. 4.

——O. 22, R. 4—*Abatement of appeal—Total or partial—Test—Suit for declaration against person attaching property and against persons claiming rateable distribution—Appeal—Death of a respondent—Failure to add legal representative—Appeal if abates* in toto.

In case of death of one of the respondents where his legal representative is not added, it cannot be said that in all such cases where the allowing of the appeal would result in conflicting decrees it is necessary for the whole appeal to abate. Mere inconsistency is not sufficient nor is it an absolute test to find out whether an appeal is to abate *in toto* or partially. Where in a suit to declare certain property not liable to attachment, the person attaching the property and persons claiming rateable distribution were added as defendants and during the pendency of an appeal by the plaintiff from the decision in the suit, one of the respondents died and his legal representative was not added as a party, it was held that the appeal did not abate *in toto* but only as against the respondent whose legal representative was not added in time. (*Bennet and Madeley, JJ.*) LACHMI NARAIN *v.* MUSADDI LAL.

1941 O.W.N. 1195=1941 A.W.R. (Rev.) 1010=1941 O.A. 891.

——O. 22, R. 4—*Abatement—Test—Death of a formal respondent—Appeal, if can proceed without his legal representatives.*

Whether an appeal can be heard in the absence of any of the respondents depends on the nature of the suit and where a successful appeal will not create any contradictory decrees between the appellants and deceased formal respondents, the appeal can be heard without the legal representatives. (*Harper, S.M. and Sathe, J.M.*) RAM ANJORI *v.* BABUA SAHEB SINGH.

1941 O.W.N. 95=1941 R.D 63=1941 A.L.J. (Supp.) 29=1941 A.W.R. (Rev.) 265 (1)=1941 O.A. (Supp.) 214 (1).

——O. 22, R. 4—Administration suit—Death of one of defendants—Abatement of suit. *See* 1940 Dig., Col. 311. MAHOMEDALLY TAYEBALLY *v.* SAFIABAI.

67 I.A. 406=I.L.R. (1940) Kar. (P.C.) 410=I.L.R. (1941) Bom. 8=191 I.C. 113=13 R.P.C. 113=53 L.W. 1=45 C.W.N. 226=7 B.R. 210=1941 A.W.R. (P.C.) 1=43 P.L.R. 63=1941 O.A. 119=43 Bom.L.R. 388=73 C.L.J. 214=1941 O.W.N. 734=1941 P.W.N. 316=1941 M.W.N. 729=1941 A.L.W. 567=(1941) 1 M.L.J. 594 (P.C.).

——O. 22, R. 4—Appeal by applicant under United Provinces Encumbered Estates Act—Death of some creditor respondents—Legal representative not added—Appeal, if abates *in toto*. *See* 1940 Dig., Col. 311. UDAI PRATAP SINGH *v.* DWARKA PRASAD.

15 Luck. 748.

——O. 22, R. 4—Applicability — Mortgage suit—Preliminary decree—Subsequent death of mortgagor—Heirs not impleaded—Abatement—Rule—O. 22, R. 6. *See* 1940 Dig., Col. 311. DAWARALI JAFARALI *v.* BAI JADI. **192 I.C. 405=13 R.B. 250.**

——O. 22, R. 4—Contest by some of several defendants—Presumption as to knowledge of rest—If applies to deceased defendant—Mandatory character of O. 22, R. 4. *See* 1940 Dig., Col. 312. BHARATH DAS *v.* INDRASAN. **1941 A.L.J. (Supp.) 7.**

——O. 22, R. 4—*Death of one of respondents—Appeal, if abates* in toto.

On the setting aside of the execution sale the auction-purchaser instituted a suit for the recovery of the sale price against the decree-holder *A*, the judgment-debtor

C. P. CODE (1908), O. 22, R. 4.

B, and another decree-holder *C* who had shared the sale proceeds rateably along with *A*. The suit was decreed. At the hearing of the first appeal by *A*, *B* and *C*, *B* died and his representatives were substituted in his place. The appeal having been allowed the auction-purchaser filed a second appeal against *A*, *B* and *C* in spite of the fact that *B* had died as aforesaid :

Held, that the appeal abated only against representatives of *B* but not against *A* and *C* inasmuch as the auction-purchaser could sue on his claim *A* and *C* even if he never made *B* a party to the suit at all. (*Almond, J. C. and Mir Ahmad, J.*) MIRZA JAN *v.* GHULAM RAZA. **194 I.C. 565=14 R.Pesh. 1=A.I.R. 1941 Pesh 41.**

——O. 22, R. 4 and U. P. Encumbered Estates Act (1934), S. 4—*Death of one of the respondents—Legal representatives not added in time—Appeal, if abates* in toto—*Test—Principle applied to case under U. P. Encumbered Estates Act.*

The question whether on the failure to add the legal representatives of one of the respondents within time, the appeal abates *in toto* or not, depends on the facts of each case. The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest, and (2) whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter. Where during the pendency of an appeal by an applicant under the U. P. Encumbered Estates Act, one of the creditors opposing the debtor's application died and his legal representatives were not added in time, it was held that the interests of the deceased creditor could not be separated from those of the rest and that the heirs of the deceased were necessary parties and when they had not been added in time, the appeal abated as a whole. (*Thomas C.J., Bennet and Ghulam Hasan, JJ.*) GHULAM ABBAS *v.* SAFDARJAH ZAHID ALI.

16 Luck. 515=193 I.C. 1=13 R.O. 446=1941 O.L.R. 272=1941 A.L.W. 313=1941 O.A. 281=1941 R.D. 199=1941 A.W.R. (Rev.) 233=1941 O.W.N. 418=A.I.R. 1941 Oudh. 219 (F.B.).

——O. 22, R. 4—*Death of one of three defendants who were brothers—Widow of deceased not impleaded as legal representative—Representation by other defendants that they formed joint family—Plaintiff acting in good faith—Decree, if binds legal representatives.*

A suit was instituted against three brothers on the basis of a mortgage effected by them. One of the defendants died pending the suit but he had admitted the mortgage in his written statement. The plaintiff applied for his widow being brought on record as his legal representative but subsequently did not pursue the matter as the other defendants stated that they were members of a Joint Hindu family and had succeeded to the interest of the deceased by survivorship. The suit was eventually decreed. It was found that the defendants had separated in status before the suit.

Held, that the decree was binding on the widow as the legal representative of the deceased inasmuch as the plaintiff had acted in good faith in not insisting upon impleading her and as the estate was effectively represented by the surviving brothers. (*Bhide, J.*) SHIMBHU NATH *v.* BRAHAM WATI. **194 I.C. 304=13 R.L. 528=42 P.L.R. 806=A.I.R. 1941 Lah. 49.**

——O. 22, Rr. 4 and 5—*Decree against wrong legal representative—When binds true representative—Absence of* bona fides *on part of plaintiff—Effect.*

C. P. CODE (1908), O. 22, R. 5.

The appellant had settled his land with one *J*, who he alleged, was a tenant-at-will. On *J's* death, he settled the land with *J's* sister *P* and *K* who was the daughter of *G*, *P's* daughter, as joint tenants. The appellant sued to eject *J* and *K* on the ground that they were not rendering service as agreed to. Pending the suit *P* died; the appellant applied to have *K* recorded as the legal representative of *P*. This was done and a decree was passed in the appellant's favour. *G* brought a suit for declaration that the decree was not binding on her and for an injunction restraining the appellant from interfering with her possession in execution of the decree. It was found that *G* was in possession of the property and that the appellant made no attempt to give any explanation of his omission to implead *G* in his suit.

Held, that a decree obtained against a wrong legal representative might bind the true representative who was no party to the decree, if it be shown that the plaintiff had acted *bona fide* and was ignorant of the true facts, that there was no fraud or collusion and that the person wrongly impleaded was impleaded in a representative capacity, the decree also being passed against him as representing the state. Since the appellant had made no attempt to explain his act in not impleading *G*, daughter of the defendant *P*, he could not claim to have acted *bona fide*. The decree therefore did not bind *G*. (*Agarwala, J.*) KRISHNAVATI *v.* GUNJARI. **193 I.C. 331 = 13 R.P. 575 = 7 B.R. 592 = 22 Pat.L.T. 338 = A.I.R 1941 Pat. 299.**

——**O. 22, R. 5**—*Orders under*—Res judicata.

Orders passed under O. 22, R. 5, C. P. Code, regarding the choice of a legal representative do not finally determine the rights of any claimants to the property in suit. Such orders are limited to the purpose of carrying on the suit and do not have the effect of conferring any right to heirship or to property. Even if the claimants choose to put directly in issue any such right, the decision on such an issue does not operate as *res judicata*. (*Beckett, J.*) DAULAT RAM *v.* MEERO. **194 I.C. 585 = 14 R.L. 2 = 43 P.L.R. 16 = A I.R. 1941 Lah. 142.**

——**O. 22, R. 5**—Scope and effect—Death of appellant—Application for substitution by one heir—Notice to other heirs—Latter raising no objection—Order of substitution—Finality—If can be challenged. *See* 1940 Dig., Col. 313. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON.

192 I.C. 17 = 13 R.P. 362 = 7 B.R. 283.

——**O. 22, R. 8**—*Construction and scope—Appeal against money-decree—Insolvency of appellant—Abatement.*

A right to appeal against a money-decree is not affected by the insolvency of the appellant debtor. The words "might maintain" in O. 22, R. 8 (1) mean has the power, or is entitled, to maintain. Where pending an appeal against a money-decree the appellant is adjudicated insolvent, the Official Assignee cannot continue the appeal for the benefit of the insolvent's creditors and the appeal cannot abate under O. 22, R. 8, C. P. Code. (*Beaumont, C.J. and Macklin, J.*) CHANDRAKANT DEVJI *v.* NAROTTAMDAS AMARCHAND.

196 I.C. 339 = 14 R.B. 123 = 43 Bom. L.R. 644 = A I.R. 1941 Bom. 293.

——**O. 22, R. 8 (1)**—*Security for costs—Grounds—Poverty of appellant.*

The general principle on which the Courts act is not to order further security for the costs of the appeal to be given merely on the ground that the appellant is poor. (*Beaumont, C.J. and Macklin, J.*) CHANDRAKANT DEVJI *v.* NAROTTAMDAS AMARCHAND.

196 I.C. 339 = 14 R.B. 123 = 43 Bom.L.R. 644 = A.I.R. 1941 Bom. 293.

C. P. CODE (1908), O. 22, R. 10.

——**O. 22, Rr. 9 and 4**—*Remedy of plaintiff.*

The fact that the Court went outside the considerations which are necessary for disposal of an application seeking an order under O. 22, R. 4, C. P. Code, that the suit had abated would not bar plaintiff from filing the application to set aside abatement which R. 9 of O. 22 permits him to make. An appeal under O. 43, R. 1 (*k*) lies from an order passed under O. 22, R. 9 and not from an order passed under R. 4 of that order; and although it may be said that an order under R. 4 may amount to a decree and therefore be appealable, yet R. 9 provides a concurrent remedy of which the party aggrieved may avail himself. (*Davis, J.C. and Weston, J.*) TIRITHDAS KESHAVDAS *v.* HARCHANDRAI.

191 I.C. 447 = 13 R.S. 133.

——**O. 22, R. 9**—Sufficient cause—Mere ignorance of death. *See* 1940 Dig., Col. 313. JAGADISH BAHADUR *v.* MAHADEO PRASAD. **A.I.R. 1941 Oudh 16.**

——**O. 22, R. 9 (2)**—*Right to apply under—Heirs not coming on record—Administrator, if can apply to set aside abatement.*

Where a deceased plaintiff or appellant leaves an heir or heirs who can, if they choose, apply to be brought on record as the legal representative of the deceased plaintiff or appellant but they or any of them neglect to be brought on the record to prosecute the case, the person obtaining the grant of letters of administration to the estate after the abatement of the suit or appeal is entitled to apply for the setting aside of the abatement of the suit or appeal and it would be set aside if sufficient cause is shown. (*Mya Bu and Mosely, JJ.*) KO PO HNIT *v.* KO SIT ON. **1941 Rang.L.R. 371.**

——**O. 22, R. 9 (2)**—*Sufficient cause—Ignorance of death—Failure to apply not due to any laches.*

Where the parties lived in different villages where there is no proper road communication and the death of a party was only vaguely known to the other of having taken place during the vacation and the latter applies for substitution without undue delay, if it is found as a fact that the death occurred earlier the abatement should be set aside. Courts should not take an unreasonable view in this respect. (*Davies.*) RAM SWAROOP *v.* SUGAN CHAND. **1940 A.M.L.J. 79.**

——**O. 22, Rr. 10 and 11**—Applicability and scope—Final decree for partition allotting suit property to a person during pendency of suit in respect of such property—Application by such party to come on record during pendency of appeal from decree in suit—Maintainability. *See* 1940 Dig., Col. 314. RATNASABAPATHI PILLAI *v.* GOPALA IYER. **193 I.C. 637 = 13 R.M. 705 = (1940) 2 M.L.J. 349.**

——**O. 22, R. 10**—*Applicability—Decree under U.P. Encumbered Estates Act sent to Collector for execution—Transfer of part of the decree—Substitution of names, if permissible.*

Where after the passing of the decree by the Special Judge under the U. P. Encumbered Estates Act, it is sent to the Collector for execution, the proceedings under the Act are still pending. Hence where there has been a transfer of a part of such decree after it is sent to the Collector, an application for substitution of names could be ordered. To refuse it on the ground that after decree the suit is not pending is putting a too limited an interpretation on the words 'during the pendency of a suit' in O. 22, R. 10, C. P. Code. (*Harper, S. M. and Shirreff, J.M.*) SUNDAR LAL *v.* SADA SEWAK.

1941 A.W.R. (Rev.) 598 (1) = 1941 R.D. 518 = 1941 O.A. (Supp.) 552 (1).

——**O. 22, R. 10**—*Applicability to execution proceedings—Order under—Appeal and second appeal—O. 43, R. 1 (l) and S. 104 (2).*

C. P. CODE (1908), O. 22, R. 10.

O. 22, R. 10, C. P. Code, applies to execution proceedings. An order made under that rule dismissing an application to add a party to the execution proceeding is appealable under O. 43, R. 1 (*l*), but is not subject to second appeal in view of S. 104 (2), C.P. Code. (*Wadia and Wassoodew, JJ.*) KRISHNAJI RAMCHANDRA *v.* BHIKCHAND RAMKARAN. **43 Bom.L.R. 719.**

——**O. 22, R. 10**—*Scope of—Assignment of interest during pendency of litigation—Right to prosecute litigation, if lost—Assignment after decree and before appeal—If can affect right to appeal.*

R. 10 is not one of the rules in O. 22, C. P. Code, which declare the abatement of a suit but it is merely a provision enabling the assignee to continue the suit if, during the pendency of the suit, the interest of the plaintiff has been assigned to him. It is merely a permissive provision for the benefit of an assignee and not a punitive one to the detriment of the assignor. There is no provision in the Code which shows that a plaintiff who has assigned his interest in the property in suit during the pendency of the suit or an appellant who has assigned his interest in the property being the subject-matter of the litigation during the pendency of the appeal, loses his right of further prosecuting the suit or appeal. Where a plaintiff after dismissal of his suit and before filing an appeal against it, assigned his interest in the subject-matter of the suit, it was *held* that it was not incompetent for him to prefer an appeal against the dismissal. (*Mya Bu, J.*) MAUNG BA THAW *v.* MA SAW MAY. **1941 Rang.L.R. 366.**

——**O. 22, R. 10**—Suit for damages for wrongful entry on land in breach of contract of lease—Assignment by plaintiff of profit and loss of suit—Death of plaintiff—Right of assignee to continue suit—T. P. Act, S. 6 (*e*). *See* TRANSFER OF PROPERTY ACT, S. 6 (*e*).

(1941) 1 M.L.J. 22.

——**O. 22, R. 10**—*Who can apply under.*

It is not competent to a party who has allowed his opportunity to apply under O. 22, R. 4 to go by owing to his negligence, to fall back on O. 22, R. 10. There may be cases in which it is legitimate for one party to apply under R. 10 for substitution in the ranks of the opposite parties, but that is not speaking generally the purpose of R. 10. In ordinary cases of devolution by death R. 4 applies. In cases of assignment, creation of interest or devolution of an interest other than by death, it would normally be the party in whose favour the assignment has been made or the interest created or had devolved who would apply under R.10. Generally speaking it would not ordinarily be open to the opposite party to apply under R. 10. (*Yorke, J.*) AMAN ULLAH KHAN *v.* ABDUL HAKIM KHAN. **195 I.C. 224 = 14 R.O. 60 = 1941 O.L.R. 553 = 1941 O.W.N. 872 = 1941 A.L.W. 772 = 1941 A.W.R. (C.C.) 258 = 1941 O.A. 583 = A.I.R. 1941 Oudh 495.**

——**O. 22, Rr. 11 and 12**—Applicability—Appeal from order in execution, *See* 1939 Dig., Col. 287. MADHORAO NARAYANRAO *v.* YADAORAO.

I.L.R. (1941) Nag. 578.

——**O. 22, R. 12**—Applicability—Appeals arising from execution proceedings. *See* 1940 Dig., Col. 315. JAGADISH BAHADUR *v.* MAHADEO PRASAD.

A.I.R. 1941 Oudh 16.

——**O. 23, R. 1**—*Appellate Court—Permission to withdraw suit after dismissal of appeal—Power to grant.*

An appellate Court has no jurisdiction to allow a suit to be withdrawn under O. 23, R. 1, C. P. Code, with liberty to institute a fresh suit after passing an order dismissing the appeal. (*Bhide, J.*) LAL DEV *v.* NATHU RAM. **193 I.C. 137 = 13 R.L. 433 = 42 P.L.R. 785 = A.I.R 1941 Lah. 18.**

C. P. CODE (1908), O. 23, R. 1.

——**O. 23, R. 1**—*Applicability—Withdrawal by one of several plaintiffs—Dismissal of suit—Absence of decree—Appealability.*

Where one of several plaintiffs withdraws from the suit and the Court dismisses the entire suit on the grounds that the other plaintiffs who only derived title from the one who had withdrawn, had no case to go on with, the order is not one under O. 23, R. 1 but a dismissal of the suit on merits. Though a decree is not drawn up in such a case, an appeal lies because the decision amounts to a decree. The absence of a decree would not invest the High Court with jurisdiction to interfere in revision. (*Bose, J.*) VILAYATALI KHAN *v.* KHAIRUNISSA. **1941 N.L.J. 179 = A.I.R. 1941 Nag. 180.**

——**O. 23, R. 1 and S. 11**—*Bar to fresh suit—Court allowing plaintiff to file fresh suit and dismissing suit—Fresh suit—If barred by* res judicata.

Where on an application for withdrawal of a suit under O. 23, R. 1, C. P. Code, the Court passes an order granting permission to the plaintiff to withdraw the suit with liberty to bring a fresh suit, and also adds that "the suit stands dismissed," these words are really a surplusage and possess no significance whatever, and a fresh suit is not barred by *res judicata*. (*Tekchand and Abdul Rashid, JJ.*) CHANAN SINGH *v.* COMMITTEE OF MANAGEMENT FOR GURDWARA MAI MALAN.

I.L.R. (1941) Lah. 331 = 196 I.C. 134 = 14 R L. 129 = 43 P.L.R. 561 = A.I.R. 1941 Lah. 192.

——**O. 23, R. 1**—*Bar to fresh suit—Non-payment of costs.*

Where a plaintiff who has been allowed to withdraw a suit under O. 23, R. 1, C. P. Code, with permission to bring a fresh suit has been ordered to pay costs to the defendant but no time limit has been fixed for such payment, and such payment has not been made a condition precedent to the institution of a fresh suit, the failure of the plaintiff to pay costs is no bar to the maintainability of a fresh suit. (*Tek Chand and Abdul Rashid, JJ.*) CHANAN SINGH *v.* COMMITTEE OF MANAGEMENT FOR GURDWARA MAI MALAN.

I.L.R. (1941) Lah. 331 = 196 I.C. 134 = 14 R.L. 129 = 43 P.L.R. 561 = A.I.R. 1941 Lah. 192.

——**O. 23, R. 1**—*Duty of Court—Grant of permission to withdraw suit.*

The provisions of O. 23, R. 1, C. P. Code, require that the Court should be satisfied about the conditions justifying withdrawal of the suit under that rule before granting permission. (*Bhide, J.*) LAL DEVI *v.* NATHU RAM. **193 I.C. 137 = 13 R.L. 433 = 42 P.L.R. 785 = A.I.R. 1941 Lah. 18.**

——**O. 23, R. 1**—*Leave to file fresh suit—If can be granted on dismissal of suit.*

A Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. (*Roberts, C.J. and Mosely, J.*) U SIN *v.* MA MA LAY. **1941 Rang.L.R. 14 = 194 I.C. 482 = 13 R.R. 311 = A.I.R. 1941 Rang. 118.**

——**O. 23, R. 1 and S. 115**—*Revision—If lies against order under O. 23, R. 1—Duty of Court—Withdrawal on the ground of formal defects, when defects were material defects—Interference.*

In certain circumstances an application in revision lies against an order passed by a Court under O. 23, R. 1, C. P. Code and in such a case it is necessary to see whether the Court has been guilty of material irregularity in passing the order. Where a suit dismissed by the trial Court is allowed by the appellate Court to

C. P. CODE (1908), O. 23, R. 1.

be withdrawn with liberty to file a fresh suit on the ground that there were certain formal defects, when as a matter of fact they were material defects, the lower appellate Court must be held to have acted with material irregularity in allowing the withdrawal of the suit and its order can be set aside in revision. (*Bennett, J.*) RAM PADARATH MISIR *v.* DATA DIN MISIR.

193 I.C. 892 = 13 R.O. 522 = 1941 O.L.R. 371 = 1941 A W.R. (Rev.) 310 = 1941 O.A. 343 = 1941 O.W.N. 558 = A.I.R. 941 Oudh 417.

——**O. 23, R. 1**—*Scope and effect—Order permitting withdrawal of suit with liberty—Subsequent application for revival of suit on ground of non-acceptance of terms or to alter or vary terms—Maintainability.*

If a plaintiff simply wishes to withdraw from suit he can do so without asking for any permission from the Court. But if he wishes to withdraw his suit with liberty to institute a fresh suit in respect of the same subject matter, he has to ask for permission from the Court, and it can be given only on such terms as it thinks fit. It is clear that the permission relates not to the withdrawal of the suit but to the filing of another suit when once the suit is withdrawn it is no longer pending. After the order is made permitting the withdrawal of the suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or to annul the conditions, the suit having already ended when the order is made. Once the order for permission to withdraw is made and the suit has ceased to exist it is not open to the plaintiff to revive the suit on the ground of non-acceptance of the terms. This should be before and not after the order of withdrawal is formally made. (*Divatia, J.*) JAIJIBAI MODI *v.* BHIKHIBAI CHANDULAL.

196 I.C. 333 = 14 R.B. 121 = 43 Bom.L.R. 646 = A.I.R. 1941 Bom. 290.

——**O. 23, R. 1**—*Suit instituted in accordance with permission given under—If can be allowed to be withdrawn.*

There is nothing in the Civil Procedure Code, or any other law, which lays down that under no circumstances can a suit instituted in accordance with the permission given under O. 23, R. 1, C. P. Code, at the time of the withdrawal of the first suit be allowed to be withdrawn with the liberty to bring another suit. (*Tekchand and Abdul Rashid, JJ.*) CHANAN SINGH *v.* COMMITTEE OF MANAGEMENT FOR GURDWARA MAI MALAN.

I.L.R. (1941) Lah. 331 = 196 I.C. 134 = 14 R.L. 129 = 43 P.L.R. 561 = A.I.R. 1941 Lah. 192.

——**O. 23, R. 1 (2)**—*Scope and object—Request for permission owing to abundant caution—If could be granted.*

The main object of sub-rule (2) of rule 1 of O. 23, C. P. Code is to prevent the defeat of justice on technical grounds and the words 'sufficient grounds' refer to some defect in the suit, which had the effect of shutting out a fair trial on the merits and arose out of some error made in good faith by plaintiff or by the Court at the instance of either party which could only be effectively set right by a trial *de novo*. In a case where there was no defect which shut out a fair trial, but the plaintiff's cause of action disappeared and he out of an abundant caution to meet a possible claim by the other side made a request for permission to bring a fresh suit it was *held* that under those circumstances permission ought not to be reserved to the plaintiff to bring a fresh suit. (*Clarke, J.*) JAMNADAS *v.* BEHARILAL.

196 I.C. 544 = 14 R.N 110 = 1941 N.L.J. 382 = A.I.R. 1941 Nag. 258.

——**O. 23, R. 1 (2) (b)**—"Sufficient grounds"—Meaning of. *See* 1940 Dig., Col. 316. JAGADAMBAL *v.* SUNDARAMMAL. **A.I.R. 1941 Mad. 46.**

C. P. CODE (1908), O. 23, R. 3.

——**O. 23, R. 1 (3)**—*Applicability—Application under para. 20, Sch. II—If 'suit', for purposes of O. 23, R. 1—Withdrawal without liability—If bars subsequent suit to enforce award or suit on original cause of action apart from award—"Subject-matter."*

An application under Sch. II, para. 20, C. P. Code, to file an award, though it is numbered and registered as a suit, is not a suit for all purposes. In respect of a promissory note executed by the defendant to the plaintiff in June, 1933, there was a reference to arbitration without the intervention of the Court in 1935, and an award was made. On 14—6—1935, the plaintiff applied to file the award under para. 20, Sch. II, C. P. Code and on 18—9—1936, he applied for permission to withdraw the application on the ground that he had to file a separate suit, but did not specifically ask for liberty to bring a separate suit. The Court made an order permitting the withdrawal. On 28—10—1936, the plaintiff filed a suit to enforce the award and secondly to recover the amount due on the promissory note. It was pleaded that the suit was barred under O. 23, R. 1 (*c*), as no leave to bring a fresh suit had been granted.

Held, (1) that an application to file an award and a suit to enforce an award were not *in pari materia*, and O. 23, R. 1 could not be construed to mean that the withdrawal of an application without liberty reserved was a bar to the institution of a suit, as the word "suit" in the rule if it could mean an application to file an award at all, must mean that wherever that word occurred; (2) that even if it be held that the withdrawal of an application to file an award without liberty to apply again barred a suit, it would only bar a suit on the same subject-matter; (3) an application to file an award and a suit afterwards brought to enforce the award were not proceeding in respect of the same subject-matter; (4) that *a fortiori*, the plaintiff's claim for relief on the original cause of action apart from the award was not on the same subject-matter, and hence the suit was not barred, as the plaintiff's failure to obtain leave of the Court to bring the suit was not fatal to his suit.

Obiter.—O. 23, R. 1 is essentially a rule of procedure, and it would seem that it would under S. 141, C. P. Code, apply to an application to file an award, whether the application is to be regarded as a suit or not. (*Broomfield and Macklin, JJ.*) GANPAT KINUSHET *v.* VITHAL BHIKAN. **43 Bom.L.R. 976.**

——**O. 23, R. 1 (3)**—*Bar of suit—Ejectment suits—Lapse of time and fresh opportunity for ejectment—If makes second suit different from the first.*

Where the facts constituting the basis of the plaintiff's rights and the infraction are the same the mere passage of time with the recurrence of a fresh opportunity for ejectment does not constitute any such substantial difference as will make the subject matter of the second suit different from that of the previous suit. (*Sathe, J.M.*) RAJ SHATRANJA JI *v.* GUMANI RAM.

1941 O.W.N. 692 = 1941 A.W.R. (Rev.) 440 = 1941 O.A. (Supp.) 370 = 1941 R.D. 374.

——**O. 23, R. 3 and S. 115**—*Adjustment—Award in arbitration with permission of Court—Supersession—Appeal—Revision—If lies.*

An award in an arbitration whether with or without the permission of Court cannot be recorded as an adjustment by compromise under O. 23, R. 3, C. P. Code and therefore an order superseding an award is not appealable. Nor is it revisable under S. 115, C. P. Code, because there is no 'case' decided. (*Clarke, J.*) HANSRAJ *v.* SHANKARLAL. **196 I.C. 770 = 1941 N.L.J. 333 = A.I.R. 1941 Nag. 263.**

——**O. 23, R. 3**—Compromise—Recording of—What amounts to—Decree directing effect to be given to com-

C. P. CODE (1908), O. 23, R. 3.

promise, without setting out the text of it. *See* 1940 Dig., Col. 317. JAGAT SINGH *v.* SANGAT SINGH.
72 C.L.J. 287=22 P.L.T. 407.

——O. 23, R. 3—*Decree in terms of compromise—How to be drawn up.*

Where a compromise covers both matters relating to the suit and also others extraneous to it, the decree should either recite the whole of the agreement and then conclude with an order relative to that part that was subject of the suit or introduce the agreement in a schedule to the decree. (*Clarke, J.*) SHANKER BALKRISHNA *v.* SHREE GOPAL KRISHNA.
196 I.C. 232=14 R.N. 91=1941 N.L.J. 207=
A.I.R. 1941 Nag. 197.

——O. 23, R. 3—*Procedure under—Agreement recorded—Decree, if can be passed any time.*

The procedure under O. 23, R. 3 consists of two steps: first the agreement or compromise has to be recorded, and secondly a decree must then be passed in accordance therewith so far as it relates to the suit. When the agreement has been recorded a decree can be passed any time. (*Roberts, C.J. and Dunkley, J.*) V. M. R. P. CHETTYAR FIRM *v.* HAJEE MAHOMED SULTAN.
A.I.R. 1941 Rang. 316.

——O. 23, R. 3 and O. 21, R. 2—*Relative applicability—Mortgage suits—Compromise relating to whole subject-matter before end of proceedings.*

A mortgage suit does not come to an end until the mortgaged property has been duly sold and the sale proceeds dealt with, or if there is a right to a personal decree under O. 34, R. 6, C.P. Code, until that personal decree has been passed, and therefore any agreement of compromise relating to the whole of the subject-matter of the suit which is entered into by the parties before the conclusion of the proceedings in a mortgage suit is an adjustment of the suit which falls to be dealt with under O. 23, R. 3 and not under O. 21, R. 2. (*Roberts, C.J. and Dunkley, J.*) V.M.R.P. CHETTYAR FIRM *v.* HAJEE MAHOMED SULTAN.
A.I.R. 1941 Rang. 316.

——O. 23, R. 3—*Terms of decree under—Matters not forming subject matter of suit—If can be included in decree.*

Under O. 23, R. 3 all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. (*Roberts, C. J. and Dunkley, J.*) V. M.R.P. CHETTYAR FIRM *v.* HAJEE MAHOMED SULTAN.
A.I.R. 1941 Rang. 316.

——O. 25, R. 1 (3)—*Female plaintiff—Security when can and when cannot be demanded.*

As regards a plaintiff who is a woman, the legislature has specifically laid that security may be taken from her in certain circumstances in a suit for payment of money. *Inclusio unius exclusio alterius*, and therefore security cannot be taken from a female plaintiff in a suit for property. There is no discretion left in the Court for taking security in any case or in any set of circumstances other than those specifically provided for. (*Collister, J.*) SURAJKUAR *v.* SANT SINGH.
I.L.R. (1941) All. 418=196 I.C. 102=
14 R.A. 123=1941 A.L.J. 249=
1941 O.A. (Supp) 248=1941 O.W.N. 628=
1941 A.L.W. 432=1941 A.W.R. (H.C.) 138=
A.I.R. 1941 All. 219.

——O. 26, R. 1—*Pardanashin lady—Right to be examined on commission.*

A pardanashin lady should not be compelled either to appear in Court personally or attend Court even although she may have failed to observe the restraints

C. P. CODE (1908), O. 32, R. 3.

of the parda system on previous occasions. She should, therefore, be examined on commission. (*Edgley, J.*) KISSEN LAL KANKORIA *v.* PURSHOTTAM DAS.
I.L.R. (1941) 2 Cal. 155.

——O. 26, R. 8 (a)—Sick witness—Evidence taken on commission—If inadmissible. *See* 1940 Dig., Col., 318. SNEHALATA DEVI *v.* JANARDAN PRASAD SINGH. 191 I.C. 288=13 R.P. 292=7 B.R. 168.

——O. 29, R. 1—*Suit against Municipality—Power of Secretary to engage counsel—Special authorization by Municipality—If necessary.*

Under O. 29, R. 1, the Secretary of a Municipality can sign and verify the written statement, and the fact that he has been generally empowered to institute and defend suits is enough to authorize him to engage a counsel to defend actions against the Municipality. Defending an action is certainly different from instituting an action. The latter step requires initiative which should certainly come from the Municipality itself and not from its agent. Hence a special authorization by the Municipality is not necessary as is required for instituting suits. (*Mir Ahmad, J.*) TILA MAHOMED *v.* MUNICIPAL COMMITTEE, PESHAWAR. 196 I.C. 648=
A.I.R. 1941 Pesh. 76.

——O. 30, R. 1—Applicability—Joint Hindu family firm—Punjab. *See* 1940 Dig., Col., 318. NANDGOPAL OM PRAKASH *v.* MEHNGA MAL KISHORI LAL. 192 I.C. 383=13 R.L. 371.

——O. 30, R. 1—Applicability—Joint Hindu family trading firm—Punjab. *See* 1940 Dig. Col., 318. ATMA RAM *v.* UMAR ALI. I.L.R. (1941) Lah. 39.

——O. 30, R. 1—Suit by sole proprietor—Proper frame of suit. *See* 1940 Dig., Col. 318. LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS CO.
16 Luck. 357.

——O. 30, R. 8—Scope—Defendant served as partner—Appearance in protest and denial of being partner—Right to ask for issue of partnership being tried first. *See* 1940 Dig. Col. 319. NANDLAL TRIBHOVANDAS *v.* BAKER JAFER & CO. 191 I.C. 633=13 R.B. 189.

——O. 30, R. 10—Applicability—Hindu joint family trading firm. *See* C. P. CODE, O. 21, R. 50 AND O. 30, R. 10. 7 Cut.L.T. 21.

——O. 30, R. 10—Scope—Person sued in name adopted for purpose of dealings—Another using that name independently or by transfer of business before suit—If *ipso facto* become liable for debts incurred by former. *See* 1940 Dig., Col., 319. JAISINGHANI, *In re.* 191 I.C. 635=13 R.S. 160.

——O. 32, R. 3—Appointment of guardian—Father refusing to act and suggesting mother—Mother if should notify willingness. *See* 1940 Dig., Col., 320. RAM CHARAN DAS *v.* BHAGWAT SARAN.
191 I.C. 620=13 R.A. 242.

——O. 32, R. 3—Appointment of guardian—Minor's name wrongly given—None misled in fact—Objection in execution—Sustainability. *See* 1940 Dig., Col. 320. RAM CHARAN DAS *v.* BHAGWAT SARAN
191 I.C. 620=13 R.A. 242.

——O. 32, Rr. 3, 5 and 7—Compromise on behalf of minor defendant—Right to enter into—Natural guardian of minor— Compromise by—Guardian *ad litem* not party to compromise—Minor—If bound. *See* 1940 Dig., Col. 320. AWADESH PRASAD MISSIR *v.* WIDOW OF TRIBENI PRASAD. 192 I.C. 170=
13 R.P. 411=7 B.R. 322=22 Pat.L.T. 223.

——O. 32, Rr. 3 and 4—*Guardian—Absence of valid appointment—Binding nature of decree.*

In cases where in fact a guardian was appointed and in fact the guardian had acted for the minor the appointment may not be capable of being called in question, on

C. P. CODE (1908), O. 32, R. 3.

the ground of any irregularity. But where no one has appeared for the minor at all and there has been no valid appointment and the notices sent to the nominated guardian have been refused, any decree that may be passed against the minor in such circumstances cannot be regarded as a mere irregularity. It is a wholly illegal procedure and no minor can be bound by such a decree. (*Dar, J.*) SHAH UDEY RAM *v.* KANCHAN SINGH. **1941 R.D. 658 = 1941 A.L.W. 740.**

——**O. 32, R. 3 (Nagpur)**—*Suit against minor as major—Subsequent amendment and appointment of guardian—If affects limitation.*

Where a person was sued as a major and subsequently on an objection that he was a minor, he was treated as a minor and a guardian was appointed, on a contention that the suit against him was barred as it should be taken to have been instituted only on the day the guardian was appointed, it was held that O. 32, R. 3 did not mean that the suit was a nullity until a guardian was appointed or that no suit could be taken to have been instituted till such date and for purposes of the Limitation Act it did not matter whether the person was a major or a minor and further that the suit, so far as Limitation Act was concerned was against the proper person, whether he was described as a major or a minor and it would be within time, if it was within time on the date on which the suit was instituted by the filing of the plaint. It was held further that the question of guardianship was a separate matter and related not to the institution of the suit but to the right of the plaintiff to carry it on against the minor. (*Bose, J.*) ABDUL AZIZ *v.* SK. AMIR. **193 I.C. 805 = 13 R.N. 348 = 1941 N.L.J. 115 = A.I.R. 1941 Nag. 130.**

——**O. 32, R. 3 (5)**—*Appeal—Notice served on guardian* ad litem *appointed in lower Court—Power of Court to appoint fresh guardian* ad litem *without discharging existing guardian.*

Where in an appeal to the High Court from a decree of a lower Court, it is found that a guardian *ad litem* had been appointed in the lower Court for certain minor respondents and that such guardian has been served with this notice of appeal, it is not proper for the Registrar of the High Court to appoint a fresh guardian for such minors until the existing guardian has been dicharged. (*Agarwala and Rowland, JJ.*) LALJI MANDAL *v.* PARBAL MANDAL. **13 R.P. 347 = 191 I.C. 794 = 7 B.R. 260 = 22 P.L.T. 362 = A.I.R. 1941 Pat. 224.**

——**O. 32, R. 3 (5)**—*Existence of Court guardian—Appeal by minor through different guardian—Competency.*

Where a guardian appointed by Court for a minor is still due to function, not having been removed and being alive, an appeal filed by the minor under the guardianship of another person is illegal and of no effect. (*Harper, S.M.*) GANGA DIN *v.* CHHADAMI. **1941 A.W.R. (Rev.) 927 = 1941 O.A. (Supp.) 801 = 1941 R.D. 788 (2).**

——**O. 32, R. 4 (3)**—*Applicability—Non-contentious probate proceeding.*

A non-contentious proceeding for probate is not a suit. Consequently O. 32, R. 4 (3), C. P. Code, does not in terms apply to a non-contentious probate proceeding. (*Nasim Ali and Akram, JJ.*) PASUPATHI SADHU. KHAN *v.* JANAK NATH MUKHERJEE. **74 C.L.J. 383.**

——**O. 32, R. 4-A (All.)**—*Funds for Court guardian—Procedure for obtaining.*

Where an advocate is appointed guardian of a minor and the matter comes up to the High Court in which the minor is a respondent it is the duty of the advocate to make a formal application to the High Court at the earliest stage, for funds and not wait till the appeal comes on for hearing and then communicate orally to the Court through an advocate appearing for another respondent, his request for funds. The Court cannot take notice of it. (*Ismail, J.*) RAM LAL *v.* RAM DIN KILEDAR. **195 I.C. 695 = 14 R.A. 75 = 1941 O.A. (Supp.) 519 = 1941 A.L.W. 791 = 1941 A.L.J. 370 = 1941 A.W.R. (H.C.) 224 = A.I.R 1941 All. 318.**

C. P. CODE (1908), O. 32, R. 7.

——**O. 32, Rr. 7 and 15**—*Applicability—Agreement to refer to arbitration where minor or lunatic is concerned—Leave of Court—Materials to be furnished.*

An agreement to refer to arbitration in a case where a minor or lunatic is concerned is an 'agreement' within the meaning of O. 32, R. 7, C. P. Code, and hence before the matter could be referred to arbitration, the leave of the Court must be expressly got recorded in the proceedings. Before granting the leave, the Court should exercise a judicial discretion as to propriety of the reference to arbitration in the interests of the minor or lunatic. All available materials should be placed before the Court and the materials must satisfy the mind of the Court that the action proposed is for the benefit of the minor or lunatic. Though it is not possible to lay down any hard and fast rule as to what should be done in such matters, this much can be said, that all facts necessary for the exercise of a judicial discretion by the Court should be placed before it and nothing should be concealed, for where the matter is being referred to arbitration and one of the parties is a lunatic, there should be abundant good faith. (*Collister and Bajpai, JJ.*) RAMGOPAL *v.* SHANTI LAL. **1941 A.W.R. (H.C.) 302 = 1941 A.L.W. 977 = 1941 O.A. (Supp.) 844 (1) = 1941 A.L.J. 596.**

——**O. 32, R. 7**—*Applicability—Execution proceedings—Absence of sanction—Effect—Minor challenging compromise—Effect.*

Execution proceedings are a continuation of the suit and hence O. 32, R. 7 is applicable to an agreement or compromise made in course of execution proceedings. Where there is no sanction as required by sub-R. (1) of R. 7 of that order, under sub-R. (2) of the same order the compromise is voidable against all parties other than minors. It is only the minor who can sue to avoid it and the adults have no such right to avoid it on the ground of want of leave. But when a minor sues to avoid it, it is voidable against all parties. (*Dunkley, J.*) MA KALEMA *v.* MA KYAING. **1940 Rang.L.R. 772 = 193 I.C. 619 = 13 R.R. 262 = A.I.R. 1941 Rang. 103.**

——**O. 32, R. 7 and U. P. Revenue Court Manual, Para. 94**—*Applicability of O. 32, R. 7 to partition proceedings.*

Under Para. 94 of the Revenue Court Manual, the provisions of O. 32, C. P. Code have been applied only to proceedings under S. 111 (3) of the U. P. Land Revenue Act. Consequently no sanction of Court is required in the case of a compromise in partition proceedings. (*Harper, S.M. and Sathe, J.M.*) JAISRI SINGH *v.* RAM BHAROSEY. **1941 R.D. 196 = 1941 A.W.R. (Rev.) 343 = 1941 O.A. (Supp.) 257.**

——**O. 32, R. 7**—Applicability to agreements for reference to arbitration in pending suits. *See* 1940 Dig., Col. 322. LOUNG TAHIR *v.* RAMSING TAKHATRAM. **191 I.C. 291 = 13 R.S. 129.**

——**O. 32, R. 7**—*Application for leave under—Duty of Court—Materials to be placed before Court.*

The Court, when considering an application for leave to compromise on behalf of a minor, has a very serious function to perform, namely to guard the interest of the minor and this duty is not one which ought to be per

C. P. CODE (1908), O. 32, R. 7.

formed in a perfunctory way. It is obviously difficult for the Court itself to go into every matter meticulously and to assess the value and so forth. In simple cases there are however at least two things which the Court ought to have before it—the first is an affidavit from the guardian himself that he, at any rate, has considered the matter carefully from the minor's point of view and has formed a considered opinion that the proposed transaction is for the minor's benefit. That should be indispensable in every case. The second item of assistance to which the Court is always entitled is a statement at the bar from the advocate or professional gentleman who represents the minor that he in his professional capacity has examined the matter and has formed an opinion that that it is one from which the infant will benefit. (*Braund, J.*) AKBAR HUSAIN KHAN *v.* BUDHU.

1941 A.W.R. (H.C.) 308 = 1941 A L.W. 997 = 1941 A.L.J. 605 = A.I.R. 1941 All. 431.

——**O. 32, R. 7**—Construction—Duty of Court—Leave of Court—Grant of before entering into compromise—If essential—Approval of terms of compromise already entered into—Sufficiency. *See* 1940 Dig., Col. 322. AWADESH PRASAD MISSIK *v.* WIDOW OF TRIBENI PRASAD. **192 I.C 170 = 13 R.P. 411 = 7 B.R. 322 = 22 Pat.L.T. 223.**

——**O. 32, R. 7**—*Leave to refer to arbitration on behalf of minor—Form of order granting—Failure to give reasons—Effect—Suit to avoid agreement offending against O. 32, R. 7—Maintainability.*

No particular formula is required for the express recording of the leave of Court to refer a matter to arbitration when a minor is involved. Where the Court is informed about the proposal and about a minor being involved and grants time to get the express consent of the guardian concerned and after satisfying itself about this it makes the reference, it satisfies the conditions of O. 32, R. 7 and it amounts to an 'express recording' of the leave of Court within the meaning of that provision. It is a salutory rule that the Judge must on the face of his order show that he has considered the question of the minor's benefit and give reasons for his thanking that it is. But the omission to record reasons will not make the order a nullity. O. 32, R. 7 does not give the minor an unqualified right to have the matter avoided but vests the Court with the discretion to avoid or not to avoid it. An agreement which offends O. 32, R. 7 in that the Court had not given reasons for its granting leave, cannot be avoided by a separate suit in the absence of fraud upon the Court, for there is only an irregularity and not an illegality. (*Stone, C.J. and Bose, J.*) MADANLAL *v.* RAMCHANDER SWAMI. **1941 N.L.J. 601.**

——**O. 32, R. 7**—Scope—Arbitration—Agreement of reference by guardian *ad litem* without leave of Court—Validity—Option to resile—If available to parties other than minor—Guardian agreeing to reference—Right to impeach validity on behalf of minor. *See* 1940 Dig., Col 323. RAMANATHAN CHETTIAR *v.* KUMARAPPA CHETTIAR. **194 I C. 826 = 14 R.M. 94.**

——**O. 32, R. 15**—Applicability—Agreement to refer to arbitration where minor or lunatic is concerned—Leave of Court—Materials to be furnished. *See* C. P. CODE, O. 32, RR. 7 AND 15. **1941 A.L.J. 596.**

——**O. 32, R. 15**—*Duty of Court—Application for appointment of guardian* ad litem *for judgment-debtor alleged to be insane and mentally infirm for purpose of applying for scaling down decree under Madras Act of* 1938—*Dismissal without judicial inquiry and without opportunity to produce medical certificate.*

Where an application is made to a Court after the final decree in a suit has been passed by the mother of

C. P. CODE (1908), O. 33, R. 1.

the judgment debtor for appointing a guardian *ad litem* for the judgment-debtor who is alleged to be mentally infirm and unable to manage his affairs for the purpose of enabling the guardian to ask the Court to apply the provisions of Madras Act IV of 1938 to the decree passed in the Court, the Court should hold a judicial inquiry as contemplated by O. 32, R. 15, C. P. Code. It is not proper for the Court to dismiss the application by merely relying on the previous history of the litigation and on its opinion after looking at the judgment-debtor and questioning him. When the applicant is desirous of adducing evidence such as a doctor's certificate, an opportunity must be given to adduce such evidence. Since the consequence of the dismissal of the application would be to prevent the applications of the provisions of the Madras Act IV of 1938, to a case to which they may apply it is incumbent on the Court to hold a regular inquiry and to invite the parties to adduce proper evidence even if the parties are somewhat indifferent, as otherwise justice could not be done. (*Pandrang Rao, J.*) RAMANATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR.

53 L W. 193 = 1941 M.W.N. 165 = A.I.R. 1941 Mad. 505 = (1941) 1 M.L.J. 234.

——**O. 32, R. 15**—*Procedure—Suit on behalf of person of unsound mind—Enquiry into competency of next friend—Where to be held.*

In cases coming under O. 32, R. 15, C. P. Code, it is desirable that the Court should, before admitting the plaint, insist upon an independent application and an affidavit disclosing the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented; it is also open to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed is that there should be some *prima facie* proof to satisfy the Court that the person was, by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked, when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent the plaintiff in the suit. (*Venkataramana Rao and Horwill, JJ.*) GOVINDAYYA *v.* RAMAMURTHI.

53 L.W. 258 = 1941 M.W.N. 198 = A.I.R. 1941 Mad. 524 = (1941) 1 M.L.J. 354.

——**O. 33, Rr. 1 and 2**—Application for leave to sue—Claim for damages for slander—Summary dismissal on the ground that damages cannot exceed a certain amount and referring party to Court of lower jurisdiction—Propriety. *See* PRACTICE. **(1941) 2 M.L.J. 505.**

——**O. 33, R. 1 and O. 9, R. 9**—Pauper application—Dismissal for default — Restoration — Propriety—Revision, if lies. *See* C. P. CODE, S. 115 AND O. 9 R. 9. **1941 O.A 427.**

——**O. 33, R. 1, Expl.**—"*Possessed of sufficient means*"—*Meaning of—Applicant having share in inheritance though not in possession thereof—Grant of leave to sue without considering whether money cannot be raised with it—Revision—Material irregularity.*

An applicant for leave to sue *in forma pauperis* who has a share in an inheritance cannot succeed unless he or she shows that he or she is not possessed of sufficient means in the sense that the applicant, having a share in an inheritance, cannot raise enough money to pay the Court-fee. The words "possessed of sufficient means

C. P. CODE (1908), O. 33, R. 2.

to enable him to pay the fee," in O. 33, R. 1, C. P. Code, mean having sufficient realizable property to be able to pay the Court-fee stamp on the plaint and cannot be construed as meaning "having sufficient hard cash for the purpose." To ignore the applicant's share in an inheritance because he is not in possession of it, and allow him to sue as a pauper, without considering whether he has shown that with the share he could not raise enough money to pay the Court-fee, would amount to material irregularity in the exercise of the jurisdiction conferred upon the Court under O. 33, C. P. Code, affording ground for interference by the High Court under S. 115, C. P. Code. (*Dhavle, J.*) JAINATUN NISSA BIBI *v.* IDRAKUNNISSA. **7 Cut.L.T. 28 = 22 P.L.T. 760 = A.I.R. 1941 Pat. 638.**

——**O. 33, R. 2 and O. 44, R. 1**—Mortgage decree—Mortgagor applying for leave to appeal *in forma pauperis*—Duty to state in affidavit valuation of equity of redemption. *See* C.P. CODE, O. 44, R. 1 AND O. 33, R. 2. **45 C.W.N. 426.**

——**O. 33, Rr. 2 and 5**—Scope—Suit for partition—Objection to court-fee—Order calling on plaintiff to pay additional court-fee—Application for amendment and for leave to continue suit as pauper—Power of Court to allow—Application if defective and liable to be rejected—Rules of procedure—Object of. *See* 1940 Dig., Col. 325. CHAITAN RAY *v.* PADMA CHARAN ROY. **192 I.C. 223 = 13 R.P. 443 = 7 B.R. 360.**

——**O. 33, R. 2**—*Scope—Suit in ordinary form—Leave to continue as pauper—Power of Court to grant—Conditions to be satisfied.*

The Court has power to allow a plaintiff to continue *in forma pauperis* a suit which has been instituted in the ordinary way, but before he can do so, there must be an application for permission which must comply with O. 33, R. 2, C. P. Code. (*Rowland, J.*) POKHAN GORAIN *v.* BENGALI GORAIN. **196 I.C. 40 = 14 R.P. 171 = 7 B.R. 987 = A.I.R. 1941 Pat. 621.**

——**O. 33, R. 5 (a)**—*Scope—Schedule of property—Omissions—If fatal.*

Omissions of some items of property from the schedule of property submitted by a pauper applicant are not fatal unless they are *mala fide*. (*Dhavle, J.*) JAINATUN NISSA BIBI *v.* IDRAKUNNISSA. **7 Cut.L.T. 28 = 22 P.L.T. 760 = A.I.R. 1941 Pat. 638.**

——**O. 33, R. 5 (d) and S. 115**—*Dismissal on ground of cause of action being barred—Propriety—Revision—Competency.*

O. 33, R. 5 (*d*) contemplates a subsisting cause of action which is not barred by limitation. Where a Court confines itself to the application for leave to sue as pauper and to the arguments and considers the question of limitation to be simple and decides it against the applicant, it cannot be said that it has exercised its jurisdiction illegally or with material irregularity. It is certainly within its powers to decide what it considered to be not a complicated question of limitation and hold that the application should be rejected as the claim is barred by limitation. Such an order could not be revised. (*Clarke, J.*) DARGAH OF SAINT MISKEEN-SHAH BARENA PIR *v.* HARDAYAL PRASAD. **1941 N.L.J. 473 = A.I.R. 1941 Nag. 330.**

——**O. 33, Rr. 5 (d) and 7**—*Scope—Duty of Court—Jurisdiction to go into evidence and to dismiss application on ground of suit being barred by* res judicata—*Dismissal—Interference in revision.*

Where an application for leave to sue *in forma pauperis*, itself does not disclose any want of cause of aetion, the Court should grant leave to the applicant, if

C. P. CODE (1908), O. 33, R. 15.

other conditons are satisfied. The Court is not entitled to look into other evidence, such as documents, at that stage and to dismiss the application under O. 33, R. 5 (*d*), C. P. Code, on the ground that the suit would be barred by *res judicata*. The dismissal of the application being on a ground not contained in O. 33, R. 5, C.P. Code, the Court acts without jurisdiction and the order is therefore liable to be set aside by the High Court in revision. (*Horwill, J.*) PERUMAL AIYAR *v.* SRINIVASA AIYANGAR. **1941 M.W.N. 64 (2) = 53 L.W. 201 = A.I.R. 1941 Mad. 398 = (1941) 1 M.L.J. 31.**

——**O. 33, Rr. 7 and 9**—*Grant of leave to sue as pauper—Facts justifying dispaupering coming into existence since application—Court refusing to consider them—Revision—C. P. Code, S. 115.*

If facts come into existence since the date of the application for leave to sue as a pauper, on which the plaintiff can be dispaupered under O. 33, R. 9, C. P. Code, there is no reason why the Court can not make such an order in anticipation by straightaway refusing the leave asked for. But if the Court allows the plaintiff to sue as a pauper refusing to take into account those facts, it can not be said to act so clearly without jurisdiction that the High Court should be bound to interfere in revision. (*Biswas and Roxburgh, JJ.*) AGENT, B. N. RY. CO. *v.* VENKATESWARI. **45 C.W.N. 551.**

——**O. 33, R. 9**—Procedure—Application to dispauper plaintiff—Time for disposal—Order dispaupering plaintiff after judgment in suit and along with disposal of suit—Propriety. *See* 1940 Dig., Col. 327. ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. **A.I.R. 1941 Mad. 217.**

——**O. 33, Rr. 10, 11 and 12**—*Court-fee payable—Computation—Basis—Amendment of valuation—Subsequent compromise—Court-fee payable.*

The payment of the Court fee under Rr. 10 and 11 of O. 33 ought to be calculated on the basis of the valuation at the date of the filing of the suit which is the valuation upon which the plaintiff would have had to pay 'if he had not been permitted to sue as pauper.' Hence where a pauper plaintiff gets his valuation amended to a figure less than that given originally in his plaint, and the suit is compromised subsequently, the Court-fee payable to the Government is to be calculated not on the amended valuation but on the original valuation given by the pauper plaintiff. (*Braund, J.*) SECRETARY OF STATE *v.* GOMTI KUNWARI. **195 I.C. 246 = 14 R.A. 23 = 1941 O.A. (Supp.) 327 = 1941 A.W.R. (H.C.) 162 = 1941 A.L.W. 404 = 1941 A.L.J. 253 = A.I.R. 1941 All. 221.**

——**O. 33, Rr. 10 and 11**—Plaintiff succeeding only in part—Order for payment of whole court-fee by defendant—Propriety. *See* 1940 Dig., Col. 327. MUJWIR HUSAIN *v.* KISHWAR JEHAN BEGAM. **16 Luck. 252 = 191 I.C. 185 = A.I.R. 1941 Oudh 66.**

——**O. 33, R. 15**—*Applicability—Notice served only on some of the respondents—Dismissal of application for default—If order refusing to allow applicant to sue as pauper—Fresh application—If barred.*

An order refusing to allow an applicant to sue as a pauper falling within O. 33, R. 15, C. P Code, must be an order passed under R. 7 (3) of O. 33, and R. 7 has to be read with R. 6. It is clear that, having regard to Rr. 6 and 7, the stage of R. 7 is not reached unless notice is given to the opposite party and the Government pleader as provided in R. 6. When there are several respondents, all the respondents must be served with notice. The Court cannot hear evidence as to pauperism and decide the question as against some only of the whole

C. P. CODE (1908), O. 33 R. 15.

body of opposite party or respondents. When the application is rejected for default without notice being served on all the respondents (only some of them being served) it does not amount to an order refusing to allow the applicant to sue as pauper so as to attract the operation of R. 15 of O. 33, C. P. Code, a fresh application is therefore not barred. (*Dhavle and Chatterji, JJ.*) PROVINCE OF ORISSA *v.* DEBYA SINGH. **20 Pat. 765 = 22 Pat. L.T. 814 = 7 Cut L.T. 34 = A.I.R. 1941 Pat. 594.**

——**O. 33, R. 15**—*Refusal contemplated by—Dismissal of application for default—If bars fresh application.*

The refusal which is contemplated by R. 15 of O. 33, C. P. Code, is a refusal to allow the applicant to sue as a pauper under sub-R. (3) of R. 7 of that order which must be the result of an inquiry into the merits of the application as directed by sub Rules (1) and (2) of R. 7. Dismissal for default of appearance of applicant cannot amount to such a refusal. R. 15 of O 33 only authorises the application of the principle of *res judicata* to an application to sue *in forma pauperis* and prohibits the entertainment of a fresh application when the first has been dismissed on the merits. It does not contemplate that a summary order passed without inquiry or contest should be given the force of *res judicata*. (*Mullah, J.*) NIMAR PANDEY *v.* JAGDISH PANDEY.

I.L.R. (1941) All. 313 = 196 I.C 109 = 14 R.A. 121 = 1941 A.L.W. 73 = 1941 A.W.R. (H C.) 56 = 1941 A.L J. 103 = A.I.R. 1941 All. 166

——**O. 33, Rr. 15 and 5**—*Rejection of application on merits—If bars fresh application.*

O. 33, R. 15, C. P. Code, applies only to cases in which permission has been refused after the issue of notice under R. 7 of the same order, and does not apply to cases in which the application has been summarily rejected under R. 5. An order of rejection under R. 5, although passed on the merits, does not operate as a bar to the presentation of a fresh application. (*Tek Chand and Beckett, JJ.*) ARYA SAMAJ, CHAORI BAZAR, DELHI *v.* RAM GOPAL

I.L.R. (1941) Lah. 709 = 195 I.C. 717 = 14 R.L. 85 = 43 P.L.R. 257 = A.I.R. 1941 Lah. 253.

——**O. 34**—Applicability to charges created by decrees. *See* 1940 Dig., Col. 327. RAYCHAND JIVAJI *v.* BASAPPA. **I.L.R (1941) Bom. 136 = 193 I.C. 740 = 13 R.B. 337 = A.I.R. 1941 Bom. 71.**

——**O. 34, R. 1**—*Necessary parties—Test—Person claiming paramount title.*

In a mortgage suit no question of title arises. The only question with which parties are concerned is the question of redemption. It is only those who are interested in paying in order to save the property who are necessary parties to the suit. A person who claims a paramount title is not a necessary party in as much as he disclaims all interest in the equity of redemption. (*Bose, J.*) SHAKUNTALABAI *v.* ROSHANLAL.

194 I.C. 19 = 13 R.N. 354 = 1941 N.L.J. 81 = A.I.R. 1941 Nag. 133.

——**O. 34, R. 1**—*Necessary and proper party—Distinction—Suit on mortgage against one of several heirs of mortgagor—Other heirs impleaded after limitation—Effect.*

There is a distinction between 'necessary party' and 'proper party'. A proper party is not necessarily a necessary party and he may be impleaded even after limitation had expired but a person who is a necessary party must be impleaded within the period of limitation and if he is not so the entire suit fails. If a suit is brought

C. P. CODE (1908), O. 34, R. 1.

against one of the several heirs of a mortgagor and the other heirs are impleaded after the expiry of the period of limitation, the suit against the heirs subsequently impleaded would be barred by time unless it can be shown that those heirs were represented by the person against whom the suit was originally instituted within time. It is wrong to say that in every case one of the several heirs of a mortgagor represents the others. (*Agarwal, J.*) GUR CHARAN *v.* RAM CHANDRA SINGH. **1941 A.W.R. (C.C.) 373 = 1941 A.L.W. 1088 = 1941 O.A. 961 = 1941 O.W.N. 1279.**

——**O. 34, R. 1**—Non-joinder of all interested parties—Effect of. *See* 1940 Dig., Col. 328. GIRDHAR *v.* MOTILAL CHAMPALAL. **I.L.R. (1941) Nag. 615 = 13 R.N. 267 = 192 I.C. 556 = A.I.R. 1941 Nag. 5.**

——**O. 34, R. 1 and U. P. Encumbered Estates Act R. 6**—O. 34, R. 1 if applies to proceedings under Encumbered Estates Act—Persons interested in mortgage, subject matter of proceedings under the Encumbered Estates Act—If can be made parties. *See* 1940 Dig., Col. 328. DWARKA NATH SINGH *v.* RAJ RANI. **16 Luck. 110.**

——**O. 34, R. 1**—*Parties—Party claiming paramount title—If necessary party.*

It is an established rule that a party claiming title paramount in a mortgage suit is not a necessary party. (*R.C. Mitter and Akram, JJ.*) BARODA PROSAD SUKUL *v.* NAOGAON LOAN OFFICE, LTD. **72 C.L.J. 493.**

——**O. 34, R. 1 and Form 9, Appx. D**—*Puisne mortgagee-defendant, claiming decree in form No. 9 of Appx. D—Jurisdiction of Court, if affected by the total amount being beyond its pecuniary jurisdiction—Court-fee if payable on defendants' prayer for such decree.*

Where in a mortgage suit the puisne mortgagees impleaded as defendants ask for a decree in form No. 9 of Appx. D, the suit for purposes of jurisdiction has to be valued *ad valorem* on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of that Court. The relief which the puisne mortgagees ask for does not require to be stamped at all. (*Pollock and Gruer, JJ.*) GANPATRAO *v.* SHAMRAO.

I.L.R (1941) Nag. 194 = 194 I.C. 390 = 13 R.N. 367 = 1941 N.L.J. 105 = A.I.R. 1941 Nag. 138.

——**O. 34, R. 1**—*Scope—Mortgage suit—Necessary parties—Person interested in mortgage security—Application to be impleaded as party to suit and claiming adversely to plaintiff—Duty of Court to implead.*

Although it is ordinarily undesirable to implicate in a mortgage suit persons claiming adversely to either the mortgagor or the mortgagee, this does not apply to the case of a person who has an interest in the mortgage security and whose claim is not in any way in derogation of the rights of the mortgagee or the mortgagor, notwithstanding that his claim is adverse to the plaintiff in the mortgage suit. If the person applying to be impleaded as a party in a mortgage is interested in the mortgage suit, he should be added as a party before a decree is given in the suit. O. 34, R. 1 requires that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the security. (*Wadsworth, J.*) MUTHUSWAMI CHETTIAR *v.* NARAYANASWAMI CHETTIAR. **196 I.C. 389 = 14 R.M. 292 = 1941 M.W.N. 517 = 54 L.W. 65 = A.I.R. 1941 Mad. 710 = (1941) 1 M.L.J. 626.**

C. P. CODE (1908), O. 34, R. 1.

——O. 34, R 1—Scope—Non-joinder—Effect. *See* 1940 Dig., Col. 328. JASRAJ FAOOJI *v.* SUGRABAI. **191 I C. 483.**

——O. 34, R. 4—Interest from suit till redemption—Rate of—Right of mortgagee. *See* 1940 Dig., Col. 329. GHULAM MAHOMED *v.* RAJESHWAR. **I.L.R. (1940) Lah. 658 = 192 I.C. 505 = 13 R.L. 385.**

——O. 34, R. 4 (3) and T. P. Act, S. 58 (g)—'Lahan gahan' mortgage—Decree that could be passed—Scope and grounds for the exercise of discretion of Court. *See* 1940 Dig., Col. 329. SITARAM *v.* KRISHNARAO. **I.L.R. (1941) Nag. 607.**

——O. 34. R 4 (3)—Scope of - Discretion of Court under. *See* MORTGAGE—ANOMALOUS MORTGAGE. **1941 A.L.J. 111.**

——O. 34, R. 4 (4)—Suit on prior mortgage—Subsequent mortgagee impleaded as party—Rights and remedies of. *See* 1940 Dig., Col. 330. HEM CHANDRA ROY *v.* SURADHANI DEBYA. **67 I.A. 309 = I L.R. (1940) Kar. (P C) 271 = 72 C.L J. 298 = 45 C.W.N. 253 = 1941 P.W.N. 63 = (1940) 2 M.L.J. 505 (P.C.).**

——O. 34, R. 5—*Decree for sale—Application of sale proceeds—Subsequent interest and costs—If can have priority.*

The general rule of appropriation of payments towards a debt is that in the absence of a specific indication to the contrary by the debtor, the money is first applied in payment of interest and then when that is satisfied, in payment of the capital. This principle applies even to the sale proceeds of the properties sold in execution of a mortgage decree. Therefore, in the absence of a direction to the contrary in the decree, the sale proceeds of the properties sold in execution of a mortgage decree must be applied first in payment of subsequent interest and costs, and thereafter the balance to discharge the principal sum declared as payable in the decree. 19 Lah. 403, Overr. (*Tek Chand, Monroe and Beckett, JJ.*) JIA RAM *v.* SULAKHAN MAL. **196 I.C. 625 = A.I.R. 1941 Lah. 386 (F.B.).**

——O. 34, R. 5—*Final decree—If must invariably be in accordance with preliminary decree—Power to order sale of property not available for sale, though included in preliminary decree.*

A final decree should, no doubt, be made in accordance with the preliminary decree; but where there is an obvious mistake in the preliminary decree, the Court is not bound to repeat that mistake, when passing the final decree. Particularly in the case of a final decree for sale in a mortgage suit, the Court must not direct the sale of any mortgaged property which is no longer available for sale under the mortgage, though it is wrongly included in the preliminary decree. (*Chatterji, J.*) KUNJA BEHARI MISRA *v.* BENUDHAR PANDA. **7 Cut.L.T. 49.**

——O. 34, R. 5—*Mortgage suit—Application for final decree—Dismissal of, decree having been satisfied under S. 19, Madras Act IV of 1938—If terminates suit—Right to apply for final decree for balance due.*

A mortgage suit must be considered to be pending till a final decree under O. 34, R. 5 (1) or (3) is passed, and it is open to the plaintiff to ask for a final decree to be made for the balance due to him under the preliminary decree. The fact that a final decree has been once refused on the ground that decree has been discharged under S. 19 of the Madras Act IV of 1938, and that the order of refusal has not been appealed against within the period prescribed for appeal, does not preclude an application for a final decree for the balance, if any, found to be due to the plaintiff. The refusal to pass a final decree is not and cannot be a dismissal of the suit. (*Wadsworth and Patanjali Sastri, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BHUSHANARAO. **54 L.W. 107 = 1941 M.W.N. 741 = 4 F.L.J. (H C.) 280 = A.I.R. 1941 Mad. 817 = (1941) 2 M.L.J. 125.**

C P. CODE (1908) O.) 34 R. 6.

——O. 34, R. 5 (3)—*Execution of mortgage decree—Decree-holder's right to proceed against separate items of property at different times.*

The intention of the legislature in enacting O. 34, R. 5 (3), C. P. Code, is to confer a right upon the mortgagee ordinarily to realise his security by bringing only a part of the mortgaged property to sale provided that he is satisfied that the sale of a portion of such property will be sufficient for the purpose of enabling him to realise his dues. If in execution proceedings against a portion of the mortgaged property only, the mortgagee fails to realise his full dues, there is no reason why he should not proceed against some other items of the mortgaged property; and it certainly cannot be said that by failure to proceed against the entire property he waives his right to do so in a subsequent execution case. (*Edgley, J.*) ABDUR ROUF *v.* ABDUR RAHIM. **I.L.R. (1940) 2 Cal. 520 = 195 I.C. 134 = 14 R.C. 48 = A.I.R. 1941 Cal. 205.**

——O. 34, R. 5 (3)—*Scope—Power of Court—Mortgaged property already sold for prior claim—Surplus sale proceeds—Final decree declaring mortgagee's right to surplus proceeds—Power of Court to pass—C. P. Code, S. 151.*

Where mortgaged property has already been sold in execution of a prior claim and the surplus sale proceeds are lawfully payable to the plaintiff mortgagee, there is no reason why the Court should not pass a final decree declaring the right of the plaintiff to recover the surplus sale proceeds. O. 34, R. 5, would be enough to empower the Court to do so, but if that rule be considered not wide enough to cover such a case, the Court may act in the exercise of its inherent powers under S. 151, C. P. Code. (*Chatterji, J.*) KUNJA BEHARI MISRA *v.* BENUDHAR PANDA. **7 Cut.L.T. 49.**

——O. 34, R. 6—*Applicability—Consent decree providing for instalments—Charge created on shares of defendants—Default clause entitling plaintiff to recover whole amount on failure to pay two instalments—Right given to plaintiff to realise amount by sale of shares—If personal decree—Right to proceed against other property without fresh personal decree—Construction.*

A decree which directs payment of the amount is *prima facie* a personal decree. O. 34, C. P. Code, regulates the enforcement by suit of mortgages. The Court must read the decree as a whole, and if a preliminary mortgage decree provides in the first instance that the mortgagor should pay the amount, not into Court but to the mortgagee, the Court would not be justified in construing the decree as an executable decree for payments because, taking the decree as a whole, it provides that there is not to be a personal decree for payment until the mortgaged property has been sold and a deficit has resulted. But there is no reason why one should apply the analogy of a mortgage decree to a consent decree which must be construed according to the language used. In the case of a consent decree, there is no justification for holding that by taking a charge upon specific property, the primary object of which is to secure the creditor against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to aban-

C. P. CODE (1908), O. 34, R. 6.

don. To hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment. A consent decree directed the defendant to pay to the plaintiff a lump sum of Rs. 9,000 by yearly instalments of Rs. 2,000. There was a default clause making the whole amount payable on default of payment of two instalments. Then it provided that a charge in favour of the plaintiff for the decretal amount of Rs. 9000 was given on certain shares belonging to the defendant; it then went on: "If the defendant fails to pay the monies in time, the same should be recovered by sale of the said shares. The defendant committed default, and the shares were sold and realised Rs. 4,350. Subsequently the plaintiff took out a darkhast to recover the balance of the debt by attachment and sale of a house of the defendant. The latter contended that the plaintiff having taken a charge on specific shares, had abandoned his right to recover the money by any other means. He also pleaded alternatively that if the plaintiff desired to proceed against other properties, and had a right to do so, he must first of all proceed to get a personal decree for payment.

Held, that the decree amounted to an order for payment and could be enforced by attachment and sale of any of the defendant's property; and merely because the plaintiff protected himself against other creditors by taking a charge on part of the defendant's property, he could not be held to have impliedly deprived himself of his right to proceed against any property or delayed its enforcement. The plaintiff, having failed to realize the whole amount of his debt by sale of the charged shares, could proceed under the decree to attach any other property of the defendant which might be available. (2) That the decree did not in terms restrict the right of the plaintiff to proceed against any other property and it did contain a decree for personal payment and could therefore be executed against the house of the judgment-debtor. (*Beaumont, C.J., Macklin and Wassoodew, JJ.*) GURAPPA GURUSHIDDAPPA *v.* AMARANGJI VANICHAND. **I.L.R. (1941) Bom. 299 = 193 I C. 217 = 13 R.B. 319 = 43 Bom.L.R. 26 = A.I.R. 1941 Bom. 90 (F.B.).**

——**O. 34, R. 6**—Applicability—Mortgage decree for sale and providing for personal remedy in case of insufficiency of sale proceeds to satisfy decree—Mortgaged property ceasing to be available for sale under decree—Right to apply for personal decree without sale. *See* 1940 Dig., Col. 331. GANESWAR PARIDA *v.* HARISH CHANDRA DUTTA. **191 I.C. 599 = 13 R.P. 331 = 7 B.R. 231.**

——**O. 34, R. 6**—*Liability—Hypothecation by lessee of minerals—Suit by lessor to enforce hypothecation against lessee and sub-lessee—Decree—Sale proceeds insufficient—Application for personal decree against sub-lessees—Competency.*

The lessees of minerals hypothecated certain property to secure sums due by way of royalty; in a suit by the lessor for royalty against the lessees and sub-lessees praying for a decree for sale of the hypothecated property, a preliminary decree was passed and then a final decree also was made. The hypothecated property was brought to sale but the amount fetched at the sale was not enough to satisfy the whole decree. The lessor applied under O. 34, R. 6, C. P. Code, for a personal decree against both the lessees and the sub-lessees,

Held, that no personal decree could be passed against the sub-lessees merely because they were interested in the property. They were in no way personally liable to the lessor and therefore there could be no personal decree against them. (*Harries, C.J. and*

C. P. CODE (1908), O. 38, R. 5.

Manohar Lall, J.) JOYRAM NARAYAN *v.* SHIVA PRASAD SINGH. **193 I.C. 32 = 7 B.R. 503 = 13 R.P. 534 = A.I.R. 1941 Pat. 416.**

——**O. 34, R. 11**—Interest *pendente lite*—Discretion of Court to reduce contract rate. *See* 1940 Dig., Col. 331. JAIGOBIND SINGH *v.* LACHMI NARAIN RAM. **21 Pat.L T. 1109 = (1940) 1 M.L.J. (Supp.) 14 (F.C.)**

——**O. 34, R. 11**—*Pendente lite* interest—Power of Court to refuse. *See* BIHAR MONEY-LENDERS ACT (1939), S. 7. **196 I.C. 677.**

——**O. 34, R. 11**—*Scope—Discretion of Court as to interest* pendente lite.

O. 34, R. 11, C. P. Code which must be read with Rr. 2 and 4, gives a discretion to the Court to allow interest up to the date for redemption on the amount found or declared due by the preliminary decree. The interest must be calculated up to the contract rate unless the Court finds that such a rate is penal or excessive. The Court has no option to disallow interest at that rate, even if it be compound interest, unless of course the rate is found to be penal. For the period subsequent to the date of the preliminary decree, however, the Court has under the rule the option to allow or refuse interest. (*Chatterji and Meredith, JJ.*) MADHO PRASAD SINGH *v.* MAKUTDHARI SINGH. **193 I C. 661 = 13 R.P. 687 = 7 B.R. 641 = 22 P.L.T. 317 = A.I.R. 1941 Pat. 378.**

——**O. 34, R. 12**—*Sale of property free from prior mortgage—When may be ordered.*

Under O. 34, R. 12, C. P. Code, the Court can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any prior mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold. (*Mukherjea and Biswas, JJ.*) ROWSHAN KHAN *v.* ABDUL KHALEQ. **45 C.W.N. 705 = 74 C.L.J. 1.**

——**O. 34, R. 14**—*Applicability—Conditions—Mortgage suit for sale—Decree for sale refused—Attachment and sale of mortgaged property in execution of money decree—If barred.*

The plain language of O. 34, R. 14, C. P. Code implies obviously that the claim arising under the mortgage must be a claim for which the mortgage is still enforceable and upon which a suit could be brought. Where a suit for sale on the basis of the mortgage has already been brought and a decree for sale has been refused, it is impossible to hold that in such a case the provisions of O. 34, R. 14 can have any application. (*Chatterji and Meredith, JJ.*) SITARAM *v.* LACHMAN LAL GOSWAMI. **20 Pat. 751.**

——**O. 35, R. 5**—Scope—Landlord and tenant—Interpleader suit by tenant against landlord and stranger—Maintainability. *See* 1940 Dig., Col. 333. YESHWANT BHIKAJI *v.* SADASHIV GOVIND. **I.L.R. (1940) Bom. 842 = 191 I.C. 655 = 13 R.B. 191.**

——**O. 38, Rr. 5 and 6**—*Applicability—Conditions—Disposal of property subsequent to suit—If condition precedent—Disposal made before suit—If may be relied on in support of application for attachment.*

There is no justification for the view that in order that Rr. 5 and 6 of O. 38, C. P. Code, should apply there must be a transaction subsequent to the institution of the suit. There is nothing in the plain words of the rules which would make a transaction subsequent to the institution of the suit a condition precedent to the application of Rr. 5 and 6. R. 5 refers not to the past but to the future. It refers to a defendant who with a particular intent is about to dispose of the whole or part of his property. The fact that he has done

C. P. CODE (1908), O. 38, R. 5.

so after the institution of the suit may be strong evidence of the future intention provided he has any property left. But transfers before the institution of the suit may, as evidence of conduct, be evidence of intention after the institution of the suit.

Weston, J.—Action under R. 5 of O. 38, C. P. Code, is preventive to provide against future attempts of the defendant to place his assets beyond the reach of the potential decree-holder, and is not punitive in order to punish such acts of the defendant committed either before the suit was filed or before presentation of the application under the rule. An application under R. 5 may be made at any stage in the suit; if a defendant, having knowledge that a suit will be filed against him begins disposal of his property with the intention of obstructing or delaying the execution of a decree likely to be passed against him, there is nothing in R. 5 which debars the plaintiff from applying under that rule at the time he files his suit, and from relying in support of his application not on disposals made subsequent to the filing of the suit or subsequent to service of suit on the defendant, but on disposals made before the suit has been filed. (*Davis, C.J. and Weston, J.*) BISHAMBAR DAS & CO. *v.* SACHOOMAL KOTOOMAL.

I.L.R. (1941) Kar. 362 = A.I.R. 1941 Sind 178.

——O. 38, R. 5—*Scope of—Grounds for attachment before judgment—Inference from circumstances.*

O. 38, R. 5 sets out the conditions necessary to be fulfilled before an attachment before judgment can issue. The Court must be satisfied that a defendant is about to transfer his property in order to defeat or delay the interests of the creditor, who seeks to obtain a decree against the debtor concerned. Where a debtor had transferred more than 80 per cent. of his property including his residential house and had also changed the name of his firm, it was held that the circumstances justified an order under O. 38, R. 5. (*Davies.*) RAM SARUP *v.* CHIRANJI LAL. **1941 A.M.L.J. 30.**

——O. 38, R. 10—Scope—If controls S. 64—Attachment before judgment—Contract of sale entered into before attachment—Effect—Decree-holder's rights—Right to bring property to sale. *See* C. P CODE, S. 64 AND O. 38, R. 10. **43 Bom L.R. 206.**

——O. 39, Rr. 1 and 2—*Applicability—Injunction to restrain execution for possession.*

An injunction to restrain the execution of decree for possession cannot be granted either under O. 39, R. 1 or R. 2 pending suit for declaration of title. (*Davies.*) RAM PAL *v.* CHHAGAN MAL. **1941 A.M.L.J. 23.**

——O. 39, Rr. 1 and 2 and Ss. 24, 36—*Applicability of O. 39, R. 2 (3)—Injunction under R. 1—Enforcement—Procedure—Such proceedings, if transferable—Effect of transfer on interim orders.*

Sub-R. (3) of R. 2 of O. 39, C. P. Code does not apply to injunctions issued under R. 1 of O. 39, but applies only to injunctions issued under R. 2 of that order. The enforcement of injunctions issued under O. 39, R. 1 is to be under the provisions of S. 36 and O. 21, R. 32, C. P. Code. The proceedings for the enforcement of an injunction under O. 39, R. 1, are transferable under S. 24, C. P. Code. On the analogy of S. 37, C. P. Code, a Court which has passed an interim order which requires execution, ceases to have jurisdiction in the matter of enforcing the order, when it ceases to have jurisdiction to deal with the suit and consequently the power of enforcing the order lies in the Court which would deal with the interim proceedings, if it began at that time. (*Allsop and Braund, JJ.*) DULHIN JANAK NANDINI KUNWARI *v.* KEDAR NARAIN SINGH. **I.L.R. (1941) All. 295 = 194 I.C. 166 = 13 R.A. 474 =**

C. P. CODE (1908). O. 40, R. 1.

1941 A.W.R. (H.C.) 51 = 1941 O A. (Supp.) 65 = 1941 A.L.W. 53 = 1941 A.L.J. 46 = 1941 O.W.N. 48 = A.I.R. 1941 All. 140.

——O. 39, R. 2 (3)—*Application under—Grant of—Applicant actuated by personal motives.*

An application under O. 39, R. 2 (3), C. P. Code, for disobedience of an injunction, should not be granted where the applicant has not at heart the honour of the Court whose authority he says has been condemned but is actuated by personal motives. (*Blacker, J.*) SHIV RAM BATIA *v.* D. D. DESAI. **196 I.C. 776 = 43 P.L.R. 447 = A.I.R. 1941 Lah. 334.**

——O. 40, R. 1—Appeal—Interference with discretion—Order appointing receiver. *See* 1940 Dig., Col. 534. PAHLAD DASS BHAGWAN DASS *v.* SHANTI SAGAR. **I.L.R. (1941) Lah. 590.**

——O. 40, R. 1—*Effect of appointment—Possession not taken by receiver—Creditor's right to proceed to execution.*

It is a well-established rule that until a receiver's appointment has been perfected and the receiver is actually in possession a creditor is not debarred from proceeding to execution. (*McNair, J.*) SURESH CHANDRA ROY *v.* PRAKASH KRISHNA. **45 C.W.N. 1104.**

——O. 40, R. 1—Execution—Appointment of receiver—Proceedings to be transferred to Collector. *See* 1940 Dig., Col. 335. NARAIN DAS GULAB SINGH *v.* PATIALA DURBAR. **191 I.C. 704 = 13 R.L 325.**

——O. 40, R. 1—Execution—Appointment of receiver—When may be made. *See* C. P. CODE, S. 51. **45 C.W.N. 1104.**

——O. 40, R. 1—Execution of money decree—Appointment of receiver—When justified. *See* 1940 Dig., Col. 335. PAHLAD DASS BHAGWAN DASS *v.* SHANTI SAGAR. **I.L.R. (1941) Lah. 590.**

——O. 40, R. 1—*Execution—Receiver appointed in—Judgment-debtor subsequently adjudicated insolvent—Costs, charges and expenses incurred by receiver—If can be recovered from insolvents' estate—Presidency-Towns Insolvency Act, S. 54.*

Where subsequent to the appointment of a receiver of the property of the judgment-debtor at the instance of the decree-holder, the judgment-debtor is adjudicated insolvent and the possession of the property is made over to the Official Assignee, the receiver is only entitled to the costs and expenses incurred in the execution proceedings till the date of the order of adjudication to be paid out of the estate of the insolvent. The receiver's remedy for the other charges and expenses he has incurred, *viz.*, rent due for premises of which he was in occupation and charges in respect of *durwan* and estate clerk will be against the person at whose instance he was appointed. (*McNair, J.*) DEVA DUTTA SAROWGEE *v.* P. C. MITTER AND SONS. **I.L.R. (1941) 2 Cal. 37.**

——O. 40, R. 1—"*Just and convenient*"—*Appointment of Receiver—Interference with* status quo.

Defendant's brother who died leaving as his heirs a widow and an infant son carried on a bakery business in the name of "Adam Sumar & Co." A few days before the death of his brother the defendant entered upon the business premises, took possession, removed the board which described the business as "Adam Sumar & Co., Bakers and Confectioners," and put his own board "Ismail, D. Adam Sumar, Bakers and Confectioners." The widow and her infant son therefore filed a suit for a mandatory injunction directing the defendant to desist from interfering with the business and to remove himself from the business premises of Adam Sumar & Co., and for an account. Along with the suit the plain-

C. P. CODE (1908), O. 40, R. 1.

tiffs filed an application for the appointment of a receiver to carry on the bakery under O. 40, R. 1.

Held, that it was impracticable and highly undesirable in the circumstances of the case to interfere with the *status quo* though ordinarily it would have been proper to appoint a receiver. (*Lobo, J.*) AISHABAI *v.* MAHOMED ISMAIL. **195 I.C. 503 = 14 R.S. 28 = A.I.R. 1941 Sind 112.**

——**O. 40, R. 1**—*Mortgage executed by receiver under Court's order—Order sanctioning loan on first charge—Precedence of mortgage over earlier encumbrances created by parties.*

In those cases where the order of the Court simply sanctions a loan by the receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. In cases, however, where the order itself recites the purpose of the loan, different considerations should apply. If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the receiver, or if the order is made in an administration suit or in a partition suit for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the receiver would have first charge in accordance with the order. The principle seems to be this. By the appointment of the receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its own officer, namely, the receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction loan to be raised by the receiver, and if necessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. He may be unaware of such prior mortgages or even if aware, may not give notice to those mortgagees. This power of the Court being thus incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a receiver, must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case, the mortgagee from the receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court. (*Mitter and Akram, JJ.*) BHADRABATI DEVI *v.* JIBANMAL BABU. **I.L.R. (1941) 1 Cal. 155 = 194 I.C. 650 = 14 R.C. 5 = 45 C.W.N. 68 = 72 C.L.J. 427 = A.I.R. 1941 Cal. 163.**

——**O. 40, R. 1**—*Mortgage suit—Appointment of receiver—Payment of revenue—Liability of mortgagor.*

In a mortgage suit after the receiver has taken possession of the mortgaged property the mortgagor is under no duty to pay revenue in respect of the aforesaid property. It is the duty of the receiver to preserve the property by paying the public demand. (*R.C. Mitter and Khundkar, JJ.*) HARIDAS SAHA *v.* DULAL CHANDRA. **A.I.R. 1941 Cal. 305.**

——**O. 40, R. 1**—*Partition suit—Appointment of receiver—Power of parties to deal with their shares thereafter.*

A mortgage executed by the parties to a partition suit is valid notwithstanding the fact that they executed it after the appointment of a receiver without any reference to the Court. The title to the properties does not vest in the receiver appointed under O. 40, C. P. Code, for the management and preservation of the properties in suit. The parties have, therefore, the power to deal with their shares without reference to Court, provided that their acts do not interfere with possession of the receiver. The receiver could exercise the powers of the owners in the matter of execution of documents and if the Court sanctions a loan on mortgage, he could validly execute the mortgage instrument so as to bind the shares of the parties. (*Mitter and Akram, JJ.*) BHADRABATI DEVI *v.* JIBANMAL BABU. **I.L.R. (1941) 1 Cal 155 = 194 I.C. 650 = 14 R.C. 5 = 72 C.L.J. 427 = 45 C.W.N. 68 = A.I.R. 1941 Cal. 163.**

——**O. 40, R. 1**—*Partnership—Suit for dissolution—Receiver appointed—Judgment-creditor's remedy—Charging order—Application for— Proper forum—Effect of such order.*

Where in a suit by a partner for dissolution of partnership a receiver is appointed of the assets of the partnership, the remedy of the creditor who had obtained a decree against the partnership firm is either to apply to the Court which appointed the receiver for leave to attach some specific property or for an order charging the assets in the hands of the receiver on giving an undertaking to deal with the charge according to the orders of the Court. There is no doubt that the application for a charging order must be made to the Court by which the receiver was appointed. But where the Court which appointed the receiver in the partnership suit and passed the decree in the creditor's suit is the same, and all the parties in both suits are present, including the receiver, there can be no objection to a charging order being made on an application made in the creditor's suit, instead of in the partnership suit, and the cause title can be formally amended. The effect of a charging order will be to give the judgment creditor's priority over creditors who have not proceeded to judgment. (*McNair, J.*) SURESH CHANDRA ROY *v.* PRAKASH KRISHNA. **45 C.W.N. 1104.**

——**O. 40, R. 1**—*Powers of receiver—Right to sue for debt due to deceased person—Succession certificate, if necessary.*

A receiver who is an officer of the Court, although he represents the estate of the deceased, does not claim by right of succession. Therefore he can maintain a suit for a debt due to a deceased person to whose estate he has been appointed a receiver without a succession certificate. (*Lort Williams, J.*) ANIL CHANDRA MITRA *v.* INDIAN ECONOMIC INSURANCE CO., LTD. **I.L.R. (1941) 2 Cal. 221 = A.I.R. 1941 Cal. 579.**

——**O. 40, Rr (1) and (4) and O. 43, R. 1 (s)**—*Receiver, appointment of—Appeal—Order against person not a party to suit—Remedy.*

In considering the right of appeal under O. 43, R. 1 (s), the distinction between an order appointing a receiver and an order removing a person from the possession or custody of the property should not be lost sight of because an order merely appointing a receiver does not affect the person in possession of the property directly whereas an order for the removal of any person from possession or custody of the property affects him directly. If the order appointing a receiver is made

C. P. CODE (1908), O. 40, R. 1.

against a party to the suit, then he would have a right to appeal under O. 40, R. 1 (*a*) read with O. 43, R. 1 (s); if the Court orders the removal of a person from possession he would have a right of appealing against that order under O. 40, R. 1 (*b*) read with O. 43, R. 1 (s). But where an order is made against a person not a party to the suit, refusing to direct the receiver to release the property there is no appeal against it by the third party. His remedy is by suit. (*Mya Bu, J.*) BANK OF CHETTINAD, LTD. *v.* U CHAN HMWE.

1941 Rang.L.R. 300 = 196 I.C. 768 = A.I.R. 1941 Rang 236.

——**O. 40, R. 1**—*Receiver—Grounds—Sufficiency—Rival claims—Likelihood of waste—Claimants not in possession.*

Where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of receiver. (*Thomas, C.J. and Ghulam Hasan, J.*) SHEOAMBAR BAN *v.* MOHAN BAN. **1941 O.A. 197 = 1941 O.W.N. 272 = 1941 A.W.R. (Rev) 145 = 194 I.C. 8 = 1941 A.L.W. 293 = 1941 O.L.R. 400 = 13 R.O. 541 = A.I.R. 1941 Oudh 328.**

——**O. 40, R. 1**—*Receiver in respect of waqf property—Execution of personal decree against mutawalli—Propriety—Powers.*

Where a certain property is dedicated as waqf property and under the terms of the deed of waqf it is not liable to attachment and sale and has to be managed by a trustee who is enjoined to perform certain religious duties, it would not be just and convenient to appoint a receiver of such property in execution of a decree against the trustee as the property does not belong to him and further such an order of appointment would offend against the provisions of O. 40, R. 1 (2), C. P. Code, inasmuch as the effect of the order is to remove the mutawalli from the possession or custody of the property which the Court at the instance of the decree-holder has no right to do. (*Thomas, C.J. and Ghulam Hasan, J.*) TAQI HUSAIN *v.* SHYAM BEHARI.

1941 O.A. 967 = 1941 A.W.R. (C.C.) 370 = 1941 O.W.N. 1274.

——**O. 40, R. 1**—Removal of Receiver—Failure to file accounts. *See* 1940 Dig., Col. 336. SARBA SUNDARI DASI *v.* NANDA RANI DASI. **194 I.C. 13 = 13 R.C. 484 = A.I.R. 1941 Cal. 144.**

——**O. 40, R. 1**—*Title of receiver—Receiver appointed in respect of contingent debt—Receiver giving notice to debtor and latter admitting claim—Title of receiver if perfected.*

The property in respect of which a receiver was appointed was a contingent one. The receiver gave notice to the debtor and the latter admitted his claim.

Held, that the admission plus the notice already given immediately perfected the title of the receiver. (*Lort Williams, J.*) ANIL CHANDRA MITRA *v.* INDIAN ECONOMIC INSURANCE CO., LTD.

I.L.R. (1941) 2 Cal. 221 = A.I.R. 1941 Cal. 579.

——**O. 41, R. 1**—*Applicability—Revenue Court appeals—Power to dispense with production of copy of judgment.*

O. 41, R. 1 is applicable to appeals under the Land Revenue Act and hence the production of the copy of the judgment appealed against can be dispensed with by the appellate Court. (*Sathe, A.M.*) KANCHAN SINGH *v.* ISHWAR KIRPAL SINGH.

1941 A.W.R. (Rev.) 993 = 1941 O.A. (Supp.) 837.

C. P. CODE (1908), O. 41, R. 6.

——**O. 41, R. 1**—Order under S. 47—Appeal filed without copy of formal order—If competent. *See* 1940 Dig., Col. 336. MANGRAY *v.* SUNDAR.

15 Luck. 669.

——**O. 41, R. 1**—Scope of. *See* C. P. CODE, O. 3, R. 1 AND O. 41, R. 1. **1940 O.W.N. 1253.**

——**O. 41, R. 1 (1) and (2)**—*Relative scope and effect of—Former, if curtailed or controlled by latter—* Raiyati *land in Chota Nagpur—Power of Court to appoint receiver.*

In the face of the clear language of O. 40, R. 1 (2), it must be held that a Court has no power to appoint a receiver of the *raiyati* holdings held by a judgment-debtor in Chota Nagpur, a sale of which is prohibited by the Chota Nagpur Tenancy Act. The general power given to the Courts under O. 40, R. 1 (1) is curtailed by sub-R. (2). Both the sub-rules have to be read together as forming part and parcel of one rule. (*Agarwala, J.*) PERMESHWAR RAM *v.* CHARU RAM.

1941 P.W.N. 580 = 22 Pat.L.T. 798.

——**O. 41, Rr. 4 and 33**—Combined effect of—Suit by co-sharers—Appeal—Death of some—Legal representatives not brought on record—Appeal, if can be continued by others. *See* 1940 Dig., Col. 339. SHEO GOVIND *v.* ZAHUR MAHOMED. **16 Luck. 382 = 191 I.C. 234 = 13 R.O. 232 = A.I.R. 1941 Oudh 155.**

——**O. 41, R. 5 and S. 47**—*Stay of execution in transferee Court pending appeal—Dismissal of appeal—Fresh execution application, if necessary—Effect of decree being affirmed in appeal—Merger—Limits to doctrine of.*

Where an appeal is preferred against a decree during the pendency of its execution in the transferee Court and the execution is stayed and the appeal is subsequently dismissed and the stay order is discharged, it cannot be said that fresh applications for transfer and execution are necessary. The execution in the transferee Court may be revived by a mere application to that Court. Where a decree is affirmed in appeal, the result is not to wipe out the decree of the trial Court for all purposes. Where the terms of the decree of the trial Court are not in any way affected by the appellate decree, the fiction of merger should not be carried so far as to lead to such a palpably absurd and inequitable result that the decree-holder should be put to the inconvenience of filing a fresh application in the Court which originally passed the decree, getting a fresh transfer certificate to another Court and pursuing the proceedings for execution in that Court. (*Ghulam Hasan and Agarwal, JJ.*) SAROOP NARAIN *v.* SURAJ MOHAN DAYAL. **197 I.C. 94 = 1941 O.L.R. 811 = 1941 O.W.N. 1186 = 1941 O.A. 909 = 1941 A.W.R. (Rev.) 1031.**

——**O. 41, R. 5**—*Stay—When takes effect—Sale after stay order but before communication—Validity.*

A stay order passed by a higher Court takes effect from the date on which it is pronounced and not on the date on which it is communicated. A sale held despite the passing of such a stay order even though the same is not communicated is *ultra vires*. (*Ghulam Hasan, J.*) RAJ BAHADUR SINGH *v.* PIRTHIPAL SINGH.

196 I.C. 418 = 14 R.O. 168 = 1941 R.D. 795 = 1941 O.L.R. 679 = 1941 O.A. 742 = 1941 A.W.R. (Rev.) 774 = 1941 O.W.N. 1044.

——**O. 41, R. 6**—Stay of sale—Duty of Court—Rule for stay discharged under R. 5—Effect. *See* 1940 Dig., Col. 339. DHIRENDRA NATH ROY *v.* SAILAJ KUMAR BOSE. **193 I.C. 109 = 13 R.C. 362.**

——**O. 41, R. 6 (2)**—Appellate Court refusing to stay execution under R. 5 (1)—Power of decretal Court to stay sale. *See* 1940 Dig., Col. 339. JITENDRA NATH *v.* BHOLANATH. **73 C.L.J. 297**

C. P. CODE (1908), O. 41, R. 6.

——**O. 41. R 6 (2)**—Limited stay order—If can be granted. *See* 1940 Dig., Col. 339. MURARI MOHAN *v.* KRISHNAPPA. **191 I C. 144=45 C.W.N. 382 (1).**

——**O. 41, R. 6 (2) and S. 115**—Order under—Revision. *See* 1940 Dig., Col. 339. JITENDRA NATH *v.* BHOLANATH. **73 C.L.J. 297.**

——**O. 41, R. 6 (2)**—*Power of Court—Mortgage decree—Order for sale—Appeal against part of decree—Court taking security for further interest and staying sale—If justified—Court if bound to stay only sale of part of property.*

A mortgage decree for sale is not separable or divisible, and when the Court which has ordered the sale has taken security for further interest pending appeal from the decree, it is bound to stay the sale under O. 41, R. 6 (2), C P. Code. The fact that the appeal is directed only against a part of the decree and not against the whole decree, is no ground for holding that the Court cannot stay the sale of the entire mortgaged property. (*Chatterji and Meredith, JJ.*) JUGAL PRASAD MISSIR *v.* JADUBANS NARAYAN MISSIR. **193 I.C. 592= 13 R.P. 610=22 Pat.L.T. 236=7 B R. 568= A.I.R. 1941 Pat. 483.**

——**O. 41, R. 10**—*Appeal—Order directing security to be furnished within a specified time—Security tendered in time—Rejection of appeal before testing—Propriety.*

Where security for costs of appeal is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the security itself need not be within the time. Decision of *Jackson, J.*, in 52 M.L.J. 53 (Short Notes), relied on. (*Happell, J.*) RANGASWAMI NADAR *v.* PITCHAIMANI NADAR. **1941 M.W.N. 748=54 L.W. 234= (1941) 2 M.L.J. 291.**

——**O. 41, R. 10 (2)**—Order rejecting an appeal for failure to furnish security within the time ordered by Court—Not a decree. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 1. **(1941) 2 M.L.J. 500 (F.B.).**

——**O. 41, R. 11 and Ss. 151, 152**—*Dismissal of appeal under O. 41, R. 11—Effect—Amendment of decree appealed against—Application for—Proper forum.*

When the Chief Court dismisses an appeal under O. 41, R. 11, C. P. Code, it neither confirms nor varies the decree of the lower appellate Court but allows it to remain as it was. Hence when the decree in question is sought to be amended, it is the lower appellate Court which could amend the decree and hence an application for amendment of the decree should be made to that Court and not to the Chief Court. (*Zia-ul-Hasan and Yorke, JJ.*) TRIBENI PRASAD TEWARI *v.* RUKMIN DEVI. **16 Luck 697=192 I.C. 269=13 R.O. 335= 1941 A.W.R. (C.C.) 44=1941 O L.R. 100= 1941 A.L.W. 192=1941 O.W.N. 1=1941 O.A. 8= A.I.R. 1941 Oudh 251**

——**O. 41, R. 20**—Addition of necessary parties—Powers of Board—When to be exercised—Procedure to be followed where defect occurred in the lower Court. *See* 1940 Dig., Col. 340. JHAGRU *v.* SHEODATTA. **(1941) A.L.J. (Supp.) 15.**

——**O. 41, R. 20**—*Addition of new party in appeal*—De novo *trial—Necessity.*

Where though an opportunity was given to the plaintiff to add a person as defendant he did not avail himself of it, but later on in appeal made that person, a respondent, it was *held* that the new party should have an opportunity of putting forward his case before it could be decreed against him and hence there should be a remand for a *de novo* trial. (*Harper, S.M. and Sathe, J.M.*) RANDHIR SINGH *v.* MOOL CHAND. **1941 R.D. 422=1941 O.A. (Supp.) 486= 1941 A.W.R. (Rev.) 555.**

C. P. CODE (1908). O. 41, R. 22.

——**O. 41, R. 20**—*Addition of parties—Parties against whom right of appeal is barred by limitation.*

Parties who have not been impleaded in an appeal and against whom the right of appeal has become barred by limitation, cannot under O. 41, R. 20, C. P. Code, be made respondents to an appeal against the others. (*Ghulam Hasan and Madeley, JJ.*) RAMESHWAR *v.* AJODHIA PRASAD. **195 I.C. 761=14 R.O. 117= 1941 O.L R 620=1941 R.D. 752= 1941 O.A. 714= 1941 A.W.R. (Rev.) 694=1941 O.W.N. 998= A.I.R. 1941 Oudh 580.**

——**O. 41, R. 20**—*Power of Court—Omission to implead necessary party to appeal—Application after objection by respondent to implead—Power of Court to allow—Omission found to be deliberate and wilful.*

Two Hindu daughters brought a suit for a declaration that two alienations made by their mother, the third defendant in favour of the second defendant who was the husband of the fourth defendant (the plaintiffs' sister) were not binding on the plaintiffs and the fourth defendant. The suit was dismissed. In appeal by the plaintiffs, the second and third defendants were not impleaded as respondents. The first defendant contended that the appeal was liable to be dismissed *in limine* in view of the omission to implead the second defendant. It was found that the omission was deliberate and wilful, and not due to any mistake. On an application by the appellants to implead the second defendant after the objection was raised,

Held, that there was no jurisdiction to pass an order directing the impleading of the second defendant as a party respondent to the appeal. (*Pandrang Row, J.*) RAMAMOHANA RAO *v.* RAGHAVAMMA. **1941 M.W.N. 311=53 L.W. 392= (1941) 1 M.L.J. 471.**

——**O. 41, R. 21**—*Applicability—If limited to case of decree in appeal* ex parte *against respondent—Appeal dismissed—Observations in judgment against respondent on some point—If ground for application for restoration of appeal.*

O. 41, R. 21, C. P. Code, which corresponds to O. 9, R. 13, C. P. Code, cannot be limited to cases in which a decree against the respondent has been passed in appeal, because the appeal may have other results than the passing of a decree against the respondent. But the rule is not wide enough to cover the case of an appeal which has been wholly dismissed, merely by reason of some remarks which may be in the nature of *obiter dicta* and thus incapable of constituting a final decision of the matter discussed so as to be *res judicata*. (*Rowland, J.*) GOPI LOHAR *v.* MAHESHWAR PRASAD NARAIN SINGH. **192 I.C. 211= 13 R.P. 436=7 B.R. 329=21 Pat.L.T. 1082= A.I.R. 1941 Pat. 141.**

——**O. 41, R. 22**—Applicability—Revision petitions—Memorandum of cross-objections—Competency. *See* 1940 Dig. Col., 341. LATCHANNA DORAVARU *v.* MALLU DORAVARU. **193 I.C. 175=13 R.M. 634= A.I.R. 1941 Mad. 55=(1940) 2 M.L.J. 572.**

——**O. 41, R. 22**—*Cross-objections — Necessity—Adverse finding favourable decree.*

Where a suit for arrears of rent is dismissed but a finding is given as to amount of rent, there is no need to file a written cross-objection under O. 41, R. 22, C. P. Code, as cross-objections are filed only against decrees and not against individual findings. (*Harper,*

C. P. CODE (1908), O. 41, R. 22.

S.M. and Sathe, J.M.) MAHADEO *v.* GHURPATTAR.
1941 R.D. 299=1941 A.W.R. (Rev.) 401=
1941 O.A. (Supp.) 350.

——**O. 41, R. 22**—Letters Patent Appeal from first appeal—Cross-objections—If can be filed. *See* 1940 Dig., Col. 342. KHAZANCHI SHAH *v.* NIAZ ALI.
191 I.C. 417=13 R.L. 291.

——**O. 41, R. 22**—*Scope — Memorandum of cross objections—Question between co-respondents—If can be raised.*

In a memorandum of objections a respondent may raise a question that arises only between him and a co-respondent. (*Burn, J.*) GOPALA MENON *v.* MEENAKSHI AMMA. 53 L.W 57=1941 M.W.N. 89=
A.I.R. 1941 Mad. 402=(1941) 1 M.L.J. 106.

——**O. 41, R. 22 (4)**—*Applicability — Appeal—Rejection for non-payment of Court fee—Effect on cross-objections—If also fail.*

It is quite clear that if an appeal is rejected for non-payment of Court-fee, the cross-objections preferred by the respondent must fail with the appeal; if the appeal is rejected there can be no respondent and no cross-objections. Such rejection for non-payment of Court fee does not amount to withdrawal or dismissal for default under O. 41, R. 22 (4), C. P. Code, (*Beaumont, C.J. and Sen, J.*) KASHIRAM SENU *v.* RANGLAL MOTILALSHET. I.L.R. (1941) Bom. 477=
195 I.C. 894=14 R.B. 84=43 Bom.L.R. 475=
A.I.R. 1941 Bom. 242.

——**O. 41, R. 23**—*Appeal—Order of remand substantially one under R. 23.*

Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order under that rule, nevertheless if the order of remand as made purports to be an order under O. 41, R. 23 and appears to be in form and substance an order under that rule it is to be regarded as an order of remand passed under R. 23 and therefore subject to appeal. 31 C.W.N. 878, foll. (*Sen, J.*) PULIN CHANDRA *v.* SARAT CHANDRA
72 C.L.J. 383.

——**O. 41, R. 23 and S. 151**—*Appeal—Order of remand under inherent power.*

No appeal lies against an order of remand made not under O. 41, R. 23 but in the inherent jurisdiction of the Court unless it could be said that the order amounts to a decree in accordance with the definition in S. 2, C. P. Code (*Henderson, J.*) GOPAL CHANDRA *v.* DWARIKA NATH. 195 I.C. 864=14 R.C. 144=
A.I.R. 1941 Cal. 446.

——**O. 41, R. 23**—*Applicability—Preliminary point—Rejection of plaint under O. 7, R. 11.*

A preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. The preliminary points may arise before or after admission of the plaint. In either case if the decision on the preliminary point is against the plaintiff that would stop the further progress of the suit so as to compel the Court to dispose of the suit finally without deciding the merits of the controversy. An order rejecting a plaint under O. 7, R. 11, C. P. Code, has the force of a decree under S. 2 (2) and the rejection of the plaint brings about the disposal of the suit. When an appeal is preferred against such an order, and the appellate Court sets it aside, it has to remand the case for the trial of the other issues arising in the case and such an order of remand could not be made under any provision of law except under O 41, R. 23, C. P. Code and such an order is appealable under O. 43, R. 1 (*u*). (*Niyogi, J.*)

C. P. CODE (1908) O. 41, R. 23.

MADHAORAO GANESH *v.* KESHAO GAJANAN.
I.L.R. (1941) Nag. 629=197 I.C 43=
1941 N.L.J 410=A.I.R. 1941 Nag. 304

——**O. 41, R. 23 (as amended in Oudh)**—Construction—'Have not been decided'. *See* 1940 Dig., Col. 343. LACHMIN *v.* BHAIRON BAKHSH SINGH.
16 Luck. 65.

——**O. 41, R. 23 (Allahabad.) and Court-Fees Act, S. 13**—Ex parte *decree after striking off defence—No findings recorded on issues—Reversal in appeal—Remand, if one under O. 41, R. 23—Refund of Court-fee.*

Where the trial Court after striking off the defence for non-compliance with an order awarding costs to plaintiff, passes an *ex parte* decree without recording any finding on the questions arising in the case and the decree is set aside in appeal and the suit is remanded to trial Court for rehearing, the remand is one under O. 41, R. 23 (Allahabad)—and the appellant is entitled to refund of Court-fees paid in appeal by him, under S. 13 of the Court-Fees Act. (*Ganga Nath, J.*) SHIAM SUNDER *v.* VENNEY PRAKASH.
1941 A.W.R. (H.C.) 301=
1941 A.L.W. 976=1941 O.A. (Supp.) 843=
1941 A.L.J. 604.

——**O 41, R. 23 and S. 151**—Inherent power of remand—If exists—When could be resorted to. *See* 1940 Dig., Col. 343. SHEOLAL *v.* JUGAL KISHORE.
191 I.C. 566=13 R.N. 203.

——**O. 41, R. 23**—*Order of remand—When not justified.*

An order of remand is not justified when the net result of the order is to allow an unsuccessful litigant to fish out evidence in order to prove his case and make up the lacuna which exists. (*Almond, J.C. and Mir Ahmad, J.*) MT. MOTAI *v.* MOHD. AKBAR KHAN.
193 I.C. 871=13 R. Pesh. 70=
A.I.R. 1941 Pesh. 28

——**O. 41, R. 23**—*Remand—Clear findings on remitted issues—Course open to appellate Court.*

Where an appellate Court remitted two issues to the lower Court for trial and that Court had given clear findings on those issues, it is open to the appellate Court to differ from those findings and to set aside the order of the trial Court, but a remand of the case back is not justified. (*Harper, S.M. and Sathe, J.M.*) TULSI RAM *v.* DHUPAN RAI. 1941 O.A. (Supp.) 208=
1941 A.W.R. (Rev.) 259=1941 R.D. 315.

——**O. 41, R. 23 as amended by Madras High Court**—*Remand order - Failure to appeal—Effect of.*

The president of the Union Board filed a suit against the Secretary of State for the recovery of a certain amount imposed as a surcharge for the Board's failure to collect certain arrears of tax and which the Board had paid under protest alleging that it would have been unlawful for the Board to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The defendant's contention that the Court had no jurisdiction to try the suit was rejected by the trial Court, which accepted the plaintiff's plea that the notification was invalid. The defendant appealed and the appellate Court concurred in the findings of the trial Court, but at the request of the plaintiff remanded the case to the trial Court to decide whether the tax could be deemed to be lawfully levied under an earlier notification and set aside the decree of the trial Court. On remand the trial Court held that the earlier notification was also invalid and accordingly passed a fresh decree. This resulted in the defendant again appealing. The appellate Court held that the trial Court was right in declaring the earlier notification to be invalid.

C. P. CODE (1908), O. 41 R. 23.

The defendant then appealed to the High Court; where the plaintiff contended that as there was no appeal against the order of remand the appellant was precluded from raising the question whether the trial Court had jurisdiction to entertain the suit and the question of the validity of the finding with regard to jurisdiction and the legality of the later notification could have been raised only on an appeal from the order of remand:

Held, that in remanding the suit the lower appellate Court set aside the trial Court's decree and therefore there was no decree from which the appellant could appeal. The appellant was not aggrieved by the order of remand and therefore there was no ground for an appeal and hence the appellant in the circumstances was not precluded from raising the question of jurisdiction. The appellate Court's decree on the appellant's second appeal must be taken to embody the previous findings of the appellate Court that the trial Court had jurisdiction and that the later notification was invalid, and therefore the appellant had a right in appeal before the High Court to question all the decisions made by the appellate Court except the decision to order a remand. (*Leach, C.J. Wadsworth and Somayya, JJ.*) SECRETARY OF STATE *v.* JAGANNADHAM.

I.L.R (1941) Mad. 850=196 I.C. 353=
14 R.M. 289=1941 M.W.N. 644=
54 L.W. 7=A I R. 1941 Mad 530=
(1941) 2 M.L J. 47 (F.B).

——O. 41, R. 23—Remand under—Construction of order. *See* 1940 Dig., Col. 343. MATHURA PRASAD *v.* SITA RAM. 15 Luck. 686.

——O. 41, R. 25—*Remand under—Appeal.*

Where there is a remand by the appellate Court for a decision on certain issues which had not been decided, no appeal lies from such an order of remand. (*Davies.*) HAMIRA *v.* KISHAN CHANDRA.

1941 A.M.L.J. 24.

——O. 41, R. 27—*Additional evidence—Disentitling circumstances.*

The plaintiff chose to rely on such evidence as was produced before the trial Court, in spite of the objections taken by the opposite party as to the admissibility of that evidence. Even in the appellate Court that evidence was argued to be sufficient to prove what the plaintiff had to prove. The appellate Court held such evidence to be inadmissible whereupon the plaintiff asked for further opportunity to produce additional evidence.

Held, that the plaintiff had ample opportunity of giving that necessary evidence in the trial Court but he elected not to do so. He knew clearly what he had to prove and chose to prove it in a particular manner and took the chance of a judgment in his favour on that evidence. He would not therefore be allowed to give the evidence which he could have given before. (*Ba U and Shaw, JJ.*) FATIMA BEE BEE *v.* OFFICIAL TRUSTEE. A.I.R. 1941 Rang. 344.

——O. 41, R. 27—*Additional evidence—Filling up lacuna.*

Where the non-production of the documents in the lower Courts was due either to the negligence of the party or his counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced and to patch up the weak points of the case, by permitting him to produce additional evidence in appeal. (*Yorke and Ghulam Hasan, JJ.*) MUNIA *v.* MANOHAR LAL. 194 I.C. 161=
1941 A.W.R. (Rev.) 395=1941 R.D. 359=
13 R.O. 558=1941 O.L.R. 428=1941 O.A. 422=
1941 A. L.W. 492=1941 O.W.N. 648=
A.I.R. 1941 Oudh 429.

C. P. CODE (1908), O. 41, R. 27.

——O. 41, R. 27—*Additional evidence in second appeal—When may not be allowed.*

Where the additional evidence was within the knowledge of the appellant all along and he has not explained why he did not produce it at the trial, he cannot be allowed in second appeal to fill up gaps in his case by calling such evidence. Obviously O. 41, R. 27, C. P. Code, does not apply to such a case. (*Tekchand and Din Mahomed, JJ.*) JAWALA SINGH *v.* JAGDISH SINGH. 195 I C. 244=14 R.L. 49=
43 P.L.R. 41=A.I.R. 1941 Lah. 144.

——O. 41, R. 27—Power of Court—Additional evidence—When to be admitted—Party failing to produce necessary evidence in trial Court—Additional evidence in appeal to fill up gaps—Admissibility. *See* 1940 Dig., Col. 344. ASSYA UMMA *v.* MOOSSA. 194 I.C. 816=
14 R.M. 91.

——O. 41, R. 27—Scope—Omission to record reasons for admission of additional evidence—When ground for reversal—Absence of objection to admission of evidence—Effect. *See* 1940 Dig., Col. 345. ASSYA UMMA *v.* MOOSSA. 194 I.C. 816=14 R.M. 91.

——O. 41, R. 27 (1) (b) (All.)—*Applicability—Conditions.*

According to sub-clause (*b*) of R. 27 (1) of O. 41, C. P. Code, it is obligatory on the party seeking, to produce additional evidence in appeal to show that the evidence sought to be produced after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. (*Bennet and Ghulam Hasan, JJ.*) GOKUL PRASAD *v.* MAHADEI.

1941 O.W.N. 643=1941 O.A. 412=
194 I.C. 195=13 R.O. 563=1941 O.L.R. 425=
1941 A.L.W. 520=1941 A.W.R. (C C.) 166=
A.I.R. 1941 Oudh 341.

——O. 41, R. 27 (1) (b)—*Grounds for admission—Additional evidence.*

Under O. 41, R. 27 (1) (*b*), C. P. Code, the appellate Court cannot admit additional evidence when it neither finds an inherent lacuna on examining the record nor requires the proposed evidence to enable it to pronounce judgment. (*Harries, C.J. and Manohar Lall, J.*) BALMUKUND RAM *v.* JANARDAN PRASAD NARAIN SINGH. 193 I.C. 129=
7 B.R. 583=13 R P. 551.

——O. 41, R. 27 (1) (b)—*New evidence—Discovery after decision of trial Court—Unsuccessful review application—Admissibility of new evidence in appeal against decision of trial Court.*

Where in a suit for ejectment the defendant pleaded that he held under a written lease which he had lost but the suit was decreed and the lease was subsequently discovered and a review against the decision on the ground of discovery of new and important evidence was also dismissed, on a question as to whether that evidence could be admitted in an appeal against the order of ejectment of the trial Court preferred after the application for review and before its dismissal, it was held that in the circumstances the document should be admitted and that there was no absolute prohibition against the admission of evidence after the failure of such a review application. (*Harper, S.M. and Sathe, A. M.*) BILAS KUAR *v.* BALISTER. 1941 R.D 825=
1941 O.A. (Supp.) 752=1941 A.W.R. (Rev.) 843.

——O. 41, R. 27 (1) (b)—*Powers of Court—Admission of further evidence.*

From the wording of O. 41, R. 27 (1) (*b*), C. P. Code, it is quite clear that it comes into operation only when the Court requires fresh evidence. The requirement must be of the Court and not of the party to the

C. P. CODE (1908), O. 41, R. 27.

litigation. When the Court is of opinion that without fresh evidence it cannot pronounce judgment or that without fresh evidence it finds it difficult to perform its functions, then and then only will the Court admit fresh evidence. The rule is not intended to assist a party who through negligence or over-confidence fails to produce sufficient evidence to prove his case in the Court below. If the Court upon the evidence on the record is able to pronounce judgment or perform its functions it has no jurisdiction to admit further evidence. (*Sen, J.*) JAMADAR SINGH *v.* NAIYAB ALI.

I.L.R. (1941) 1 Cal. 536 = 196 I.C. 193 = 74 C.L.J. 121 = 14 R.C. 190 = 45 C.W.N. 498 = A.I.R. 1941 Cal 378.

——**O. 41, R. 27 (1) (b)**—*Second appeal—Admission of additional evidence—When justified.*

The production of additional evidence in second appeal is open to strong objection. But an exception can be made in a case where it is necessary to prove what the entries in the revenue papers throughout the years prior to the suit have been. (*Harper, S.M. and Sathe, J.M.*) BEHARI *v.* PARMAL. **1941 R.D. 19 = 1941 A.W.R. (Rev.) 174 = 1941 O.A. (Supp.) 118.**

——**O. 41, R. 27 (2)**—Additional evidence—Admissibility in appeal—Grounds of—Admission of fresh evidence for corroborating oral evidence disbelieved by trial Court—If justified. *See* 1940 Dig., Col. 344. NARASIMHAMURTHI *v.* HAYAT KHAN.

192 I.C. 355 = 13 R.M. 543 = (1940) 2 M.L.J. 287.

——**O. 41, R. 31 (3)**—*Requirements of—Compliance with—Necessity.*

Appellate Courts should comply with the mandatory provisions of O. 41, R. 31 (3), C. P. Code and should state clearly the relief to which an appellant is entitled when a decree is reversed or varied. (*Sathe, J.M.*) DULAR AHIR *v.* RAM CHARAN.

1941 A.W.R. (Rev.) 101 = 1941 O.A. (Supp.) 89 = 1941 R.D. 30.

——**O. 41, R. 31 (d)**—*Duty of Court under—Appeal in abatement of rent suit—Specification of rent.*

When a Court of appeal allows an appeal in an abatement of rent suit, it is obligatory on the Court to specify the new rent. (*Harper, S.M. and Sathe, J.M.*) LAKSHMI SAHAI *v.* BASDEO DUBEY.

1941 A.W.R. (Rev.) 504 = 1941 O.A. (Supp.) 403 = 1941 R.D. 581.

——**O. 41, R. 33 and Letters Patent (Rangoon), Cl. 13**—*Powers of appellate Court—Scope of jurisdiction—If confined to point mentioned in certificate granting leave—Order for costs—Interference.*

It is an error to assume that when leave is granted, the appeal and the terms of the certificate are to be regarded as a reference only. The jurisdiction of the appellate Court is not limited to the consideration of only the point mentioned in the certificate granting leave to appeal. In view of the wide provisions of R. 33 of O. 41, C. P. Code, the appellate Court has the right and duty to pass whatever decree should have been passed by the Subordinate Court in all the circumstances of the case, and that means, in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter.

Per *Blagden, J.*—A Letters Patent appeal is an appeal in a 'case' certified to be fit for appeal. The word case' is a very wide word and includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in that case. Neither the precise form of the certificate nor any failure of the appellant to file a document which he should have filed under O. 41, R. 1 could deprive the Court of its power under O. 41, R. 33 to pass or make such further or other decree as the case may require. (*Roberts, C.J. and Blagden, J.*) SEIN DASS *v.* LAKHAJEE. **1940 Rang.L.R. 693 = 194 I.C. 306 = 13 R.R. 301 = A.I.R. 1941 Rang. 63.**

C. P. CODE (1908), O. 43, R. 1.

——**O. 41, R. 33**—Powers of appellate Court—Suit dismissed against two co defendants—Appeal by plaintiff impleading only one defendant—Power of Court to decree suit against defendant not impleaded. *See* 1940 Dig., Col. 346. VIRUPAKSHAYYA *v.* SUBBARAYUDU. **191 I.C. 891 = 13 R.M. 532.**

——**O. 41, R. 33 and S. 151**—*Powers of appellate Court—Wholly irregular procedure in trial Court—Proper order to be passed.*

Where the procedure adopted in the trial Court was wholly irregular and the judgment is pronounced by a Judge who neither heard the evidence nor arguments the proper thing is to remand the case to the trial Judge, with a direction to hear the parties and then record his findings. (*Davies*) ABDUL RAHIM KHAN *v.* BHAG CHAND. **1940 A.M.L.J. 67.**

——**O. 41, R. 33**—*Suit by worshipper against shebait, idol and transferees for declaration that suit property is debutter property of idol—Suit decreed—Appeal by transferees—Neither shebait nor idol made party——Omission, if defect of form.*

The worshipper's suit against the shebait, idol and transferees of debutter property for a declaration that certain immovable property was debutter property of the idol having been decreed the defendants transferees went up in appeal but failed to make the shebait and the idol parties to the appeal:

Held, that the shebait and not the idol had the right to sue and be sued and since the idol was in fact represented in appeal by the plaintiff-respondent the omission to make either the shebait or the idol herself a party to the appeal was at most an error in form and not in substance. (*Khundkar and Lodge, JJ.*) SASHI KUMARI DEVI *v.* DHIRENDRA KISHORE

I.L.R. (1941) 1 Cal. 309 = 196 I.C. 241 = 14 R.C. 199 = 45 C.W.N. 699 = A.I.R. 1941 Cal. 248.

——**O. 43, R. 1 (d) (k)**—*Appeal under Cl. (d)—Refusal to set aside abatement of—If appealable under Cl. (k).*

There is no provision in O. 43 laying down that the word 'suit' in Cl. (*k*) of R. 1 of that order should be taken to include an appeal. Hence an order refusing to set aside the abatement of an appeal under Cl. (*d*) of R. 1 of O. 43 is not appealable under Cl. (*k*) of R. 1 of that order. (*Verma, J.*) UMMATUR RABAB *v.* MAHADEO PRASAD. **196 I.C. 574 = 1941 A.L.J. 516 = 1941 O.W.N. 1010 (2) = 1941 A.L.W. 826 = 1941 O.A. (Supp.) 681 = 1941 A.W.R. (H.C.) 251 = A.I.R. 1941 All. 338.**

——**O. 43, R. 1 (k)**—Suit—If includes appeal—Order refusing to set aside abatement of appeal—Appealability. *See* 1940 Dig., Col. 347. RAJU MUDALI *v.* CHINNARAJU NAIDU. **193 I.C. 832 = 13 R.M. 724 = A.I.R. 1941 Mad. 61 = (1940) 2 M.L.J. 562.**

——**O. 43, R. 1 (l)**—Order refusing to add party under O. 22, R. 10—Appeal and second appeal. *See* C. P. CODE, O. 22, R. 10. **43 Bom.L.R. 719.**

——**O. 43, R. 1 (m) and O. 23 R. 3**—*Applicability of O. 43, R. 1 (m)—Recording of compromise under O. 23, R. 3—Order that fresh decree could not be passed—Appeal—Power of High Court in.*

The Judge on the Original Side of the High Court directed a compromise to be recorded under O. 23, R. 3. The Deputy Registrar recorded the same but was of the opinion that no fresh decree could be drawn up. The

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Advocate High Court

C. P. CODE (1908), O. 43, R. 1.

defendant also acquiesced in the procedure adopted by the Deputy Registrar.

Held, that the Deputy Registrar's order holding that no fresh decree could be passed did not fall under O. 43, R. 1 (*m*).

Held, further, that the defendant having acquiesced in the procedure adopted by the Deputy Registrar could not subsequently urge that decree ought not to be passed because the plaintiff failed to take necessary steps to get the erroneous opinion of the Deputy Registrar corrected.

Held also, that the High Court had power to direct that the operative part of the recorded adjustment with certain modifications should be treated as if it was a decree. (*Roberts, C.J and Dunkley, J.*) V. M. R. P. CHETTYAR FIRM *v.* HAJEE MAHOMED SULTAN.

A.I.R. 1941 Rang. 316.

——**O. 43, R. 1 (q)**—*Scope—Order of interim attachment and notice—Defendant bringing into Court money equal to value of property attached—Order confirming interim order and directing money to remain in Court as security—Appealability—If falls under O. 38, R. 6 or R. 5.*

On an application for attachment before judgment under O. 38, R. 5, C.P. Code, the Court made an interim order in the following terms. "Interim attachment as prayed and notice." The defendant brought into Court money equal to the value of the property attached and the Court confirmed the order of attachment. The terms of the order were: "The rule issued is made absolute. The money deposited by the defendant in Court will remain as security against any decree that may be passed against the defendant in this suit" In appeal against the order, the plaintiff contended that no appeal lay on the ground that the order was one under O. 38, R. 5 and not under O. 38, R. 6, as there was no attachment but only a security.

Held, that the defendant did not show cause why security should not be furnished and did not furnish security. What he did in effect was to bring the property (its equivalent in money) into Court, in effect to submit to its attachment if the Court so ordered; the final order passed by the Court was an order under R. 6 of O. 38 and not under R. 5 and the order was therefore appealable under O. 43, R. 1 (*q*), C. P. Code. (*Davies, C.J. and Weston, J.*) BISHAMBARDAS & CO. *v.* SACHOOMAL KATOOMAL.

I L R. (1941) Kar. 362 = A.I.R. 1941 Sind 178.

——**O. 43, R. (1) (s**—Appeal under—When lies—Order against person not a party to suit—Remedy. *See* **C. P. CODE O. 40 RR. 1 AND 4 AND O. 43, R. 1 (s).**

1941 Rang L.R. 300

——**O. 43, R. 1 (u)**—Remand order—When appealable. *See* 1940 Dig., Col. 348. SHEOLAL *v.* JUGAL KISHORE.

191 I.C. 566 = 13 R.N. 203

——**O. 43, R. 1 (w)**—*Scope Order of remand- Suit disposed of on merits—Appellate Court sending case back for disposal according to law—Appeal from order of remand—Competency.*

Where the trial Court goes into the merits of a case and does not dispose of the suit on a preliminary point only and the appellate Court sends back the case for disposal in accordance with law, after making certain observations no appeal lies against the order of demand under O 43, R. 1 (*w*) read with O. 41, R. 23. (*Varma J.*) RAGHUBIR SARAN SINGH *v.* MAHOMED JAHIR ALI KHAN.

8 B R. 35 = 14 R.P. 209 = 196 I C. 562

——**O. 44, R. 1**—*Applicability—Memo. of cross-objections* in forma pauperis—*Permissibility.*

There is no provision in the C. P. Code relating to the filing of cross-objections *in forma pauperis*, but

C. P. CODE (1908), O. 45, R. 8.

when a respondent files cross-objections, he is in fact filing a cross-appeal, and the same principle as in O 44, r. 1, C. P. Code, must be applied. The conditions prescribed by that rule must be satisfied before leave, to file an appeal or cross objections *in forma pauperis* can be granted. (*Leach, C.J. and Happell, J.*) RAMACHANDRA AIYAR, *In re*

54 L.W 171 = 1941 M.W.N. 794 = A.I R. 1941 Mad. 833 (1) = (1941) 2 M.L J. 187.

——**O. 44, R. 1 and O. 33, R 2**—*Mortgage decree—Mortgagor applying for leave to appeal* in forma pauperis—*Duty to state in affidavit valuation of equity of redemption.*

In a suit for enforcement of a mortgage at the instance of a mortgagee, the equity of redemption which is in the mortgagor or defendant is not the subject-matter of the suit, and for the purpose of deciding the question as to whether the mortgagor is a pauper or not, the value of the equity of redemption cannot be excluded by the Court from its consideration. The mortgagor is, therefore, bound to state the valuation of the equity of redemption on oath in his affidavit in support of his application under O. 44, R. 1, C. P. Code, for leave to file an appeal *in forma pauperis* against the mortgage decree. If he does not do so, his application is defective and is liable to be dismissed. (*Mitter and Khunukar, JJ.*) SUBODH CHANDRA *v.* K L BANK, LTD.

I.L.R (1941) 1 Cal. 428 = 45 C W.N 426 = A.I R 1941 Cal. 659.

——**O. 44, R. 1**—Pauperism—Determination - Property decreed in trial Court, if can be taken into account. *See* 1940 Dig., Col. 348. NASIR AHMAD KHAN *v.* SAIDAN.

191 I.C. 722 = 13 R O 275 = 1941 O.L R 16 = A.I.R. 1941 Oudh 113.

——**O. 44, R. 1**—Procedure—Rejection of application without hearing applicant or giving him opportunity of being heard—If justified. *See* 1940 Dig., Col. 348. SUBBAYYA NADAR *v* ANJANEYALU.

I.L.R. (1941) Mad. 389 = 195 I.C. 867 = 14 R.M. 239 = A.I R. 1941 Mad 49 = (1940) 2 M.L.J. 570.

——**O. 45, R. 7**—*Deposit under—Nature of—Dismissal of appeal—Order for costs of respondent—Decree satisfied by adjustment and appropriation under S. 19, Madras Act IV of 1938—Right of respondent to payment under order for costs out of deposit.*

A deposit made by an appellant to the Privy Council under O. 45, R. 7, C. P. Code, is merely by way of security for any liability for costs of the respondent which might arise in case the appeal failed. When such liability arises and is discharged by appropriation of amounts already received in respect of the decree as provided for in S. 19 of the Madras Act IV of 1938, the decree-holder or respondent can no longer claim any payment under his decree for costs, and the deposit has to be returned to the appellant judgment-debtor. (*Wadsworth and Patanjali Sastri, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BH SHANARAO

54 L W 107 = 1941 M.W.N. 741 = 4 F.L J (H C) 280 = A.I.R 1941 Mad 817 = (1941) 2 M.L J 125.

——**O. 45, R. 7**—Extension of time for furnishing security—Jurisdiction of High Court. *See* 1940 Dig., Col. 349. AKIMUDDIN *v.* FATEHCHAND.

I.L.R. (1941) 1 Cal. 299.

——**O. 45, R. 8 (as applied to Federal Court)**—*Scope of—Declaration of admission of appeal—If condition precedent to jurisdiction of Federal Court.*

(*Obiter.*) *Sulaiman, J.*—Under O. 45, R. 8, C. P. Code, as applied to the Federal Court, the High Court after the deposit has been made to its satisfaction, has

C. P. CODE (1908), O. 45, R. 13.

to declare the appeal admitted, and then give notice to the respondent, and to transmit the record to the Federal Court. After the certificate required by S. 205 of the Government of India Act has been granted, the admission of the appeal by the High Court under O. 45, R. 8, C. P. Code, is its final judicial act. The declaration that the appeal is admitted is not a mere ministerial or administrative act, but a judicial act. An appellant cannot come to the Federal Court without his appeal having been admitted by the High Court.

Varadachariar, J.—Though the scheme of O. 45, C. P Code, implies that till the High Court makes the order under R. 8, it still retains a measure of control over the proceedings, it cannot be said that such an order is a condition precedent to the exercise of jurisdiction by the Federal Court. When the Federal Court has power to dispense with or give special directions as to printing and production of the records before it, it would be illogical to insist that the High Court must pass an order under O. 45, R. 8 (*a*), C. P. Code, which can be passed only on compliance with the directions originally given by the High Court, which *ex hypothesi* have become inoperative because of the Federal Court's discretion in the matter. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) LACHMESHWAR PRASAD SHUKUL *v.* KESHWAR LAL CHAUDHURI.

I.L.R. (1941) Kar. (F.C.) 1 = 20 Pat. 429 = 13 R.F.C. 4 = 45 C W.N. (F.R.) 66 = 1941 O.W.N. 372 = 1941 P.W.N. 133 = 7 B.R. 362 = 3 F.L.J. 73 = 73 C.L.J. 51 = 53 L.W. 373 = 1941 A.L.W. 255 = 191 I.C. 659 = 1941 O.L R. 82 = 1941 A.W.R. (F.C.) 39 = 1941 M.W.N. 136 = 1941 O.A. 224 = 22 Pat L T. 119 = A.I.R. 1941 F.C. 5 = (1941) 1 M L.J. (Supp.) 49.

——**O. 45, R. 13 (2) (d) and S. 151**—*Power of High Court—Income of property in suit accruing after decree, lying in deposit in High Court pending appeal—Order for its preservation—It may be passed after and before application for leave to appeal to Privy Council is filed.*

Under O. 45, R. 13 (2) (*d*), C. P. Code, the High Court can, after an application for leave to appeal to His Majesty in Council has been filed make an order for the preservation of the subject matter of the appeal. A sum of money representing the fruits and profits of the decretal property accruing after the decree was passed, which was deposited in the High Court under its orders pending the disposal of the appeal to it, forms part of the subject matter of the appeal to the Privy Council, as an adjudication of title in respect of the property one way or the other would directly affect its ownership. *Prima facie*, therefore, the High Court will have the power under that clause to make an order for the preservation of this sum of money, if in its discretion it thinks fit to do so. Even if Cl. (*d*) does not cover this case, the High Court will have the inherent power to make an order concerning this sum of money. Pending the filing of an application for leave to appeal to His Majesty in Council, the High Court has the auxiliary power, the inherent power to make an *interim* order touching this sum of money maintaining the *status quo* till such time within which the application for leave to appeal may be made and for such further period as within which an order may be obtained from the Court dealing with Privy Council matters. (*Mitter, and Khundkar, JJ.*) RAMENDRA NARAYAN ROY *v.* BIBHABATI DEBI. **45 C.W.N. 1023.**

——**O. 45, R. 17**—*Scope and effect of—Appeal to Federal Court—Order declaring appeal admitted under R. 8—If necessary.*

C. P. CODE (1908), O. 47, R. 1.

An appeal lies to the Federal Court from a final order of a single Judge of a High Court when a certificate has been granted under S. 205 (1) of the Government of India Act of 1935. The provisions of S. 111-A and O 45, R. 17, C. P. Code, do not preclude the admission of the appeal. When matters have proceeded as far as R. 8 of O. 45, a formal order of admission by the High Court is not necessary, but if all the requirements of the law, up to that stage have been complied with, it would be improper for the High Court not to declare the appeal admitted. When the certificate under S. 205 (1) of the Government of India Act has been given, no further certificate, is necessary, and the person aggrieved, is entitled to go to the Federal Court provided he complies with so much of R. 7 of O 45 as is incumbent upon him. (*Leach, C. J. and Mockett, J.*) RAMANATHA SASTRIGAL *v.* KRISHNA MENON.

1941 F.L.J (H.C.) 326 = 54 L.W. 295 = (1941) 2 M.L.J 514.

——**O. 46, R. 1**—"*Any such decree*"—*Meaning of.*

The words "any such decree" in O. 46, R. 1, C. P. Code, must mean either (*a*) a decree in a suit where no appeal is provided against the decree, or (*b*) a decree in an appeal where no further appeal is provided. (*Broomfield and Divatia, JJ.*) CHHOTUBHAI BHIMBHAI *v.* BAI KASHI. **43 Bom.L.R. 733 = A.I.R. 1941 Bom. 365.**

——**O. 46, R. 1**—Applicability — Reference—When competent. *See* 1940 Dig., Col. 350. BABU BHAI VAMALCHAND *v.* HIRALAL VAMALCHAND. **I.L.R. (1941) Bom. 131 = 193 I.C. 242 = 13 R.B 305 = A.I.R 1941 Bom. 69.**

——**O. 46, R. 1**—*Construction*—"*Not subject to appeal*"—*Meaning—Reference—Competency.*

The words not subject to appeal in O. 46, R. 1, C. P. Code, must mean that the law provides no appeal in any circumstances. They do not mean that no appeal has in fact been made. If in the case of a decree of a High Court, there might have been an appeal, it cannot be said that the decree is not subject to appeal, although it is very unlikely that such an appeal would have been made or that the High Court would have granted leave to appeal to the Privy Council. If there might have been an appeal, the decree is subject to appeal, and no reference can be made under O. 46, R. 1 in such a case. (*Broomfield and Divatia, JJ.*) CHHOTUBHAI BHIMBHAI *v.* BAI KASHI. **43 Bom L R. 733 = A.I.R. 1941 Bom. 365.**

——**O. 46, R. 1**—Question of law arising during execution—Jurisdiction of Court to make reference—Conditions. *See* 1940 Dig., Col. 350. MANINDRA NATH GHOSE *v.* MANDAR BISWAS. **72 C.L.J. 522.**

——**O. 47**—Compliance with—Necessity— Review application to the Board under S. 250, Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 250 AND C. P. CODE, O. 47. **1940 R.D. 624.**

——**O. 47, R. 1**—*Applicability—Compromise decree—Application for review on ground that it was fraudulently procured—Competency—Proper remedy.*

An application for review will not lie to vacate a compromise decree on the ground that it was fraudulently procured. O. 47, R. 1, C. P. Code, does not apply to such a case. The proper remedy and indeed the only course is to proceed by a separate suit for the purpose. (*Harries, C.J. and Fazl Ali, J.*) GIRIDHARAN PRASAD *v.* BHOLI RAM. **194 I.C. 551 = 14 R.P. 6 = 1941 P.W.N. 385 = 7 B.R. 795 = A.I.R. 1941 Pat. 574.**

——**O. 47, R. 1**—Discovery of new matter—Decree under S. 14 of Encumbered Estates Act—*Pendente lite* and future interest not granted — Dispossession of

C. P. CODE (1908), O. 47, R. 1.

mortgagee-decree-holder under S. 35 of that Act—If a "discovery of new matter." *See* 1940 Dig., Col. 351. BAIJNATH MARWARI *v.* GANESH SINGH.
192 I.C. 212=13 R.A. 299.

——O. 47, R. 1—*"Error apparent on the face of the record"—Meaning of—Failure to take note of decision establishing clear position of law—If ground for review.*

"An error apparent on the face of the record" may be an error of law. It cannot of course be held that whenever a Judge has overlooked a ruling he has a power to review his decision; nor can it be held that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission to draw his attention to the authority, it may in a proper case be a ground for review, coming within the category of an error apparent on the face of the record under O. 47, R. 1, C. P. Code. (*Wadsworth, J.*) NATESA NAICKER *v.* SAMBANDA CHETTIAR.
54 L.W. 263=1941 M.W.N. 1047=
A.I.R. 1941 Mad. 918=(1941) 2 M.L.J. 390.

——O. 47, R. 1—*Ground for review—Absence due to illness on date of the order.*

Absence owing to illness on the date of the order is not a sufficient ground for asking for review of the order passed on that day without contest by him. (*Harper, S. M. and Sathe, A.M.*) MATA DIN *v.* KALI PRASAD.
1941 O.A. (Supp.) 868=1941 A W.R. (Rev.) 1070.

——O 47, R. 1—*Power of Court—Review* suo motu.

A Court can correct arithmetical or clerical errors under S. 152, C. P. Code. But it has no power to review and modify its judgment when neither party has applied for review under O. 47, R. 1. (*Bhide, J.*) JIWAN DAS *v.* RAKHMAT DIN 195 I.C 157=14 R.L. 37=
43 P L.R. 88=A.I.R. 1941 Lah 212.

——O. 47, R. 1—*Review—Entertainability—Subsequent appeal against same order.*

An application for review is entertainable, notwithstanding the fact that an appeal has subsequently been preferred against the same order. (*Shirreff, J M.*) BABU LAL *v.* SULTAN BEGAM.
1941 R D. 428=1941 O.W.N. 813=
1941 A.W.R. (Rev.) 571=1941 O.A. (Supp.) 539.

——O. 47, R. 1—*Review—Grounds—Mistake of law or on a point of judgment—Proper remedy.*

Any mistake committed by a Court in respect of either law or judgment cannot give occasion for a review application and the only remedy open to the aggrieved party is to appeal against the order. (*Sathe, A.M.*) JANGJIT SINGH *v.* PITAMBAR SINGH.
1941 R.D. 880=1941 O.A. (Supp.) 840=
1941 A.W.R. (Rev.) 996.

——O. 47, R. 1—*Review—Grounds—Wrong decision on a point of law.*

The only right which subsists once an appeal has been heard and determined is a right of review, and that right must be exercised in strict confirmity with O. 47. A review could not be obtained on the ground that some wrong decision on a point of law has found its way in the judgment. What is intended is something like an arithmetical error or the use of wrong words, or, say, a finding of fact inconsistent with the pleadings. (*Roberts, C. J. and Blagden, J.*) P. V. SUNDARAM *v.* M. G. BAGLA.
1941 Rang.L.R. 382=
A.I.R. 1941 Rang 233.

C. P. CODE (1908), O. 47, R. 7.

——O. 47, R. 1—*Review—Jurisdiction to hear application—Partition suit—Appeal against final decree only—Dismissal—Second appeal also dismissed—Application to 1st appellate Court to review preliminary decree and order in appeal from final decree—Maintainability.*

Where the preliminary decree in a partition suit is not appealed against, but an appeal is preferred against the final decree and rejected, and a second appeal is also rejected, an application for review of the judgment in respect of the preliminary decree and of the order of the first appellate Court in the appeal from the final decree will not lie in the appellate Court. The review application in respect of the preliminary decree has to be made in the Court which passed it, as there was no appeal against that decree. So far as the appellate decree in the appeal against the final decree is concerned, there having been a second appeal which was dismissed, the first appellate Court has no jurisdiction to entertain the application for review. (*Harries, C.J. and Chatterji, J.*) JUGESHWAR MISRA *v.* KIRIT SINGH.
1941 P.W.N. 557.

——O. 47, R. 1—*'Sufficient reason'—Mistaken view of law or fact.*

The 'other sufficient reason' which would justify a review under O. 47, R, 1, must be of a cognate nature. A mistaken view of the law or of the facts is not a matter which can be covered by the expression 'some other reason'. (*Shirreff, S.M. and Sathe, J M.*) SHYAM LAL SAHU *v.* LAL NIRINDRA BAHADUR CHAND.
1941 A W R. (Rev.) 683=1941 O A. (Supp.) 623=
1941 R.D 745 (2)=1941 A.L J. (Supp.) 117.

——O. 47, R. 4 (1)—Order rejecting review application—If a judgment—Letters Patent Appeal, if lies. *See* LETTERS PATENT (NAGPUR) AND C. P. CODE, O. 47, R. 4 (1). 1941 N.L.J. 617.

——O. 47, R. 4 (2)—*Finding as to absence of knowledge—Discretion—Granting of review—Interference in revision.*

Where the Court in its discretion holds that after due diligence, the applicant did not have knowledge of the new fact alleged by him and that it came to his knowledge only after the decree had been given and grants the review application, it could not be said that in arriving at this view the Court committed any illegality or material irregularity. (*Harper, S.M*) DAULAT RAM *v.* POORAN MAL. 1941 R.D. 454=
1941 A.W.R. (Rev.) 573 (2)=
1941 O.A. (Supp.) 531 (2).

——O. 47, R. 5—*Jurisdiction—High Court—Appeal disposed of by two Judges—Application for review after one Judge has left the Court—Jurisdiction to hear.*

Where after the disposal of an appeal by a bench of two Judges an application for review of judgment is made when only one of the Judges who heard the appeal remains attached to the Court, the application can be heard and disposed of by that remaining Judge alone. In accordance with the invariable practice of the Madras High Court even in first appeals, the application for review is heard and decided only by the Judges who heard the appeal or, where one of them is absent, by the other Judge sitting alone. (*Somayya J.*) PEERAMCHENNA REDDI, *In re.* 1941 M.W.N. 898=
54 L.W. 444=(1941) 2 M.L J 644.

——O. 47, R.7 and United Provinces Encumbered Estates Act (1934), S. 35—*Appeal under S. 35 of the United Provinces Encumbered Estates Act based on an order of review—O. 47, R. 7, if applies to it.*

Where though an appeal is under S. 35 of the U. P. Encumbered Estates Act and is based on an

C. P. CODE (1908), O. 47, R. 7.

order of review, the special provisions of the C. P. Code, contained in O. 47, R. 7 applies to it and hence a wrong conclusion on a question of fraud would not be a sufficient ground for appeal. (*Shirreff, J M.*) BABU LAL *v.* SULTAN BEGAM 1941 R.D. 428 = 1941 O W.N. 813 = 1941 A.W.R. (Rev.) 571 = 1941 O.A. (Supp.) 539.

——O. 47, R. 7—*Applicability— Appeal against amended decree.*

O. 47, R. 7, C. P. Code, does not apply to the case of an appeal against the decree amended on review. Hence such an appeal is not confined to those grounds mentioned in R. 7 of O. 47. (*Shirreff, S. M. and Sathe, J. M.*) KHURSHED HUSAIN *v.* MOHAN KEWAT. 1941 A.W.R. Rev) 800 = 1941 O.A. (Supp.) 711 = 1941 R.D. 729

——O. 47, R. 7—Scope—If over-ridden by S. 75 of the Provincial Insolvency Act. *See* PROVINCIAL INSOLVENCY ACT, S. 75. (1941) 1 M L.J. 537.

——Sch. II—Applicability—Restitution proceedings. *See* C. P. CODE, S. 144 AND SCH. II. 1941 A.L.J. 596.

——Sch. II, Para. 1—*Scope—Suit for restitution of conjugal rights—If can be referred to arbitration.*

The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there is nothing in Sch. 2, C. P. Code, to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. (*Almond J.C. and Mir Ahmad, J.*) MT. KUNTI DEVI *v* BHOLA NATH 194 I.C. 466 = 13 R. Pesh. 81 = A.I.R. 1941 Pesh. 43.

——Sch. II, Para. 1 (1)—*Judgment contemplated by—Pendency of review application—If a bar to reference to arbitration without intervention of Court.*

The 'judgment' contemplated by para. 1 (1) of the second Schedule, C. P. Code, is a judgment in a suit Review proceedings are not a suit. Para. 1 (1) predicates the pendency of a suit. Hence a reference to arbitration without the intervention of Court is not bad in a case after the judgment in a suit but during the pendency of a review application thereafter. (*Collister and Baipai, JJ.*) SAGAR MAL *v.* PARSHOTTAM DAS. 1941 A.W.R. (H.C.) 371 = 1941 A.L.W. 1095.

——Sch. II, Para. 5—*Applicability—Agreement to refer—Refusal by some arbitrators named to act—Effect—Application to file agreement—Power of Court to appoint new arbitrators and make reference—Absence of provision in agreement in case of refusal of arbitrators to act—Effect of—Para.* 17 (4).

It cannot be seriously disputed that there is some difference between the procedure to be followed where the arbitration is made in a pending suit and where there is a mere agreement to refer to arbitration which is sought to be filed in Court. In the latter case the Court obviously cannot go beyond the terms of the agreement, and if the agreement specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators other persons, in the face of the clear provision in para. 17 (4) of Sch II C. P. Code. Para. 5 of Sch. II, C. P. Code will not apply to such a case, as it can come into play only after there has been an order of reference by the Court. If one or more of the arbitrators named in the agreement refuse to act and thus make the agreement incapable of performance, the agreement becomes void, and the Court has no jurisdiction under para. 17 to make a reference to the

C. P. CODE (1908), Sch. II, Para. 17.

arbitrators who are willing to act. (*Harries, C.J. and Chatterji, J.*) TARA PRASAD BALIASEY *v.* BAIJNATH PRASAD BALIASEY. 19 Pat. 927 = 193 I.C. 756 = 13 R.P. 628 = 1941 P.W.N. 49 = 7 B.R. 615 = A.I.R. 1941 Pat. 155.

—— Sch. II, Para. 10—*Reference of suit to arbitration—Parties joining together with arbitrators and third persons, and executing document agreeing to compromise suit on certain terms—Document, if award.*

The parties to a partition suit referred the matter to the arbitration of certain Amins. When the Amins had decided what they were going to do, the parties joined together with the Amins and certain local gentlemen and executed a document by which they agreed that the parties shall be bound to compromise the suit upon certain terms which were annexed to the document which was signed by the parties.

Held that the document was not an award but an agreement to compromise. (*Derbyshire, C.J. and Mukherjea, J.*) PURNA CHANDRA CHOWDHURY *v.* JAGAT BANDHU CHOWDHURY. 45 C.W.N. 381.

——Sch. II, Para 14 (c)—Taking of an erroneous view of law by arbitrator—When renders an award liable to be set aside. *See* 1940 Dig., Col. 355. PHOOL CHAND *v* MOOL CHAND. 16 Luck. 79.

——Sch. II, Para. 15—*Construction—Cancellation of reference to arbitration under R. 8—Subsequent award—If void—If can be filed.*

Even where an award has been made by arbitrators whose powers have been revoked by cancellation of order of reference under R. 8 of Sch. II, C. P. Code, the award is not void *ab initio* but has to be set aside under R. 15 of Sch. II. If no application is made to set aside the award, it remains in force and may be filed. (*Mockett, J.*) SUBBAYYA *v* VENKATADRI. 1941 M.W.N. 780 = 54 L.W. 604 = A.I.R. 1941 Mad. 921 = (1941) 2 M L J. 395.

——Sch. II, Para. 15—Delay in pronouncing award—Rights of parties. *See* 1940 Dig. Col. 355. KESHOLAL *v.* LAXMAN RAO. 192 I.C 371 = 13 R.N. 244.

——Sch. II, Para. 15—*Setting aside award—Grounds — Complaint as to vagueness of award—Sufficiency.*

An objection that an award is vague and illegal, is itself a vague objection and does not deserve any consideration. (*Harper, S.M. and Sathe, J.M.*) DINA *v.* KALIKA PRASAD. 1941 R D. 284 = 1941 A.W.R (Rev.) 404 = 1941 O.A. (Supp.) 353.

——Sch. II, Para. 16 (1)—*Powers of Court—Award—Objections—No orders—Competency of Court to dispose suit on merits.*

Where an award has been given on a reference and objections are filed but no orders are passed either accepting or rejecting them, it is not competent for the Court under Sch. II, R. 16 (1) of the C. P. Code to dismiss the suit on the merits. (*Harper, S.M. and Sathe, J.M.*) INA *v.* KALIKA PRASAD. 1941 R.D 284 = 1941 A W.R. (Rev.) 404 = 1941 O.A. (Supp) 353.

——Sch II, Para 16 (2)—*Appeal—Decree in excess of award—Sustainability.*

Where a decree is passed on an award and it is found that part of the decree was in excess of the award, that portion of the decree which has exceeded the award, cannot be supported in appeal and is liable to be set aside. (*Harper, S.M. and Sathe, J.M.*) DINA *v.* KALIKA PRASAD. 1941 R.D. 284 = 1941 A.W.R. (Rev.) 404 = 1941 O.A. (Supp.) 353.

——Sch. II, Para 17 (4)—Power of Court—Agreement to refer to named arbitrators—Refusal by some to

C. P. CODE (1908), Sch. II, Para. 20.

act—Absence of provision in agreement to meet situation—Application to Court to file—Power of Court to appoint arbitrators in place of those specified in agreement. *See* C. P. CODE, SCH II, PARA. 5.
19 Pat. 927.

——**Sch. II, Para. 20**—*Award on private reference made rule of Court—Minor party represented by guardian—Suit by minor to avoid award for want of registration—Maintainability.*

Where an award on a private reference has been by consent of all parties made a rule of Court and a decree passed in terms thereof and a minor party has been throughout represented by his guardian, he is not entitled to file a suit for a declaration that the decree is void and of no effect as it was based upon an unregistered award. (*Collister and Bajpai, JJ.*) SAGAR MALL *v.* PARSHOTTAM DASS. **1941 A.W.R. (H.C) 371 = 1941 A.L.W. 1095.**

——**Sch. II, Paras. 20 and 21**—Jurisdiction of Court under—Award allotting business to one partner and directing others to pay dues and execute release deeds to the former in fixed time—Provision for payment of fixed amount of damages on default—Legality—Enforceability of award—Power of Court to modify. *See* 1940 Dig., Col. 357. THIRUMALAI CHETTIAR *v.* NANJAYYA GOWDER. **A.I.R. 1941 Mad. 266.**

——**Sch. III, Para. 2**—Property under management of Collector—Alienation by judgment debtor—If void or voidable—Sale and subsequent acceptance by Collector—Effect. *See* 1940 Dig., Col 358. SHALAGRAM *v.* MANNU. **I.L.R. (1941) Nag. 214 = 192 I.C. 312 = 13 R.N. 236 = A.I.R. 1940 Nag. 12.**

COMPANIES—Debenture holders—Rights of. *See* 1940 Dig., Col. 358. MITHAN LAL *v.* OFFICIAL LIQUIDATORS, AGRA SPINNING AND WEAVING MILLS CO., LTD. **191 I.C. 458 = 13 R.A 234.**

——Deposits by employees in Bank as security—Nature of. *See* 1940 Dig, Col. 359. DINSHAW & CO. *v.* KRISHNA PIARY. **16 Luck. 241 = 191 I.C. 178 = 1941 Comp. C. 138 = A.I.R. 1941 Oudh 126.**

COMPANY—*Director or managing director—Position of.*

A director or a managing director is in no way a servant of the company; he is the agent of the company for carrying on its business. (*Young, C.J. and Sale, J.*) GULAB SINGH *v.* THE PUNJAB ZAMINDARA BANK, LTD., LYALLPUR. **43 P L.R. 619 = 1941 Comp.C. 301.**

——*Directors—Power to refuse to recognise transfer of shares—Failure to give reasons—Presumption of mala fides—Opinion of shareholders—Relevancy.*

Where a discretion is given to the Directors of a company by its Articles of Association, to refuse to register the transfer of shares to any person whom they think it undesirable to be admitted to membership of the company, it is certainly open to the directors to refuse to register a transfer on that ground without giving any further reasons. But if a shareholder challenges this undoubted right of the Directors to use their discretion in such a matter, the burden lies heavily on him to allege with particularity and to prove such *mala fides* on the part of the Directors as amounts to arbitrary and wanton conduct. The Directors are not to be exposed to suspicion of *mala fides* by reason merely of the fact that they have chosen to withhold their reasons and which they are not bound to give. In such a matter the opinion of the shareholders is quite irrelevant. So long as a Board of Directors exists and particular powers are vested in them by the articles, then they are entitled to exercise those powers without interference by other shareholders. If they are dissatisfied

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they can always remove the Directors. (*Braund,* JAGDISH PRASAD *v.* PARAS RAM. **1941 A.L.J. 483 = 1941 O.A. (Supp) 690 = 1941 A.W.R. (H.C) 260 = 1941 A.L.W. 864 = A.I.R. 1941 All. 360.**

——*Effect of order terminating its existence.*

Where a company has ceased to exist by an act of the country by whose acts and under whose laws it was made a juristic entity, it must be treated as non-existent by all courts administering English law. (*Lord Romer.*) DAIREN KISEN KABUSHIKI KAISHA *v.* SHIANG KEE. **196 I.C. 414 = 14 R.P.C. 28 = 1941 O.L.R. 712 = 54 L.W. 610 = 8 B.R. 61 = 1941 A.W.R. (P.C.) 69 = 1941 O.A. 707 = A.I.R. 1941 P.C. 88 (P.C.).**

——*Liquidation — Preferential Creditor—Trust—Payment of arrears of premia to insurance company by assignee of policy for revival of lapsed policy—Condition as to production of medical certificate not fulfilled—Company ordered to be wound up before production—Right of assignee to rank as preferential creditor—Trust—If created.*

Whenever money is paid by one person to another it can be said that it is remitted for a specific purpose, *e.g.*, when a buyer pays to a seller of goods or a hirer for the hire of an article; but because money is paid that does not *ipso facto* make the recipient a trustee. A trust would exist when a banker is to collect and remit, but not when he is to use and repay. The applicant, as assignee of a policy of insurance, issued by an assurance company which had lapsed on default by the assured to pay the premia for two years, applied for revival of the policy, to which the company agreed on condition that the applicant paid the arrears of premia amounting to Rs. 140 and produced a medical certificate in respect of the assured. The applicant sent the amount to the company which acknowledged receipt of the same, stating that it would consider revival of the policy upon receipt of the medical receipt and that meanwhile the amount would be placed in the suspense account. In fact, however, the company placed the money not in any account named "suspense" but in an account called "advance premium receipt account". Within a few days of this, the company went into liquidation and no further step was taken in the matter of the policy or its revival. The applicant claimed to be treated as a preferential creditor on the ground that the amount was paid by him to the company in circumstances which created a trust, the company being the trustee and the applicant the *cestui que* trust.

Held, that the payment to the company of the sum of Rs. 140 was for a specific purpose which did not involve any payment by the company to a third person nor was it agreed that the money should be returned to the applicant on the happening of any specified event. The object for which the payment was made and which was the consideration for the payment had failed, but the company could not be said to have received this money in any fiduciary capacity, and therefore no question of trust arose. (*Gentle, J.*) RAMAKRISHNA AIYAR *v.* OFFICIAL LIQUIDATOR.
1941 M.W.N. 1067 = (1941) 2 M.L J. 910.

——Management—Board of management—Power to frame by-laws delegated to Board—Gratuity to ex-employee in cases not covered by by-laws—Power of General Body to sanction award of. *See* 1940 Dig., Col. 360. VENKATESA RAO *v.* TRICHINOPOLY DISTRICT CO-OPERATIVE CENTRAL BANK, LTD.
193 I.C. 89 = 13 R.M. 615 = (1940) 2 M.L.J. 488.

——*Shares — Forfeiture — Non-payment of call money—Directors not appointing person or place to whom or at which it is to be paid, as provided by*

articles—Notice calling for payment of both call and allotment money—Forfeiture for their non-payment—Validity.

It was provided by the Articles of Association of a company that the Directors 'may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof "made payable at fixed times", and that each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the Directors". It was stated that if any member failed to pay any such call, the Directors might serve a notice on such member requiring him to pay the same together with interest and expenses, and that if the requisitions of any such notice were not complied with, the shares might be forfeited by the Directors. These provisions as to forfeiture were made applicable "in the case of non-payment of any sum which by the terms of the issue of a share becomes payable at a fixed time". The Directors of the company passed a resolution for a call fixing the sum per share to be called up and the date for payment. Nothing was said in the resolution about the persons or places to be appointed in accordance with the Articles of Association. A notice was subsequently sent to the petitioner signed by the Secretary "by order of the Board" requesting him to remit the call money to the "Company's Head Office" on or before the date fixed in the resolution. As no payment was made, a notice was served on the petitioner informing him that the Directors required him on or before a certain date to pay a certain sum which included the allotment money as well as the money due for call on his shares and that in the event of non-payment the shares would be liable to be forfeited. The petitioner did not pay this amount and the Directors thereupon forfeited the shares standing in his name.

Held, (*i*) that no forfeiture of shares could be made unless every condition precedent had been strictly and literally complied with; (*ii*) that as the Directors had not, as provided by the Articles, appointed the persons and places to whom and at which the call money was to be paid either in their resolution making the call or in any subsequent resolution, the call and the notice given in respect thereof were invalid and that consequently the forfeiture of shares founded on them was *ultra vires*; (*iii*) that the forfeiture of shares based upon failure to pay the allotment money was also invalid and *ultra vires*, as the notice requiring its payment was defective in that it asked for payment of the call money as well, which was invalid. (*Lort Williams, J.*) BENGAL ELECTRIC LAMPWORKS, LTD., *In the matter of*.

45 C.W.N. 1075.

———*Shares—Transfer in blank—Transferee's right to fill in particulars after transferor's death.*

The transferee, in cases of transfers in blank of shares in a company, has the right to fill in the necessary particulars, including his own name as transferee and the date of the transfer, after the death of the original transferor. (*Lort Williams, J.*) BENGAL SILK MILLS CO., LTD., *In the matter of*. **45 C.W.N. 1109.**

———*Suit against—Right of shareholders—"Fraud on the minority"—Frame of suit—Directors, when necessary parties—Increase of capital—Directors, if may be assailed.*

There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts *ultra vires*. Suits to restrain acts *ultra vires* and suits to restrain acts notwithstanding that they have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of *ultra vires* acts, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority". These cases, however, are only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances. If the wrongdoer has the balance of power, and therefore the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and the better course, where the wrongful act is supported by the majority, is for the minority shareholders to sue in their own name or, as a matter of convenience, for a shareholder to sue on behalf of himself and all the other shareholders. If, however the wrongdoers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiffs. In a suit so brought, it is not sufficient to plead simply the dominance of the majority of the shareholders or what may be called the secondary fraud. The primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. It is not sufficient to allege fraud against the company generally. The wrongdoers must be specified and made party defendants to the action. It may be sufficient to make them parties *qua* shareholders, although if the primary wrong is that of the directors, it is right and proper they should be sued *qua* directors. Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. The directors may be assailed if it is established first that the increase of capital is for the purpose of power and secondly that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependants or by any kind of device. (*Ameer Ali, J.*) JHAJHARIA BROS. *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD.

I.L.R. (1941) 1 Cal. 30 = 195 I C. 36 = 14 R.C. 29 = 72 C.L.J. 458 = A.I.R. 1941 Cal. 174.

———Winding up—Agreement to advance money and get cotton spun—Adjustment of charges against advances—Winding up—Rights, how to be worked out. *See* 1940 Dig., Col. 361. MITHAN LAL *v.* OFFICIAL LIQUIDATORS, AGRA SPINNING AND WEAVING MILLS CO., LTD. **191 I.C. 458 = 13 R.A. 234.**

———*Winding up—Assets or capital—Uncalled share money on ordinary issued shares—If available for payment to preference shareholders—Right to payment of dividend out of capital when there are no profits.*

Uncalled share money upon issued shares at the date of the winding up of a company forms part of the assets or capital of the company. The preference shareholders being entitled in winding up to return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to pay the preference share capital, and the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment

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of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares. Where the memorandum of association of a company provides that "No dividend shall be payable except out of the net profits arising from the business of the company," there can be no dividend payable to the preference shareholders from the amount of the share capital when there have been no profits, although under the articles of association preference shares confer the right to a fixed cumulative preferential dividend. (*Gentle, J.*) D'CRUZ *v.* VISWANATHAN. **1941 M.W.N. 972 = 1941 Comp. C. 277 = A.I.R. 1941 Mad. 806 = (1941) 2 M.L.J. 94.**

———*Winding up—Onerous contract with creditor—Company unable to carry on its business and pay its debts.*

Where in consequence of an onerous contract with a creditor the company loses its identity and the creditor becomes *de facto* the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract seizes the machinery and plant of the company with the result that the company is unable to carry on its business and to pay its debts it is just and equitable to wind up the company. (*Lord Justice Luxmoore.*) ERNEST HUGH CANNING *v.* SOOBRAN PARTAP. **1941 A.W.R. (P.C.) 51 = 1941 O.A 603 = A.I.R. 1941 P.C. 106 (P.C.).**

———*Winding up—Priority of debts—Costs of successful litigant against company—If entitled to priority.*

A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the fund available for the discharge of their debts. (*Young, C.J and Sale, J.*) THE KAILASH PICTURE PALACE, LTD. *v.* KIDAR NATH. **43 P.L.R. 648 = 1941 Comp.C. 294.**

———*Winding up—Set-off—Principle underlying—Effect of S. 3, Limitation Act—Barred debts, it could be set off—Difference between set off in liquidation proceedings and set off under Civil Procedure Code.*

The effect of S. 3 of Limitation Act is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which according to their various periods of limitation are time barred. It is only the remedy that is destroyed, but the debt remains. Such a debt can be set-off by a liquidator in winding proceedings against debts by the company to the debtor. The right of set-off exercisable in winding up proceedings is distinguishable from the set-off provided for under the C. P. Code, O. 8, R. 6. In the latter case it is required as a condition precedent that the money should be legally recoverable by the defendant from the plaintiff, but no such condition attaches to the exercise of a right of set-off by the official liquidator in winding up proceedings acting under the Companies Act. (*Braund, J.*) THAKUR PRASAD *v.* OFFICIAL LIQUIDATOR OF THE BENARES BANK, LTD. **I.L.R. (1941) All. 415 = 194 I.C. 839 = 14 R.A. 10 = 1941 Comp. C. 298 = 1941 A.W.R. (H.C.) 133 = 1941 O.A. (Supp.) 243 = 1941 A. L.W. 399 = 1941 O.W.N. 548 = A.I.R. 1941 All. 278.**

COMPANIES ACT (VII OF 1913), S. 21—*Articles of association—If constitute contract—Implied contract—If may be proved.*

Though the memorandum and articles of association of a company do not constitute a contract, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association. (*Young, C. J. and Sale, J.*) GULAB SINGH *v.* THE PUNJAB

COMPANIES ACT (1913), S. 73.

ZAMINDARA BANK, LTD., LYALLPUR.
43 P.L.R. 619 = 1941 Comp. C. 301.

———**S. 32**—*Construction—Failure to send return—Liability of company and of officers.*

While a company is always liable where a return is not sent as required by S. 32 of the Companies Act, the officers of the company are liable only if they knowingly or wilfully authorise or permit the default. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* LURY CO.
54 L.W. 726 = 1941 Comp. C. 331 = 1941 M.W.N. 846 = (1941) 2 M.L.J. 487.

———**S. 32**—*Prosecution of Managing Director for non-compliance with section—Several meeting not held during year—Finding by Court that this is due to his default—If necessary—His previous conviction under S. 76 for such default—If sufficient.*

Where in a case in which a general meeting of the company was not held during the year, the Managing Director is prosecuted under S. 32 of the Companies Act for wilful default in submitting the information required by that section, it is necessary for the Magistrate to come to a finding that he was responsible for the default in connection with the failure to hold the meeting, assuming that he cannot put forward as a defence the impossibility of complying with the section if the failure to hold the meeting was due to his own default. It is doubtful if the accused could be convicted without the Magistrate coming to an independent finding that he was responsible for such default even if he had been previously convicted under S. 76 of the Act for such default. (*Henderson, J.*) SURENDRA NATH SARKAR *v.* EMPEROR. **45 C.W.N. 1130 = 74 C.L.J. 367.**

———**S. 34 (3)**—Scope—Company—Expulsion of member by resolution—Name struck out from register of members—Subsequent amendment of articles to enable company to transfer such member's shares without proper instrument of transfer—*Ultra vires*—Sale of shares by Company—Legality—Right of members as shareholder—If affected. *See* 1940 Dig., Col. 362. MADHAVA RAMACHANDRA KAMATH *v.* CANARA BANKING CORPORATION, LTD. **195 I.C. 265 = 14 R.M. 165 = 1941 Comp. C. 78 = A.I.R. 1941 Mad. 354 = (1940) 2 M.L.J. 721.**

———**S. 72**—*Permissive or imperative.*

S. 72 is merely permissive and not imperative; it only provides one of several methods whereby a communication or notice may be served on a company. (*Roberts, C.J., Dunkley and Shaw, JJ.*) DAWSONS BANK, LTD. *v.* MUNICIPAL COMMITTEE, KYAIKLAT.
A.I.R. 1941 Rang. 339 (S.B.).

———**S. 73 (a)**—*Construction "outside the office"—Meaning—Company having office in building with compound—Name—If to be painted or affixed outside the compound as well as outside office.*

S. 73 (*a*) of the Companies Act is a penal provision and has to be construed strictly. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The words "outside the office" cannot be construed as outside the premises or outside the compound, where the office is in a building with a compound. The requirements of the section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. The fact that the company owns the whole premises makes no difference. Where an office is situated within a compound the law does not require the name of the company to be painted or affixed outside the compound as well as outside the office. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* BATLIWALA SONS & CO., LTD. **I.L.R. (1941) Bom 186 = 193 I.C. 620 =**

COMPANIES ACT (1913), S. 76.

1941 Comp. C 154 = 42 Cr.L.J. 452 = 13 R.B. 335 = 43 Bom L.R. 105 = A.I.R. 1941 Bom. 97.

——S. 76 (2) — *Applicability—Absence of evidence of knowing and wilful default—Conviction—Sustainability.*

The petitioner who was one of the managing directors of a company was charged and convicted under S. 76 (2) of the Companies Act. The evidence did not justify the conclusion that he was knowingly and wilfully a party to the default under S. 76 (1).

Held, that he could not be convicted under S. 76 (2). (*Lakshmana Rao, J.*) KASI VISWANADHA CHETTIAR *v.* EMPEROR. **196 I.C. 126 = 1941 Comp. C. 341 = 42 Cr L.J. 854 = 53 L.W. 680 = (1941) M W.N. 381 = (1941) 1 M L.J. 702.**

——S. 76 (2)—*Scope—Ordinary director of company—Conviction under—Evidence to show that director was knowingly and wilfully a party to the default—Necessity for.*

Before an ordinary director of a company can be convicted of an offence under S. 76 (2) of the Companies Act, there must be evidence to show that he was knowingly and wilfully a party to the default under S. 76 (2). (*Lakshmana Rao, J.*) PERIYANNAN CHETTIAR *v.* EMPEROR. **1941 M W.N. 959.**

——Ss 76 (2) and 131—*Scope—Delay in holding general body meeting and laying balance sheet—Condonation by Registrar—Effect of—Power to condone delay.*

Where the Registrar of joint stock companies condones the delay on the part of the directors of a company in holding a general body meeting, and thereby condones the delay in filing a balance sheet before the general body at its meeting, the directors cannot be convicted under Ss. 76 (2) and 131 of the Companies Act. *Quaere*, whether the Registrar can condone the delay in holding a general meeting. (*Horwill, J.*) APPALA SWAMI *v.* EMPEROR. **1941 M.W.N. 225 = 195 I C. 140 = 14 R.M. 139 = 53 L.W. 660 = 42 Cr.L.J 683 = A.I R. 1941 Mad. 504 = (1941) 1 M.L.J. 419.**

——S 87 (b)—*Scope—Compulsory sale at creditor's instance—If barred.*

The restriction by S. 87 (*b*) is against a managing agent making a voluntary charge or assignment of his remuneration and the object is undoubtedly to prevent him from doing so to the detriment of the company. It is an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. (*McNair, J.*) PURSATTAMDAS *v.* BAIJNATH. **195 I C. 69 = 14 R C. 41 = A.I.R. 1941 Cal. 240.**

——S. 91 B (1) (before amendment)—*Scope and effect—Shareholder creditor—Right to vote for resolution authorising set off of future calls against debt due.*

It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set-off against future calls But where such shareholder creditor is himself a director and the managing agent, he cannot validly vote for a resolution authorising such set-off. The resolution would be invalid when the necessary quorum is lacking without such director's vote. Such a shareholder can, therefore on liquidation, be placed in the list of contributories in respect of the unpaid share money. (*Leach, C.J. and Chandrasekhara Aiyar, J.*) PANDALAI *v.* SOUTH INDIAN GENERAL ASSURANCE CO, LTD. **1941 M.W.N. 1022 = 1941 Com C. 327 = 54 L.W. 440 = (1941) 2 M L.J. 595.**

——S. 101 (3)—Scope of—Allotment without compliance with requirement of S. 101 (3)—Legality—Company, if can demand share money. *See* 1939 Dig., Col. 332. RAMLALSAO *v.* K. B M. E R. MALAK. **I.L.R. (1941) Nag 567.**

COMPANIES ACT (1913), S. 162.

——S. 131—Delay condoned by Registrar—Effect on liability to conviction. *See* COMPANIES ACT, SS. 76 (2) AND 731. **1941 M W.N 225 = (1941) 1 M.L J. 419.**

——S. 152—Scope—Arbitration with intervention of Court—Arbitration Act—If applies *See* 1940 Dig., Col. 364. EAST BENGAL BANK, LTD. *v.* JOGESH CHANDRA BANERJEE. **193 I.C. 553 = 13 R C. 419 = A.I R. 1941 Cal. 127.**

——S. 153—Duty of Court—Scheme approved by shareholders and creditors—If to be accepted by Court as a matter of course—Principles to be observed. *See* 1940 Dig , Col. 365. CALICUT BANK LTD *v.* DEVANAI AMMAL. **192 I C. 853 = 13 R M. 599.**

——S. 153—*Scheme of compromise—Insurance Company—Value of policies for ascertaining majorities at meetings.*

In view of the fact that it is impracticable to try and ascertain the true or real value of the policies of an Insurance Company, the nominal value of the policies must be accepted for the purpose of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise under S 153 of the Companies Act. (*Lort Williams, J.*) LIGHT OF ASIA INSURANCE. CO., LTD. *In re.* **45 C.W.N. 979.**

——Ss 156, 212 and 216—*Company in voluntary liquidation — Contributories settled by liquidator—Application to Court for order to enforce call—Discretion and power of Court—Necessity for suit.*

Where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application, he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case a Court can enforce the call without requiring the liquidator to institute a suit, and the amount of the call becomes payable irrespective of any question of limitation. There is no real difference between a company which is being compulsorily wound up and a company which is in voluntary liquidation. Where the contesting respondent raises several defences, the Court may direct the liquidator to file a suit. (*Leach, C.J. and Happell, J.*) RAMABHADRAN *v.* MANICKKAM. **I.L.R. (1941) Mad. 538 = 1941 M W.N. 275 = 53 L.W. 321 = 1941 Comp. C. 70 = A.I R. 1941 Mad. 565 = (1941) 1 M.L J. 369.**

——S. 156—Liability of shareholders to contribute—Unpaid calls barred by limitation. *See* 1940 Dig , Col. 365. EAST BENGAL SUGAR MILLS LTD., *In re.* **194 I.C. 59 = 13 R.C. 474 = 45 C.W.N 879 = A.I.R. 1941 Cal 143.**

——S. 160—*Payment order made against deceased contributory—Remedy of liquidator.*

Where a deceased person has been placed on the list of contributories and a payment order has been made against him, the remedy of the liquidator lies against the estate of the deceased in due course of administration as enacted in S. 160 of the Companies Act. (*Young, C.J. and Sale, J.*) T. N BOSE *v.* PANDIT YOGESHWAR. **43 P.L R. 650 = 1941 Comp. Cas 296 = A.I.R. 1941 Lah. 480.**

——S. 162 (v)—"*Unable to pay its debts*"—*Meaning of—Application for winding up—Question for consideration—Share money due and not called up—If to be taken into account.*

When the Court is called upon to wind up a company under S. 162 (*v*) of the Companies Act on the ground

that it is unable to pay its debts, what has to be ascertained is not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether, in a commercial sense, the Company is solvent. In deciding whether a company is able to pay its debts, the subscribed capital of the company which is due and which has not yet been called up can be taken into account as money available for the discharge of the debts. A company is entitled to regard money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. (*Agarwala, J.*) SUDHIYA NATH BHADURI *v.* BIHAR NATIONAL INSURANCE CO., LTD. 20 Pat 538= A.I.R 1941 Pat 603.

——S. 162 (vi)—"*Just and equitable*"—*Test to determine—Function and duty of Court—Matters to be considered.*

In deciding whether it is just and equitable to wind up a company under S. 162 (*vi*) of the Companies Act, the decisive question is whether at the date of the presentation of the petition there is any reasonable hope that the object of trading at a profit is attainable. The onus of proof is on the petitioning creditor or contributory. It is not the function of the Court to determine the question of the prospects of the company in future on its own views as to probable success or failure, but to form the best opinion it can upon the evidence of persons given with a practical knowledge of the trade in question and the local conditions where these affect the matter. If, at the relevant time, there is a reasonable hope of trading over a period of difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, there is no sufficient reason why the Court should wind up the company under class (*vi*) of S. 162. Where there is no evidence of persons with practical knowledge of the business in question, the fact that a public officer, whose duty it is to intervene in cases where a company's affairs are not conducted in a sound manner, has not taken action to wind up the company is, of course, not a deciding factor in determining whether a petition for winding up by a contributory should be granted or not, but it is a fact which is deserving of consideration under the just and equitable clause. (*Agarwala, J.*) SUDHIYA NATH BHADURI *v.* BIHAR NATIONAL INSURANCE CO, LTD.
20 Pat. 538=A.I R. 1941 Pat. 603.

——S. 171—*Appeal against company—Pendency on date of winding up order—Leave to prosecute—Necessity.*

Where at the date of the winding up order, a proceeding, namely, an appeal is pending against the company, it could not, according to S. 171 of the Companies Act, go on without the leave of the Court (*Braund, J.*) RAWAT RAJ KUMAR SINGH *v.* BENARES BANK, LTD.
I.L.R. (1941) All. 175=194 I.C. 57=
13 R A. 467=1941 O.W N. 200=
1941 Comp C. 59=1941 O.A. (Supp.) 276=
1941 A.L W 103=1941 A.L J. 23=
1941 A.W.R. (H.C.) 1=A I.R. 1941 All. 154

——Ss. 171 and 230-A (5)—*Company—Liquidation—Claim by Managing Director—Permission given to file suit within specified time—Failure to file suit in time—Effect—Right to prove claim in liquidation proceedings.*

Where the Managing Director of a limited company which is being wound up by Court under a compulsory winding up order, presents a claim against the company and asks that his application should be treated as an application to file a suit against the Official Liquidator under S. 171 of the Companies Act to prove his claim, and he is allowed time for the purpose of filing a suit, if

he fails to file the suit within the time granted to him for the purpose, and the Court refuses to grant him a further extension of time, such refusal amounts to a dismissal of his claim, and he cannot turn round and ask the Court to change the procedure which he himself considered proper and to inquire into his claim and adjudicate on it in the liquidation proceedings. (*Leach, C. J. and Venkataramana Rao, J.*) GENERAL AGENCIES AND TRADES, LTD. *v.* VISWANADHAN.
54 L.W. 275=A.I R. 1941 Mad. 855=
(1941) 2 M L.J. 417.

——S. 171—*Leave—Expiry of time for filing appeal.*

Leave to commence an appeal cannot be granted under S. 171 of Companies Act, when such leave is applied for at a time beyond that at which the commencement of the appeal would become time-barred. (*Braund, J.*) MAHARAJ KISHORE KHANNA *v.* BENARES BANK, LTD.
I.L.R. (1941) All. 565=
196 I. C. 274=1941 A.W.R. (H.C.) 237=
1941 Comp. C. 290=14 R.A. 144=
1941 A L.J. 385=1941 O.A Supp. 558 (2)=
1941 A L.W 681=1941 A W.R H.C 237=
1941 O.W.N 838=A.I.R. 1941 All. 335

——S. 171—"*Suit*" *and* "*legal proceeding*"—*Meaning of.*

The word "suit" in S. 171 of the Companies Act means a proceeding which is instituted with the presentation of a plaint in a Court of original jurisdiction. The expression 'legal proceeding" in this section is coupled with "suit" and obviously means proceedings *ejusdem generis*, that is to say, original proceedings in a Court of first instance, analogous to a suit initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit, nor proceedings arising from the suit and continued in a higher Court, like an appeal from an interlocutory order or final order passed in the suit. (*Tek Chand, Monroe and Beckett, JJ.*) SHUKANTLA *v.* THE PEOPLES BANK OF NORTHERN INDIA, LTD.
197 I.C. 1=43 P.L R. 505=1941 Comp. C. 309=
A.I.R. 1941 Lah. 392 (F.B.).

——S. 171—*Suit under O. 21, R. 63, C. P. Code, against company in liquidation—Leave of Court—If necessary.*

Where in execution of a decree obtained by a company in liquidation, certain property has been attached as belonging to the judgment-debtor, and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment debtor, such person cannot bring a suit under O. 21, R. 63, C. P. Code, against the company for a declaration of his title without having first obtained under S. 171 of the Companies Act leave of the Court which had passed the winding up order. (*Tek Chand, Monroe and Beckett, JJ.*), SHUKANTLA *v.* THE PEOPLES BANK OF NORTHERN INDIA, LTD.
197 I.C. 1=43 P.L.R 505=1941 Comp. C. 309=
A.I.R. 1941 Lah. 392 (F.B.).

——S. 178—*Property of company—If vests in liquidator.*

Under S. 178 of the Companies Act, the Official Liquidator should take into his custody or under his control all the assets of the company, but the company's property does not vest in the liquidator (*Young C.J. and Sale, J.*) RAM RAKHA MAL AND SONS *v.* SURINDAR SINGH. I.L.R. (1941) Lah. 680=195 I.C. 511=
1941 Comp C. 50=14 R.L 76=
43 P.L.R. 33=A.I.R. 1941 Lah. 134.

——S. 179—Liquidator—Power of attorney agent of—Authority to endorse promissory notes—Ratification by liquidator—Permissibility. *See* 1940 Dig., Col. 365.

COMPANIES ACT (1913), S. 185.

SANKAMMA HENGSU *v.* ANANTHA KAMATH.
192 I.C. 103=13 R.M. 537=(1940) 2 M.L.J. 309.

——Ss. 185 and 188—Direction to refund moneys paid—Jurisdiction of Court—Limits. *See* 1940 Dig., Col. 366. OFFICIAL LIQUIDATORS, GORAKHPUR ELECTRIC SUPPLY CO., LTD. *v.* SIEMENS (INDIA), LTD. I.L.R. (1940) All 730= 192 I.C. 72=13 R.A. 293.

——S. 186—If deprives contributory of right to claim set off. *See* 1940 Dig., Col. 366. SHRI NATH SHAH *v.* OFFICIAL LIQUIDATOR. I.L.R. (1941) All. 153= 1941 A.L.W. 12=192 I.C. 357=13 R.A. 311= 1941 O.A (Supp.) 1.

——S. 186 (1)—If mandatory—Refusal by Court to make an order under S. 186 (1)—Remedy of liquidator. *See* 1940 Dig., Col. 366. SHRI NATH SHAH *v.* OFFICIAL LIQUIDATOR. I.L.R. (1941) All. 153= 1941 A.L.W. 12=192 I.C. 357=13 R.A. 311= 1941 O.A. (Supp.) 1.

——S. 195—Copies of depositions—Right of deponents. *See* 1940 Dig., Col. 366. KAMAL BROTHERS (1937), LTD. *v.* SUNIL KUMAR CHATTERJI. 191 I.C. 879=13 R.C. 299.

——S. 195—Depositions under—Nature of—Liquidator's right to refer to them in other proceedings. *See* 1940 Dig., Col. 366. KAMAL BROTHERS (1937), LTD. *v.* SUNIL KUMAR CHATTERJI. 191 I.C. 879= 13 R.C. 299.

——S. 202—*Appeal against compulsory winding up order—Parties—Company not impleaded as such—Director shareholders made parties.*

An appeal against a compulsory winding up order is not incompetent merely by reason of the fact that the company as such has not been impleaded as a party, when it is in fact substantially represented before the Court by its director shareholders, all of whom are parties to the appeal. (*Young, C.J. and Sale, J.*) RAM RAKHA MAL AND SONS *v.* SURINDAR SINGH.
I.L.R. (1941) Lah. 680=195 I.C. 511= 14 R.L. 76=1941 Comp. C. 50= 43 P.L.R. 33=A.I.R. 1941 Lah. 134.

——S. 202—*Appeal against compulsory winding up order—Parties—Official liquidator—If necessary party.*

The Official Liquidator is not a necessary party to an appeal against a compulsory winding up order. On the other hand, it is desirable that as a general rule, he should be made a party to such appeals in order to prevent possible collusion amongst interested parties and to ensure that all the necessary facts are laid before the Court and that the proceedings are conducted according to law. (*Young, C.J. and Sale, J.*) RAM RAKHA MAL AND SONS *v.* SURINDAR SINGH.
I.L.R. (1941) Lah. 680=195 I.C 511= 14 R.L. 76=1941 Comp. C. 50= 43 P.L.R. 33=A.I.R. 1941 Lah. 134.

——Ss. 209 and 109-A to H—Creditors' voluntary winding up—Provisions not complied with—Procedure to be followed. *See* 1940 Dig., Col. 367. LIGHT OF ASIA INSURANCE CO., LTD., *In re.* 192 I.C. 222= 13 R.C. 303=1941 Comp.C. 75=A.I.R. 1941 Cal 30.

——S. 216—Discretion of Court — Company in voluntary liquidation—Liquidator's application to Court to enforce calls upon contributories—Power of Court—Direction to file suits. *See* COMPANIES ACT, SS. 156, 212 AND 216. 53 L.W. 321= (1941) 1 M.L.J. 369.

——S. 216—Right to apply—Company in voluntary liquidation—Application by Registrar of Joint Stock Companies for removal of liquidator and appointment of another by Court—Maintainability. *See* 1940 Dig., Col. 367. PEOPLES INTERNATIONAL TRAVEL, EDUCATION AND COMMERCIAL CO., LTD., *In re.*
I.L.R. (1941) Bom. 39= 192 I.C. 595=13 R.B. 263=A.I.R. 1941 Bom. 25.

COMPANIES ACT (1913), S. 229.

——S. 227 (2)—Validation of payments under—Principles upon which Courts should act. *See* 1940 Dig., Col. 367. OFFICIAL LIQUIDATORS, GORAKHPUR ELECTRIC SUPPLY CO., LTD *v.* SIEMENS (INDIA), LTD. I.L.R. (1940) All 730= 192 I.C. 72=13 R.A. 293.

——S. 229—*Bank—Liquidation—Set off—Debt due by A to Bank—Security given by third party to Bank in shape of fixed deposit in Bank—Right to claim set off.*

There can be no set off of claims under S. 229 of the Companies Act when there are no mutual dealings. A Bank lent a sum of Rs. 2,000 to the applicant on a promissory note dated 7-10-1936. As the Bank was not willing to lend without security, *S*, the mother-in-law, offered to give security and gave as security a sum of Rs. 4,300 which she had in fixed deposit in the Bank under a fixed deposit receipt. This receipt was handed over to the Bank along with a letter under which *S* authorised the Bank to set off at any time the whole or any portion of the said deposit and interest accrued thereon towards the loan granted to the applicant at any time the Bank deemed it necessary. Before the fixed deposit matured the Bank went into liquidation and the applicant claimed to set off the amount due by the Bank to *S* against the amount due by him. *S* also filed an affidavit expressing her willingness to the set-off.

Held, (1) that there were no mutual dealings in the case which would entitle the applicant to claim a set-off under S. 229, Companies Act; (2) that though the Bank had a right to set-off, the applicant could not say that he had a right to claim a set-off; (3) that having regard to the equity of the case, the Bank should adjust the dividend payable under the deposit receipt towards the amount due and recover only the balance. (*Venkataramana Rao, J.*) SAMUEL *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. 1941 M.W.N. 363= A.I.R. 1941 Mad. 622=(1941) 1 M.L.J. 818.

——S. 229—*Company—Winding up—Set off—Amount due to company by partners of firm—Amount due by company to one partner—Set-off.*

Under the Indian law every case of a joint promise is treated as a joint and several promise. If a debt is incurred by the members of a partnership they are jointly and severally liable. If *A* and *B*, members of a firm, sue *C*, *C* cannot set-off a debt due by *A* alone, whereas if *C* sues *A* and *B*, *A* can set off a debt due by *C*. Where the liability of the partners is joint and several in a claim to enforce that joint and several liability, it is open to the partners to set-off a debt due to them. The rule of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties, because the principle is wider. (*Venkataramana Rao, J.*) MACHADO *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD.
53 L.W. 560=1941 M.W.N. 358= 1941 Comp. C. 221=A.I.R. 1941 Mad. 654.

——S. 229—*Liquidation of company—Income-tax assessment which had become final, if can be reopened.*

Where an assessment under S. 23 (4) of the Income-tax Act has been made in respect of a company and it had also become final as against the firm and the company subsequently goes into liquidation, the assessment cannot be reopened ordinarily. There could be an interference with the assessment only, if there is reason to think that the assessment was vitiated by fraud. The case of a judgment-debt stands on a different footing, interference being allowed only because of the possibility of fraud. (*Bennett and Ghulam Hasan, JJ.*)

COMPANIES ACT (1913), S. 230.

DINSHAW & CO. *v.* INCOME-TAX OFFICER, LUCKNOW. **16 Luck. 599 = 192 I.C. 856 = 1941 A.W.R. (C.C.) 86 = 1941 O.L.R. 237 = 1941 I.T.R. 215 = 13 R.O. 411 = 1941 Comp. C. 147 = 1941 O.W.N. 118 = 1941 O.A. 129 = A.I.R. 1941 Oudh 260.**

——**S. 230 (1) (b) and (2) (b)**—*Effect of—Salary of employee—Priority over floating charge on book debts.*

On the winding up of a company an employee is, by virtue of S. 230 (1) (*b*) and (2) (*b*) of the Companies Act, entitled, in respect of salary to the extent of Rs. 1,000, to priority of payment as against the holder of a floating charge created by a debenture over the book debts of the company, from the proceeds of such book debts. (*Leach, C.J. and Happell, J.*) PARTHASARATHY *v.* MADRAS PUBLISHING HOUSE, LTD. **53 L.W. 513 = 1941 M.W.N. 444 = 1941 Comp. C. 218 = A.I.R. 1941 Mad. 586 = (1941) 1 M.L.J. 577.**

——**S. 234**—Trust monies — Disappearance—Claim entered as preferential claim under S. 234—Effect. *See* 1940 Dig., Col. 369. DINSHAW & CO. *v.* KRISHNA PIARY. **16 Luck 241 = 1941 Comp. C. 138 = 191 I.C. 178 = A.I.R. 1941 Oudh 126.**

——**S. 235**—Powers of Court—Books in possession of manager of company—Order for delivery to liquidator—Power of Court to pass. *See* 1940 Dig., Col. 369. GOPALASWAMI GOUNDER *v.* KRISHNASWAMI GOUNDER. **I.L.R. (1941) Mad. 120 = 195 I.C. 261 = 14 R.M. 161 = A.I.R. 1941 Mad. 53 = (1940) 2 M.L.J. 594.**

——**S. 280**—*Order refusing to direct company in liquidation to furnish security—Appeal—If lies.*

No appeal lies from an order refusing to direct a Company in liquidation to furnish security under S. 280 of the Companies Act. (*Pandrang Row and King, JJ.*) RAMA RAO *v.* THE NATIONAL ASSURANCE CO., LTD., VIZAGAPATAM. **1941 Comp. Cas. 292.**

——**S. 281 (2)**—*Scope of—Resort to exercise of power under—Proper stage—Relative functions of Registrar of joint stock companies and Court—Sequence of events with respect to exercise of their powers.*

It is wrong to think that S. 281 (2) of the Companies Act is a section under which the Court is empowered to extend the time for holding meetings. The section does no such thing. It gives to the High Court a power to relieve certain classes of persons from the consequences of the default where they have an apprehension that they will be prosecuted and that apprehension can arise only after the Registrar of joint stock companies has done his duty and decided whether or not he proposes to prosecute. The duty of deciding whether there should be a prosecution or not, is not a function which is intended by S. 281 (2) of the Act to be cast upon the High Court. The proper sequence of events is that the Registrar of joint stock companies should state whether he intends to launch prosecution or not. If he makes up his mind to prosecute and actually initiates the prosecution, then there can be an application under S. 281 (2) to the Court in which the prosecution is pending. If in such a case relief is sought before the prosecution is actually lodged, then that will be a proper case in which to apply to the High Court under S. 281 (2). But in such a case it would only be upon strong grounds and for special reasons, properly proved, that the High Court would interfere with a proposed prosecution. (*Braund, J.*) COMPANIES ACT (VII OF 1913), *In the matter of.* **1941 A.L.W. 1076.**

——**S. 282-B (1)**—Bank taking cash security from employees and depositing same in Scheduled Bank—Latter if a trustee or holds it for specific purpose—Liquidation of latter Bank—Right of depositor to preferential payment. *See* 1940 Dig., Col. 370. NAYAR MODERN BANK, LTD. *v.* OFFICIAL LIQUIDATOR OF T. N. Q. BANK, LTD. **I.L.R. (1941) Mad. 125 = 193 I.C 821 = 13 R.M. 720 = A.I.R. 1941 Mad. 48 = (1940) 2 M.L.J. 559.**

CONTEMPT OF COURT.

COMPROMISE. *See* PRACTICE—COMPROMISE.

CONTEMPT OF COURT—Apology—Court's power to reject. *See* 1940 Dig., Col 373. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C 519 = 13 R.S. 143 = 42 Cr.L.J. 1.**

——Apology—Nature and contents of. *See* 1940 Dig., Col. 373. SUBORDINATE JUDGE *v.* JAWAHARLAL. **I.L.R (1941) Nag. 304 = 191 I.C. 671 = 13 R.N. 209 = 42 Cr.L.J. 237.**

——Article in newspaper—Printer's and publisher's liability. *See* 1940 Dig., Col. 373. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C. 519 = 13 R.S. 143 = 42 Cr.L.J. 1.**

——Attorney of High Court—Scandalous allegations against Judge in notice sent under S. 80, C. P. Code. *See* LETTERS PATENT (BOMBAY), CL. 10. **43 Bom.L.R. 250.**

——Chief Court of Sind—Jurisdiction of. *See* 1940 Dig., Col. 373. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C. 519 = 13 R.S. 143 = 42 Cr.L.J. 1.**

——Commitment— When to be made—Technical contempt—If to be punished—Principles. *See* 1940 Dig., Col. 373. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **20 Pat. 306 = 191 I.C. 834 = 13 R.P. 399 = 7 B.R. 261 = 42 Cr L.J. 225 = A.I.R. 1941 Pat. 185.**

——Criticism of Court—Absence of good faith—Misstatement and misrepresentation—Effect of. *See* 1940 Dig., Col. 374. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C. 519 = 13 R.S. 143 = 42 Cr.L.J. 1.**

——*Duty of Courts—Accused defaming third person in his statement—Defamed person demanding apology under threat of legal action—If amounts to contempt.*

Interference with the administration of justice is one of the well-recognized heads of contempt. Courts while they have to be jealous to guard against any interference with their functions should not be too sensitive where no harm has been caused or was intended to be caused. Where the accused in a case under the Copyright Act made certain defamatory statements about a certain third person and the latter wrote and demanded an apology and compensation under threat of legal action it was *held* that the latter's action did not amount to contempt and though he might have waited for the termination of criminal proceedings, was not bound to do so. (*Gruer, J.*) EMPEROR *v.* V. B. KOLTE. **197 I.C. 56 = 1941 N.L.J. 368 = A.I.R. 1941 Nag. 241.**

——Duty of Court to preserve proceedings from misrepresentation. *See* 1940 Dig., Col. 374. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C. 519 = 13 R.S. 143 = 42 Cr L.J. 1.**

——Essence of offence—Complaint for defamation in respect of allegations in insolvency petition—Distinction between threat before and after the starting of proceedings. *See* 1940 Dig., Col 374. RADHEY LAL *v.* NIRANJAN NATH. **193 I.C. 260 = 13 R.A. 400 = 1941 A.Cr.C. 2 = A.I.R. 1941 All. 95.**

——Essentials—Pendency of proceedings—Necessity for—Prejudicing mankind against person on trial. *See* 1940 Dig., Col. 375. SUPERINTENDENT AND REMEM-

CONTEMPT OF COURT.

BRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. 20 Pat. 306 = 191 I.C. 834 = 13 R P. 399 = 7 B R. 261 = 42 Cr L J 225 = A I R. 1941 Pat. 185.

———Guardianship proceedings—Application under S. 476, Cr. P. Code, and a complaint under S. 500 I. P. Code, by one against the other party—If can amount to contempt. *See* 1940 Dig., Col. 375 HRISHIKESH SANYAL *v.* A P. BAGCHI. I L R. (1940) All 710 = 191 I.C 641 = 13 R A 283 = 42 Cr.L J. 211.

———Letter by party to Judge seised of the case—Imputation against Judge's impartiality—Duty of Court. *See* 1940 Dig., Col. 370. SUBORDINATE JUDGE *v.* JAWAHARLAL I.L.R. (1941) Nag. 304 = 191 I C. 671 = 13 R.N. 209 = 42 Cr L.J. 237.

———*Nature of proceedings—Civil Procedure Code, if applies.*

The proceedings for contempt of the High Court are in the exercise of the inherent jurisdiction of the Court and are of a criminal nature. When the matter is of a criminal nature, the Civil Procedure Code does not apply. (*Collister and Bajpai, JJ.*) RADHEY LAL *v.* NIRANJAN NATH. I.L R. (1941) All. 364 = 194 I.C. 606 = 1941 A.Cr.C. 98 = 1941 A.L.J. 265 = 1941 A.L.W. 319 (2) 42 Cr.L.J. 370 = 14 R.A. 3 = 1941 O W N. 455 = 1941 O.A. (Supp.) 193 = 1941 A W.R (H.C.) 120 = A.I.R. 1941 All. 211.

———Newspaper articles—Special responsibility of editors. *See* 1940 Dig. Col. 376. NASIR AHMAD *v.* ANIS AHMAD ABBASI 191 I C. 726 = 13 R O 299 = 16 Luck. 506 = 1941 A.W.R. C.C) 7 = 42 Cr L J 221 = 1941 O.L.R 17 = A I.R. 1941 Oudh 67.

———*Pending case—Newspaper articles—Likelihood to deter witnesses from giving evidence.*

Where the effect of certain newspaper articles was likely to be to deter witness from giving evidence in a pending case, it amounts to contempt of Court though not of a serious nature. (*Yorke and Agarwala, JJ.*) ANIS AHMAD ABBASI *v* NASIR AHMAD.

194 I.C. 158 = 1941 A.W.R (C.C.) 172 = 1941 O.W.N. 683 = 1941 A.Cr.C. 122 = 1941 O.L R. 417 = 42 Cr.L J 524 = 13 R.O. 567 = 1941 A.L.W. 530 = 1941 O.A 429 = A.I.R. 1941 Oudh 399.

———*Pending defamation case—Newspaper article by complainant—Assertion of truth and challenge to accused to prove the falsity.*

Where a complainant in a defamation case writes an article a couple of days after the complaint is filed asserting the truth of the statements contained in his paper and challenges the accused to prove their falsity, the article does not amount to contempt of Court. (*Yorke and Agarwala, JJ.*) ANIS AHMAD ABBASI *v.* NASIR AHMAD. 194 I.C. 158 = 1941 A.W R. (C.C.) 172 = 1941 O.W.N. 683 = 1941 A.Cr.C. 122 = 1941 O.L.R. 417 = 42 Cr.L.J. 524 = 13 R.O. 567 = 1941 A.L.W. 530 = 1941 O A. 429 = A.I.R. 1941 Oudh 399.

———Pending proceedings—Speech at meeting. *See* 1940 Dig., Col. 377 RADHA KRISHNA *v* RAJA RAM 16 Luck. 61 = A I R. 1941 Oudh 14

———Power of Court to proceed under S. 476, Cr. P. Code. *See* CR. P. CODE, S. 476 AND 482. I.L R (1941) Lah. 145

———Practice—Affidavit in support of application by clerk—Propriety of—Duty to set affidavit sworn to by responsible officer *See* 1940 Dig., Col. 377. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS BIHAR *v.* MURLI MANOHAR PRASAD. 20 Pat. 306 = 191 I.C. 834 = 13 R.P. 399 = 7 B R. 261 = 42 Cr. L.J. 225 = A.I.R. 1941 Pat. 185.

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———Proceedings—Right to initiate—Legal Remembrancer of Bihar—Right to move High Court on behalf of Government or Governor. *See* 1940 Dig Col. 377. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. 20 Pat 306 = 191 I.C. 834 = 13 R P 399 = 7 B.R. 261 = 42 Cr.L J. 225 = A.I.R. 1941 Pat. 185.

———Scandalizing Court—Article suggesting abuse by Chief Court of its powers—If contempt *See* 1940 Dig., Col. 378. EMPEROR *v.* P. C. TARAPORE. I.L.R. (1941) Kar. 3 = 191 I C 519 = 13 R S. 143 = 42 Cr L J 1.

———Summary jurisdiction. *See* 1940 Dig., Col. 378. EMPEROR *v.* P. C. TARAPORE. I.L.R. (1941) Kar. 3 = 191 I C. 519 = 13 R S. 143 = 42 Cr.L J. 1.

———What constitutes—Intention—Relevancy of. *See* 1940 Dig., Col. 378. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MAHOHAR PRASAD. 20 Pat. 306 = 191 I C. 834 = 13 R.P. 399 = 7 B R 261 = 42 Cr.L J 225 = A.I R 1941 Pat. 185.

CONTEMPT OF COURTS ACT (XII OF 1926), S. 2 (1)—Jurisdiction of High Court—Contempt of Subordinate Court—Power of High Court to take proceedings *suo motu*—Application defective as being taken out by person not competent to represent Government—If bar to proceedings. *See* 1940 Dig., Col. 379. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. 20 Pat. 306 = 191 I.C 834 = 13 R.P. 399 = 7 B R. 261 = 42 Cr L.J. 225 = A I R. 1941 Pat. 185.

——— S 2 (3)—Scope of prohibition contained in. *See* 1940 Dig., Col. 379. SUBORDINATE JUDGE *v.* JAWAHARLAL. I.L.R. (1941) Nag 30 = 191 I C. 671 = 13 R.N. 209 = 42 Cr L.J. 237.

——— S. 3. Proviso—Belated apology—Value. *See* 1940 Dig., Col. 379. NASIR AHMAD *v.* ANIS AHMAD ABBASI. 16 Luck. 506 = 191 I C. 726 = 13 R.O. 299 = 1941 A.W R. (C C.) 7 = 42 Cr.L.J. 221 = 1941 O.L R. 17 = A.I.R. 1941 Oudh 67.

CONTRACT—*Agreement as to terms of lease and sale of forest produce—Contemplation of execution of formal deed—It renders the agreement incomplete.*

Where when an agreement is reached as to the terms of a lease and sale of forest produce the parties contemplate the execution of a formal deed of lease and sale, that would not *per se* make the agreement incomplete. (*Bajpai and Dar, JJ.*) DEVI PRASAD SRI KRISHNA PRASAD *v.* SECRETARY OF STATE. 1941 A L.J. 570 = 1941 O.A. (Supp.) 776 = 1941 A.W.R (Rev.) 891 = 1941 A.L.W. 983 = 4 F.L.J. (H.C.) 361 = A.I.R. 1941 All. 377.

———Building contract—Contractor to build and engineer to supervise—Building as built not according to plan, unsightly and not fit for use—Owner's remedy—Joint decree against contractor and engineer, if could be passed—Measure of damages. *See* 1940 Dig., Col. 380. RAJARAM KODURAM *v.* MADHAORAO CHITNAVIS. 194 I.C. 257 = 13 R.N 361 = A.I R. 1941 Nag. 111.

———C. I. F. Contract—Printed form with typewritten portion—Conflict—Effect. *See* SALE OF GOODS—C. I. F. CONTRACT. (1941) 2 M L J. 281.

———*Completion—Agreement between parties and settlement of terms—Understanding that agreement should be reduced to formal contract—Effect—Contract—If complete before execution of formal agreement.*

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In the case of a contract in which a draft agreement and engro-sment are evidently contemplated by the parties, the contract cannot be said to be complete without the formal agreement being signed and executed, even though all the terms have been settled one by one and embodied in the draft. Once it is clear that the parties intended that the terms of their bargain are to be reduced to a formal contract, although that understanding is not in writing but is only a matter of oral agreement or of inference from the conduct of the parties, the consequence is that there must be a formal contract signed and executed by the parties before the contract can be said to be complete. (*Broomfield and Divatia, JJ.*) NEW MOFUSSIL CO., LTD. *v.* SHANKARAL NARAYANDAS. I.L.R. (1941) Bom 361 = 196 I.C. 146 = 14 R.B. 100 43 Bom L.R. 293 = A.I.R. 1941 Bom. 247.

——*Conclusion of—Place—Insurance policy—Proposal signed, and medical examination made in a particular place—Acceptance by Head Office in different place.*

Where a proposal for an insurance policy is signed at Nagpur and the medical examination is made at Nagpur but it is accepted in Calcutta by the Head Office the contract is made at Calcutta and not at Nagpur. (*Clarke, J.*) HINDUSTAN INSURANCE CO. *v.* NATHU. 1941 N.L.J. 37.

——*Consideration—Failure of—What amounts to—Sale of property subject of litigation—Stipulation that in case litigation went against vendor, vendee not to claim refund of sale price—Vendor declared not entitled to property—Right of vendee to plead want of consideration for sale.*

Where certain property, subject of a pending litigation, is sold under a sale deed which expressly stipulates that that if the pending litigation is decided against the vendor, the vendee would not be entitled to a refund of the purchase price, and the litigation is ultimately decided against the vendor who is declared to be not entitled to the property, it is not open to the vendee to plead that there is no consideration for the sale deed or that there is a failure of consideration. There is no covenant for title in such a case, and the subject of the sale is only the vendor's interest, if any, in the property in the litigation and subject to the litigation then pending. Nor can it be said that the deed of sale is void by reason of the fact that the property did not exist; the property did exist; the vendor only lost it by the result of the litigation. The vendee having purchased whatever interest his vendor had in the property with his eyes open, and no deception having been practised upon him, he cannot be heard to say that the transaction is void because the rights purchased by him are worth little or nothing. The vendee must be held to obtain what he bargained for and his failure to obtain possession of the property is not due to the act of his vendor. (*Harries, C.J. and Manohar Lall, J.*) BHULAN PRASAD SINGH *v.* RUP NARAIN SINGH. 195 I.C. 664 = 7 B.R. 955 = 14 R.P. 142 = 22 Pat.L.T. 12 = A.I.R. 1941 Pat. 333.

——*Consideration — Forbearance to sue—Sufficiency—Agreement executed by husband to wife for payment of maintenance to ward off threatened suit by wife for maintenance—Wife forbearing to sue due to execution of agreement—Enforceability of agreement.*

Forbearance to sue amounts to good consideration under the Contract Act. Where a wife was about to sue her husband in the Civil Court for maintenance and the husband in order to avoid the suit executed a deed of agreement of maintenance in her favour and thereupon the wife forbore from instituting the suit because of the deed,

Held, that the forbearance to sue amounted to good consideration, and the deed was therefore supported by consideration and valid and enforceable. (*Varma and Shearer, JJ.*) RADHA RANI *v.* RAM DAS. 22 Pat.L.T. 278 = 194 I.C. 645 = 7 B.R. 815 = 1941 P.W.N. 511 = 14 R.P. 14 = A.I.R. 1941 Pat. 282.

——Construction—Arbitration clause—"All unpaid claims whether admitted or not—Arising out of or in relation to contracts", etc.—Meaning of. *See* 1940 Dig., Col. 380. SUKHANANDAN RAMDHIN *v.* MANIKLAL KANIALAL. I.L.R (1941) Bom. 200 = 193 I.C. 779 = 13 R.B. 350 = A.I.R. 1941 Bom. 82.

——Construction—Building contract—Lump sum or rate contract. *See* 1940 Dig., Col. 381. PANCHANAN GANGULY *v.* KALIPADA BANERJEE. 191 I.C 739 = 13 R.C. 279.

——*Construction—Express term that no remuneration to be paid unless work is check measured—Right to claim compensation for work not check-measured* — Quantum meruit—*Application of principle.*

Where by the terms of a contract, the person who does a work agrees that he is not entitled to any remuneration unless the work has been check measured, then clearly he cannot claim for any work which has not been check-measured. There is no room for any implied contract, where there is an express contract in existence, and in such a case the principle of *quantum meruit* cannot be applied. (*Horwill, J.*) VANJEESWARA AIYAR *v.* DT. BOARD OF SOUTH ARCOT. 54 L.W. 342 = 1941 M.W.N. 834 = A.I.R. 1941 Mad. 887 = (1941) 2 M.L.J. 469.

——Construction—Government kabuliyat in respect of toll on public road—Clause prohibiting sub-letting or assignment without permission of Collector—Effect—Assignment without permission—If void. *See* 1940 Dig., Col. 381. BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. I.L.R. (1941) Bom. 71 = 13 R.B. 202 = 191 I.C. 806.

——*Construction*—Pakka adatia *contract—Or—If to be read alternatively or inclusively—Undertaking to do forward business without deposit for four lots of wheat or linseed or hundred bales of cotton, or ten or twelve bars of silver—Interpretation of.*

The defendants who were *pakka adatias* undertook to do business for the plaintiff on the terms contained in a letter which the defendants wrote to the plaintiff. The letter, after stating the various charges which they would make for *adate*, stated: "We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this).

Held, that having regard to the fact that a *pakka adatia* who did forward business without an initial deposit might incur a considerable risk if the market suddenly dropped, the Court was bound to give a strict meaning to the word "or" used in the letter and must be read as giving to the plaintiff alternative rights to do business in respect of the different classes of commodities mentioned up to the limits mentioned, and should not be given an inclusive or non-alternative sense. Once the plaintiff had done business to the limit mentioned in any one of the commodities specified, if he wished to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned was outstanding, pay deposit in respect of the further business. (*Blackwell, J.*) ULFATRAI HUKUM-

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CHAND *v.* NAGARMAL GOPIMAL.
I.L.R. (1941) Bom. 441 = 195 I.C. 28 = 14 R.B. 12 = 43 Bom.L.R. 269 = A.I.R. 1941 Bom. 211.

———Construction—Rules — Apparent inconsistency. *See* 1940 Dig., Col. 382. RANEEGUNGE COAL ASSOCIATION, LTD. *v.* TATA IRON AND STEEL CO., LTD. **I.L.R. (1940) Kar. (P.C.) 361 = 43 Bom.L.R. 403 = 1941 A.L.W. 25 (P.C.).**

———Construction—Sale of goods—Implied negative covenant—Breach—Interlocutory injunction—Specific Relief Act, S. 57—Sale of Goods Act, S. 58. *See* 1940 Dig., Col. 382. JAIRAM VALJEE *v.* INDIAN IRON AND STEEL CO., LTD. **191 I.C. 847 = 13 R.C 287.**

———*Contract by Government officers—Negotiation and agreement—Proper procedure.*

It will be in the public interest and desirable from every point of view if the Government Officers, after an agreement is reached, take the precaution of preparing a memorandum signed by both parties, setting out the terms which are reached. The practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on is irregular and has nothing to recommend. The proper procedure should be that after an agreement is reached, a memorandum of the agreement should be contemporaneously prepared and signed by both parties as evidence of the agreement to be followed later on by a formal document drawn up by a Government conveyancer; but it cannot be said that the law requires that contemporaneously with an oral agreement a document should also be prepared and signed, it is permissible to record the agreement, arrived at orally, later on by correspondence. (*Bajpai and Dar, JJ.*) DEVI PRASAD SRI KRISHNA PRASAD *v.* SECRETARY OF STATE.
1941 A.L.J. 570 = 1941 O.A (Supp.) 776 = 1941 A.W.R. (Rev.) 891 = 1941 A.L.W. 983 = 4 F.L.J. (H.C.) 361 = A.I.R. 1941 All. 377.

———Contract for sale of goods in two instalments—Wrongful refusal to take delivery—Right of seller to cancel contract and claim damages. *See* SALE OF GOODS—C. I. F. CONTRACT. **(1941) 2 M.L.J. 281.**

———*'Frustration of venture'—Basis of doctrine.*

The doctrine of "frustration of venture" is based not upon the existence of any actual impossibility in fact but upon the existence in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. (*Henderson, J.*) SARADA PROSAD DE *v.* BHUTNATH MALLICK. **I.L.R. (1941) 2 Cal. 78 = 45 C.W.N. 660 = 73 C.L.J. 294.**

———Marriage contract—Implied term—Hindu Law—Contract of marriage by mother of minor girl with father of adult male—Implied term—Breach of term—Suit for damages for breach—Right of minor. *See* HINDU LAW—MARRIAGE. **43 Bom.L.R. 35.**

———Mercantile contracts—What is. *See* 1940 Dig., Col. 382. LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS CO. **16 Luck. 357.**

———*Minor—Lease by guardian—Minor approving it on attaining majority and executing new patta—Rights of parties—If governed by earlier or later lease.*

Where a minor on attaining majority records his approval of the action of his guardian in granting a lease of his land and strikes his own bargain with the lessee by executing a new patta, that patta and the corresponding kabuliyat alone record the bargain between the parties, and govern their respective rights and liabilities, and the terms of the lease granted by the guardian cannot be treated as incorporated in that patta. (*Lord Russell of Killowen.*) TIKAIT UMED NARAIN

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SINGH *v.* EQUITABLE COAL COMPANY.
196 I.C. 785 = 1941 O.L.R. 809 = 1941 O.A. 1028 (P.C.).

———*Oral agreement—Proof required.*

An oral agreement must be proved by the clearest and most satisfactory evidence of credible witnesses, and it would be unwise to act upon oral evidence unless there is contemporaneous written evidence to corroborate it. (*Tek Chand and Din Mohammad, JJ.*) SHRI GOBIND LALJI *v.* MILAP CHAND.
43 P.L.R. 97.

———Pakka adatia—*Contracts in different markets for different quantities of particular commodities with different delivery dates—If distinct separate outstanding transactions—Single general demand for margin—Non-compliance—Right to close transactions.*

Contracts effected in different markets for different quantities of particular commodities, with different delivery dates, evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the parties thereof in respect of each are separate. Where there are separate outstanding transactions with different provisions as to initial deposit and margin, the commission agent or *pakka adatia*, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. A single general demand in respect of all the outstanding transactions would not entitle the *pakka adatia* to close all the outstanding transactions on the ground of non compliance with that demand. (*Blackwell, J.*) ULFATRAI HUKUMCHAND *v.* NAGARMAL GOPIMAL. **I.L.R. (1941) Bom. 441 = 195 I.C. 28 = 14 R.B. 12 = 43 Bom.L.R. 269 = A.I.R. 1941 Bom. 211**

———Pakka adatia—*Wrongful closing of outstanding transactions—Right of constituent—Damages—Measure of.*

Where a *pakka adatia* wrongfully closes his constituent's outstanding transactions before the due date, the constituent is entitled to treat them as still outstanding and the constituent is entitled, owing to the special obligation imposed upon the *pakka adatia* by custom, give instructions to the *pakka adatia* to close the transactions, and to be put in the position in which he would have been placed if the *pakka adatia* had carried out his instructions. The constituent is entitled to have an account taken on the footing of the prices prevailing on the date on which the instructions to close are given. (*Blackwell, J.*) ULFATRAI HUKUM CHAND *v.* NAGARMAL GOPIMAL. **I.L.R. (1941) Bom. 441 = 195 I.C. 28 = 14 R.B. 12 = 43 Bom.L.R. 269 = A.I.R 1941 Bom. 211.**

———*Penalty—Liquidated damages.*

Agreed liquidated damages, if to be enforced, must be the result of a 'genuine pre-estimate of damages'. They do not include a sum fixed *in terrorem* covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. Where a contract provided that "the second party (the purchaser) shall pay to the first party £2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement" it was held that the stipulation as to £2,500

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would be considered to be a penalty according to English rules. (*Lork Atkin.*) MICHEL HABIB RAJI AYOUB *v.* SHEIKH SULEIMAN. **196 I.C. 823= 1941 A.W.R. (P.C.) 63=1941 O.L.R. 814= 1941 O.A. 618=A.I.R. 1941 P.C. 101 (P.C.).**

———*Public policy—Agreement in restraint of trade —Validity—Company doing sardine business—Sale of business—Covenant not to engage in any other sardine business in specified place directly or indirectly —Enforceability—Holding shares in such business—If breach of covenant.*

Where a person enters into a covenant to the effect that "he will not directly or indirectly engage in any other sardine business whatever in the Dominion of Canada," it cannot be said that a shareholder in a company carrying on such business or being a partner therein is necessarily a breach of the covenant. The phrase "directly or indirectly" is not void for uncertainty. It is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. In cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him within bounds, which, having regard to the nature of the business, are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is capable of being enforced. This principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company. The same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold, and one or more of the directors or managers of the company, being interested in the sale, are willing, in order to enable the transaction to go through, or to obtain a better price, to enter into restrictive covenants with the purchaser. Where there is a good will to be protected, a covenant in restraint of trade, even when imposed as a condition of employment may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. The onus of establishing that such a covenant is injurious to the public in the sense that it is calculated to produce a pernicious monopoly is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties, and that there are no reasonable grounds for holding that the restriction is likely to produce a real monopoly, it is impossible to say that the public interest is affected. (*Viscount Maugham.*) CONNORS BROS., LTD. *v.* CONNORS. **196 I.C. 871= 1941 O.L.R. 819=53 L.W. 266= A.I.R. 1941 P.C. 75 (P.C.).**

———Right to enforce—Third party—Bank in liquidation—Compromise between manager and Official Liquidator — Manager undertaking to satisfy claim of depositor of bank—Default by manager—Suit by depositor against manager—If maintainable. *See* 1940 Dig., Col. 383. SURJAN SINGH *v.* NANAK CHAND. **191 I.C. 763=13 R.L. 332.**

———*Right to sue—Third party—Sale of property— Purchaser undertaking to satisfy creditors of vendor— Right of creditors to sue purchaser.*

A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian Law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine: The first is where a contract

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between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. Where the consideration for a sale of a property is that the purchaser would satisfy certain creditors of the vendor and release the latter from his liability in respect of the debts, and the property is not sold for a fixed consideration and the purchaser does not retain out of it a definite sum of money for payment to the creditors, the purchaser cannot be said to have constituted himself a trustee in respect of the property sold or the consideration money payable for it for the benefit of the creditors, and it is not competent for the latter to sue the purchaser for enforcement of his obligation under the contract of sale to which they were not parties. (*Mukherjea and Roxburgh, JJ.*) JNAN CHANDRA MUKERJI *v.* MONORANJAN MITRA. **74 C.L.J. 327.**

———Specific performance—Sale of land—Contract by Hindu coparceners one of whom being a minor—Vendee taking possession and remaining in possession without repudiating—Suit by vendors after majority of minor for specific performance—Maintainability—Plea of minority of one vendor at time of contract—Sustainability. *See* 1940 Dig., Col. 384. ADINARAYANA *v.* VENKATASUBBAYYA. **194 I.C. 446=13 R.M. 775= (1940) 1 M.L.J. 251.**

———Wagering contract—Gambling on differences—Broker's claim against customer. *See* CONTRACT ACT, S. 30. **I.L.R. (1940) 2 Cal. 385.**

CONTRACT ACT (IX OF 1872), S. 2 (b)—*Acceptance—Silence.*

Silence to a letter does not amount to an acceptance of the terms proposed. (*Roberts, C.J. and Dunkley, J.*) S. M. BHOLAT *v.* YOKOHAMA SPECIE BANK, LTD. **A.I.R. 1941 Rang. 270.**

———**S. 2 (c)**—*Promisor and promisee—Merger— Promisor himself being one of the promisees under hatchita—Portion of debt due to promisor if discharged.*

No man can in his own right be under any obligation to himself. Hence where a hatchita is executed by a person in favour of himself and some others, such person cannot in law be said to be one of the promisees. In other words, the promisees must be taken in law to be the persons mentioned in the hatchita other than such person. And the portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or confusio. Even if all the promisees are assumed to be a person distinct from the promisor the position is not different because the debtor can make payment of such a debt to the several creditors and get valid discharge in respect of the share of the creditor concerned. This being so, that portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or confusio. (*Nasim Ali and Pal, JJ.*) NABENDRA NATH BASAK *v.* SHASABINDOO NATH BASAK. **A.I.R. 1941 Cal. 595.**

———**S. 6 (1) and (2)**—Relative applicability—Allotment of shares long after application—Effect. *See* 1939 Dig., Col. 352. RAMLALSAO *v* K. B. M. E. R. MALAK. **I.L.R. (1941) Nag. 567.**

———**Ss. 11 and 25 (3)**—*Pronote in renewal of pronote executed during minority—Enforceability.*

A subsequent ratification of a contract entered into by a minor cannot form a valid contract on which a suit can be maintained. Hence nothing couldbe recovered on a

pronote which is in novation of a prior pronote which is entirely void, by reason of its having been executed during minority. (*Gruer, J.*) KISANLAL *v.* NANA KHANDUJI. 1941 N.L.J. 363.

——S. 12—*Unsoundness of mind—Onus—Shifting of.*

The onus of proving insanity or unsoundness of mind is in the first place on the person who alleges it, the normal presumption being of sanity. But where there is sufficient evidence to discharge that primary burden then the burden shifts to the person who alleges his sanity to prove that the contract was made during a lucid interval. (*Stone, C.J. and Clarke, J.*) MOHANLAL *v.* VINAYAK. 196 I.C. 660 = 1941 N.L.J. 287 = A.I.R. 1941 Nag. 251.

——Ss. 17 and 19—Building contract—Decision of owner's agent regarding rates and measurements to be final—Latter passing bill for payment—Mortgage executed by owner for balance due on bill—When can be avoided. *See* 1940 Dig., Col. 385. E. M. BAINES *v.* RAM SAHAI SETHI. 192 I.C. 747 = 13 R.L. 404.

——S. 23—Acts defeating statute—Agreement not to apply for restoration of possession under S. 35, U. P. Encumbered Estates Act—Legality. *See* U.P. ENCUMBERED ESTATES ACT, S. 35 AND CONTRACT ACT, S. 23. 1940 O.W.N. 1246.

——S. 23—*Applicability—Agreement with reference to compoundable offence—Validity.*

An agreement arrived at between the complainant or the prosecutor on the one hand and the accused or another person closely interested in the welfare of the accused on the other in the case of a compoundable offence or of an offence which may be compounded with the leave of the Court, is not against public policy and accordingly is not void and is valid. (*Mya Bu, J.*) LEWAI KHAN *v.* GOOLREZE KHAN.

1941 Rang. L.R. 316 = 197 I.C. 25 = A.I.R. 1941 Rang. 231.

——S. 23—*Applicability—Device to avoid property being taken over by Court of Wards—Legality.*

It is an established principle that the Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law. *Prima facie*, there is nothing illegal about trying to avoid or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. There is nothing in the adoption of such a device which would make it invalid in law. The purpose does not appear to be an unlawful one. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA.

196 I.C. 787 = 1941 O.A. 621 = 1941 O.W.N. 906 = 1941 A.W.R. (C.C.) 274 = 1941 O.L.R. 764 = A.I.R. 1941 Oudh 529.

——S. 23—*Compromise—Agreement not to claim ex-proprietary rights on transfer—If unlawful.*

Where in a compromise, one of the parties agrees not to claim ex-proprietary rights on a transfer by him, the agreement, is neither forbidden by, nor defeats the provisions of S. 7-A (5) of the Oudh Rent Act and hence is neither unlawful nor would it defeat the provisions of any law. (*Thomas, C.J. and Agarwal, J.*) LAL BHAGWAT SINGH *v.* HARI KISHEN DAS.

1941 O.A. 865 = 1941 A.W.R. (Rev.) 949 = 1941 O.W.N. 1138.

——S. 23—Fraudulent perpetual lease by widow to defeat reversioners—If can confer ordinary tenancy rights, at the least. *See* LEASE—PERPETUAL LEASE BY WIDOW. 1941 A.W.R. (Rev.) 858.

——S. 23—Illegal contract—Abkari sale—Bidder entering into partnership with another after sale and before grant of licence in respect of running of business of sale of toddy—Legality. *See* 1940 Dig., Col. 387. NARASIMHALU NAIDU *v.* NAGA REDDY. 193 I.C. 827 = 13 R.N. 721 = A.I.R. 1941 Mad. 64 = (1940) 2 M.L.J. 694.

——S. 23—Public policy—Burden of proof—Plea that deed is opposed to public policy—Onus. *See* DEED—VALIDITY. (1941) 1 M.L.J. 807.

——S. 23—Public policy—Combination of persons—Agreement not to bid against one another at public auction in respect of Government tolls—Legality—If opposed public policy. *See* 1940 Dig., Col. 387. BHAGWANT GENUJ *v.* GANGABISAN RAMGOPAL. I.L.R. (1941) Bom. 71 = 13 R.B. 202 = 191 I.C. 806.

——S. 23—Public policy—Marriage prohibited by Child Marriage Restraint Act performed in Native State to evade Act—Decree for payment of money towards marriage expenses—Enforceability in British India—Bar of public policy. *See* 1940 Dig., Col. 388. ANANDARAMAYYA *v.* SUBBAYYA. 193 I.C. 112 = 13 R.M. 618 = (1940) 2 M.L.J. 353.

——S. 23—Public policy—Public servant—Salary below attachable limit—Agreement between public servant and execution creditor for deducting portion from salary—Enforceability. *See* C. P. CODE O. 21, R. 148. 43 Bom. L.R. 758.

——S. 23—Scope and applicability—Mortgage to pay debt incurred for bribing an officer—If can be impeached. *See* 1940 Dig., Col. 389. KASHINATH *v.* BAPURAO. 191 I.C. 241 = 13 R.N. 168.

——Ss. 23 and 24—Scope—Licence to ply motor bus—Transfer of right by licensee—Failure to obtain previous permission of District Magistrate—Suit on basis of transfer—Maintainability — Agreement—If void. *See* MYSORE MOTOR VEHICLES RULES. 19 Mys.L.J. 262.

——S. 23—Stifling prosecution—Agreement not to file suit in consideration of forbearance to prosecute for forgery—Legality—If bar to suit. *See* 1940 Dig., Col. 389. KARNIDAN SARDA *v.* SAILAJA KANTA MITRA. 192 I.C. 187 = 13 R.P. 416 = 7 B.R. 330.

——S. 23—*Stifling prosecution—Agreement when void—Surety how affected.*

An agreement is void under S. 23 of the Contract Act if the entire consideration or a portion thereof was the agreement not to prosecute or to drop a prosecution which had already been started. This will apply equally to the case of a guarantee but where no portion of the consideration can be traced to an agreement not to prosecute criminally or not to withdraw a pending criminal prosecution, the surety cannot escape liability on the ground of an unlawful consideration. (*Ghulam Hasan and Agarwal, JJ.*) HAR NARAIN KAPUR *v.* RAM SWARUP NIGAM. 195 I.C. 253 = 1941 O.W.N. 391 = 1941 O.L.R. 563 = 1941 A.L.W. 785 = 14 R.O. 65 = 1941 A.W.R. (C.C.) 251 = 1941 O.A. 578 = A.I.R. 1941 Oudh 593.

——S. 23—Stifling prosecution — Conviction for theft—Appeal—Agreement pending appeal not to contest appeal on consideration of accused paying certain sum on his success in appeal—Enforceability. *See* 1940 Dig., Col. 390. JAGGILODU *v.* BYRAMMA. A.I.R. 1941 Pat. 349.

——S. 23—*Stifling prosecution—Compoundable offence—Promissory note in consideration of abstention from prosecution—If void.*

In the case of offences falling under S. 345 (2), Cr. P. Code, the matter may be lawfully compounded before it goes to Court, and a promissory note executed or taken in consideration therefor is not void under S. 23, Con-

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tract Act, and is therefore enforceable. (*Somayya, J.*) CHANDANMAL *v.* RAMAKRISHNAYYA.
54 L.W. 571=(1941) 2 M.L.J. 827.

——**S. 23**—*Stifling prosecution—Elements of agreement—Mortgage bond by wife as part of consideration for withdrawal of criminal proceedings against husband—Enforceability*

A contract whereby a proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence is an agreement to stifle prosecution falling under S. 23 of the Contract Act. Proof that there has actually been a crime committed is obviously unnecessary. But it is of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. Such agreements are from their very nature seldom set out on paper; like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances. An agreement whereby a wife executes a mortgage bond of her property in discharge of debt due by her husband as part of the consideration for a promise by the husband's creditor to withdraw criminal proceedings against her husband is illegal and falls under S. 23 of the Contract Act, as there is an infringement of public policy. The fact that there was a debt really due by the husband is irrelevant when the agreement to abandon the prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a crime. (*Lord Atkin.*) BHOWANIPUR BANKING CORPORATION, LTD. *v.* DURGESH NANDINI DASI.
196 I.C. 463=14 R.P.C. 31=1941 O.A. 857=1941 A.W.R. (P.C.) 90=54 L.W. 529=1941 O.L.R. 715=46 C.W.N. 1=1941 A.L.J. 668=1941 P.W.N. 648=8 B.R. 73=A.I.R. 1941 P.C. 95=(1941) 2 M.L.J. 726 (P.C.).

——**S. 25 (3)**—Applicability—If confined to original parties—"By the person to be charged therewith"—Meaning of. *See* 1940 Dig., Col. 391. GOVINDA NAIR *v.* ACHUTHAN NAIR. 193 I.C. 399=13 R.M. 661=(1940) 1 M.L.J. 682.

——**S. 25 (3)**—*Applicability—Requisites.*

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). The implied promise to pay which is contained in all acknowledgments does not attract the provisions of S. 25 (3) because the promise to pay is not in writing. Consequently, the words "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200" in an acknowledgment do not amount to a promise to pay within the meaning of S. 25 (3) (*Stone, C.J. and Clarke, J.*) SHIVJIRAM DHANNALAL *v.* GULABCHAND KALORAM. I.L.R. (1941) Nag 144=194 I.C. 806=14 R.N. 14=A.I.R. 1941 Nag. 100.

——**S. 25 (3)**—*Barred debt—Execution of mortgage in lieu thereof—If amounts to promise to pay in writing.*

In order to comply with the terms of S. 25 (3) there must be an express promise to pay a time-barred debt. If there are two debts, one barred and the other not, the promise to pay the latter cannot be interpreted as a promise to pay the former. Nor can a promise to pay an imaginary debt be interpreted as a promise to pay a barred debt. Where in lieu of the time-barred remittances of money a mortgage is executed, a promise in writing in the mortgage-deed to repay the consideration money

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cannot be said to be a compliance with S. 25 (3), when there was in fact no consideration for the mortgage and the transaction is found to be benami. (*Henderson, J.*) NUR HASSEIN SERANG *v.* TAMIJUDDIN.
A.I.R. 1941 Cal. 449.

——**S. 25 (3)**—Construction—"Wholly or in part"—Express promise to pay a portion of barred debt—If gives cause of action to sue for whole debt. *See* 1940 Dig., Col. 391. GOVINDA NAIR *v.* ACHUTHAN NAIR.
193 I.C. 399=13 R.M. 661=(1940) 1 M.L.J 682.

——**S. 25 (3)**—*Scope of—Minor held not liable in respect of a debt—Subsequent suit on an acknowledgment of that debt—Maintainability.*

S. 25 (3) of the Contract Act makes a debt recoverable only when a certain form of acknowledgment is made as regards a time expired debt. It does not allow the institution of a subsequent suit, where a debt was held irrecoverable in an earlier suit owing to the minority of the debtor. (*Davies.*) RUPCHAND *v.* GAMBIRA.
1940 A.M.L.J. 72.

——**S. 25 (3)**—Scope—Promise—If must be express promise or may be implied. *See* 1940 Dig., Col. 392. GOVINDA NAIR *v.* ACHUTHAN NAIR. 193 I.C. 399=13 R.M. 661=(1940) 1 M.L.J. 682.

——**S. 30**—*Forward contracts—If wagering contracts—Test—Proof.*

Forward contracts for the purchase and sale of goods are recognised forms of commercial transaction. They may be perfectly legitimate and genuine transactions though of a speculative character, or simply gambling or wagering contracts. To be a wagering contract there must be a bargain for differences. It would be still regarded a wagering contract and so void, even if a party thereto had an option under the terms of the contract to demand delivery. Where a contract on the face of it appears to be a contract for the sale of goods for a price, extrinsic evidence may establish that there was a common intention to wager, that is, the intention of both the parties to the contract was that the title to the goods would not pass (*i.e.*) there is to be no delivery, but the intention was only to take differences according to the rise and fall of the market on the date of delivery, mentioned in the contract. If such an intention is established, the contract is a wagering one and so void. If such an intention on the part of one of the contracting parties is established and it is further established that the other party, though intending a trading transaction, was aware of the other's intention at the time of the formation of the questioned contract, possibly it would be regarded as a wagering contract. The common intention to wager can be established either by direct evidence or from surrounding circumstances. But when it is found that all or a substantial part of goods were actually taken delivery of, such a forward contract must necessarily be taken to represent a genuine commercial transaction, as the fact of delivery destroys the inference of a common intention to wager. (*Mitter and Khundkar, JJ.*) SHEWKISSEN *v.* MANGALCHAND.
195 I.C. 885=14 R.C. 148=45 C.W.N. 478=A.I.R. 1941 Cal. 341.

——**S. 30**—*Wagering contract—Gambling on differences—Broker's claim against customer.*

There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. Where the plaintiff acting as a broker on behalf of the defendant entered into contracts for the sale and purchase of jute, and the defendant never intended to give or take delivery and was simply gambling in differences but the plaintiff was not a party to those gambling transactions.

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Held, that the defendant could not set up a plea of gaming and wagering against the plaintiff's claim for brokerage. (*Lort Williams, J.*) GOPAL DAS DAGA *v.* MANICK LAL BAITY. **I.L.R. (1940) 2 Cal. 385 = 193 I.C. 603 = 13 R.C. 442 = A.I.R. 1941 Cal. 125.**

——**S. 39**—*Contract of affreightment— Shipper's demand for space under—Shipper having no goods but only trying to take advantage of rise in freight—Shipowner's right to repudiate contract.*

Where as per terms of the contract of affreightment a demand for space is made by the shipper, the fact that the shipper had no goods to ship and was attempting to obtain an advantage due to the rise in freight does not entitle the shipowner to refuse to consider the demand and repudiate the contract though the aforesaid fact can be taken into account when considering the question of damages. (*Weston, J.*) HERMAN AND MOHATTA *v.* ASIATIC STEAM NAVIGATION CO., LTD.

196 I.C. 529 = 14 R.S. 70 = A.I.R. 1941 Sind 146.

——**S. 43**—*Contribution among joint promisors—Costs incurred in legal proceedings with promisee.*

A joint promisor cannot claim contribution from the others regarding the costs incurred by him in the legal proceedings between him and the promisee (*i.e.*) the costs which he has had to pay to his own attorney. There is no joint promise regarding these costs and S. 43 of the Contract Act would not apply. He cannot claim contribution under general equitable principles, where when such costs were incurred the promisee had already settled his claim so far as the other promisors were concerned, and he was fighting the promisees claim against himself and incurred the costs in getting that claim reduced, although the other promisors have indirectly gained by the reduction of the amount of contribution payable by them. (*Sen. J.*) KANTO MOHAN MULLICK *v.* GOUR MOHAN MULLICK.

45 C.W.N. 357.

——**S. 43**—*Contribution among joint promisors—Costs paid to promisee.*

A joint promisor is entitled to claim contribution from the others regarding the costs paid by him to the promisee, when the payment of such costs is part of the joint promise. (*Sen, J.*) KANTO MOHAN MULLICK *v.* GOUR MOHAN MULLICK. **45 C.W.N. 357.**

——**Ss. 43 and 44**—*Contribution among joint promisors—Promisee remitting part of promise in favour of some—Right of others to demand contribution from them.*

Under S. 43 of the Contract Act, each joint promisor is entitled to insist upon an equal performance by all the joint promisors of the promise. If the promisee remits the performance of part of the promise in favour of one or some of the joint promisors, such remission cannot destroy the right of the other joint promisors to demand that all the joint promisors should contribute equally to the performance of the remaining portion of the promise, (*Sen, J.*) KANTO MOHAN MULLICK *v.* GOUR MOHAN MULLICK. **45 C.W.N. 357.**

——**S. 43**—*Contribution—Right of joint promisor—Payment, if must be compulsory.*

There is nothing in the Contract Act which says that before contribution can be claimed there must be a compulsory payment. S. 43 permits any joint promisor performing the promise to claim contribution. It makes no distinction between voluntary or compulsory performance. (*Sen, J.*) KANTO MOHAN MULLICK *v.* GOUR MOHAN MULLICK. **45 C.W.N. 357.**

——**S. 43**—*Contribution—Right of—When arises.*

Right of contribution can only arise when there was admittedly a joint liability which has been discharged by one of the two persons jointly liable. (*Rachhpal Singh, C.J. and Hasan, J.*) JIJU MAL *v.* VAS DEV.

43 P.L.R. J. & K. 149.

CONTRACT ACT (1872), S. 51.

——**S. 43**—*Satisfaction made by one of parties jointly and severally liable—If discharges claim against all—English Law—Applicability.*

Under the English Law accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43 of the Contract Act. (*Nasim Ali and Pal, JJ.*) NEW STANDARD BANK, LTD. *v.* PROBODHCHANDRA CHAKRAVARTHY.

I.L.R. (1941) 2 Cal. 237 = 45 C.W.N. 830.

——**S. 45**—*Hatchitta executed by a person in favour of himself and three other persons—Suit by two of the three promisees for their shares against executant and other promisee who refused to join with plaintiffs—If maintainable.*

A hatchitta was executed by a person in favour of himself and three others who were having a money-lending business in which each had a definite share. Two of the three promisees filed a suit for their shares of the money due under the hatchita against the executant and the other promisee who refused to join with plaintiffs.

Held, that the suit as framed was maintainable. (*Nasim Ali and Pal, JJ.*) NABENDRA NATH BASAK *v.* SHASABINDOO NATH BASAK.

A.I.R. 1941 Cal. 595.

——**S. 49**—*Scope—Contract— Place of performance—Implied intention of parties—Power of Court to find out—Place of creditor—If place of payment.*

S. 49 of the Contract Act does not preclude the Court from finding out what the implied intention of the parties was in regard to the performance of the contract. Defendants who resided in Calcutta entered into a contract to purchase goods from the plaintiff who resided in Arrah. There was no express mention as to where the money was to be paid But there was a part-payment of a sum of money by the defendants to the plaintiffs at Arrah. The plaintiff sued for the balance at Arrah, but the Court declined jurisdiction on the ground that the plaintiff did not establish where the payment was to be made.

Held, that in the circumstances it could be implied that the payment was to be at Arrah and therefore the Court at Arrah had jurisdiction. (*Wort, J.*) BALA PRASAD *v.* FIRM BENI PRASAD BHAGAT.

22 Pat.L.T. 282.

——**S. 50**—*Applicability—Company—Chit fund—Prize-winner depositing amount in special Savings Bank Account as sanctioned by rules made by the company—If good performance—Bank going into liquidation—Liability of prize-winner.*

Where a subscriber to a chit fund conducted by a company deposits with the Bank a certain amount in the manner sanctioned by the company (in a special Savings Bank Account in a Bank) for the performance of his contract, *viz.*, the payment of future subscriptions to the chit fund in respect of the chit held by him, he having won the prize, the performance is good under S. 50 of the Contract Act. The promisee company has to take the risk, and if the Bank goes into liquidation the subscriber cannot be held liable. (*Lakshmana Rao, J.*) TRAVANCORE NATIONAL BANK SUBSIDIARY CO., LTD. *v.* VENKATARAMAN. **(1941) 2 M.L.J. 908.**

——**S. 51 and Sale of Goods Act (1930), S. 32**—Contract for sale of goods—Suit for damages for breach—Proof of readiness and willingness to perform—Delivery of shares at seller's option—Notice to deliver, if

CONTRACT ACT (1872), S. 55.

and when necessary. *See* 1940 Dig., Col. 394. JAGANNATH SAGARMAL *v.* AARON & CO. **191 I.C. 766 = 13 R.R. 150.**

——**S. 55**—Time, when essence of contract—Extension, where time is the essence—Effect. *See* 1940 Dig., Col. 394. LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS Co. **16 Luck. 357.**

——**S. 56**—*Construction and scope—"Impossible"—Meaning of—Absence of provision exempting from liability in case of impracticability due to act of third parties—Claim to exemption from liability—Sustainability.*

There are two matters which are dealt with by paragraph 2 of S. 56 of the Contract Act, *viz.*, an act which becomes impossible and an act which becomes unlawful. In the case of an act which has become unlawful, the promisor is exonerated from performing if be is not responsible for the act having become unlawful. The first part of the paragraph does not speak of the act having become impossible by reason of the act of the promisor. Though it is not clear what exactly is meant by speaking of an act having become impossible in the sense referred in the section, there is no reason to hold that the Legislature intended to depart from the general common law rule which is that where a party has not qualified his obligation, he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause over which he has no control. The defendants hired twelve lights and a *Kila* from the plaintiffs in connection with a marriage procession. In the course of the procession three of the lights and the *Kila* were damaged by rioters who attempted to stop the procession. The police took charge of the three damaged lights and the *Kila*. The plaintiffs were later asked by the Police to take charge of the three damaged lights and the *Kila* but they refused. The remaining nine lights were with the defendants. The plaintiffs claimed compensation for all the lights and the *Kila*. Under the terms of the contract between the parties, the defendants were to be liable for damage arising to the articles hired; there was no term expressly exempting the defendants from liability for loss or damage caused by third parties; nor was there anything from which it could be inferred that such an exemption was intended by the parties.

Held, that the defendants not having qualified their obligation to return to the plaintiffs the lights hired and the *Kila*, they were liable to compensate the plaintiffs for all the lights and the *Kila* which had not been returned to the plaintiffs, and the defendants were not absolved from liability by reason of paragraph 2 of S. 56 of the Contract Act. (*Agarwala, J.*) NOOR MAHOMED *v.* SONU MISTRI. **7 B.R. 412 = 192 I.C. 768 = 13 R.P. 521 = A.I.R. 1941 Pat. 429.**

——**Ss. 59 to 61**—*Scope—Principal and interest due on single debt or decree passed on such debt carrying subsequent interest*

Sections 59 to 61 embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. (*Tek Chand, Monroe and Beckett, JJ.*) JIA RAM *v.* SULAKHAN MAL. **196 I.C. 625 = A.I.R. 1941 Lah. 386 (F.B.).**

——**S. 60**—*Principal and surety—Creditor appropriating repayments in principal's independent account—Surety, if can claim benefit of repayments.*

CONTRACT ACT (1872), S. 65.

Where the creditor exercises his option under S. 60 and appropriates the repayments in the account which he had with the principal debtor independently of the contract of guarantee the surety cannot in law raise any objection to the appropriation and is not entitled to the benefits thereof. (*Tek Chand and Din Mahomed, JJ.*) KUCKREJA, LTD. *v.* SAID ALAM. **I.L.R. (1941) Lah. 323 = 193 I.C. 206 = 13 R.L. 440 = 43 P.L.R. 539 = A.I.R. 1941 Lah. 16.**

——**S. 62**—*Applicability—Agreement made after breach of original contract—Cause of action arising from breach—If may be discharged by accord and satisfaction.*

Whatever difficulties there might be in applying the provisions of S. 62 of the Contract Act where the agreement to substitute a new contract for the original one is made after the breach of the original contract, it is beyond all controversy that where a breach of contract has taken place, the cause of action that arises from the breach may be discharged by accord and satisfaction. (*Nasim Ali and Pal, JJ.*) NEW STANDARD BANK, LTD. *v.* PROBODH CHANDRA CHAKRAVARTHY. **I.L.R. (1941) 2 Cal. 237 = 45 C.W.N. 830.**

——**S. 62 and Central Provinces Debt Conciliation Act (II of 1933), S. 12**—Novation—Suit on original contract—If lies—Agreement before the Debt Conciliation Board—Refusal to carry out—Suit on original debt—Maintainability. *See* 1939 Dig., Col. 359. SYED AHMAD *v.* RAMGOPAL BHAGWANDEEN. **I.L.R. (1941) Nag. 464.**

——**S. 63**—*Scope—English doctrine—Application of.*

S. 63 of the Contract Act makes a wide departure from the English Law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine. (*Nasim Ali and Pal, JJ.*) NEW STANDARD BANK, LTD. *v.* PROBODH CHANDRA CHAKRAVARTHY. **I.L.R. (1941) 2 Cal. 237 = 45 C.W.N. 830.**

——**S. 63**—Scope—Remission by debtor about to become insolvent—Validity as against Official Receiver—Consideration for remission—What amounts to—Standing surety for debtor and joining him in executing mortgage—Sufficiency. *See* 1940 Dig., Col. 395. NARASIMHARAJU GARU *v.* OFFICIAL RECEIVER, EAST GODAVARY. **192 I.C. 79 = 13 R.M. 524.**

——**S. 65**—*Agreement void* ab initio—*If affected by section.*

On the language of S. 65, Contract Act, an agreement discovered to be void, would include an agreement that was void in that sense from its very inception. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76 = 1941 N.L.J. 371 = A.I.R. 1941 Nag. 273.**

——**S. 65**—*Applicability—Contract contrary to law—Right to return of consideration paid.*

S. 65 of the Contract Act does not apply to the case of a contract void as being contrary to the statute law which the parties must be presumed to have known at the time when they entered into the contract. When the object of the agreement is illegal to the knowledge of both the parties at the time it is made the section has no application. (*Agarwala, J.*) DHANNA MURDA *v.* KOSILA BANIAN. **7 B.R. 624 = 193 I.C. 851 = 13 R.P. 635 = A.I.R. 1941 Pat. 510.**

——**S. 65**—Applicability—Contract of suretyship in favour of Local Board in respect of contract of lease by contractor—Failure to comply with formalities—Suit on contract—Right to order restitution. *See* 1940 Dig., Col. 395. BHUMBHO METHARAM *v.* DISTRICT LOCAL BOARD, HYDERABAD. **191 I.C. 768 = 13 R.S. 170.**

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——S. 65—Applicability—Loan by local authority without sanction—Right of creditor to relief. *See* LOCAL AUTHORITIES LOANS ACT, S. 4.

(1941) 2 M.L.J. 216.

——S. 65—Applicability — Village panchayat—Illegal contract by—Contract of lease of right to collect taxes from occupants of sites in village market—Suit to recover money—Maintainability. *See* BOMBAY VILLAGE PANCHAYATS ACT, S. 27. **43 Bom L. R. 800.**

——S. 65—*Contract with minor—Minor representing to be major—Liability to refund money received.*

Where a minor representing to be a major has entered into a contract, the contract is void and unenforceable against the minor. The minor cannot even be compelled to refund the money received by him under the contract. (*Almond, J.C. and Sooft, J.*) KALA RAM *v.* FAZAL BARI. **194 I.C. 824 = 14 R. Pesh. 6 = A.I.R. 1941 Pesh 38.**

——S. 65—*Void alienation—Alienation of* debotter *estate—Expenses legitimately incurred by alienee—Alienee's right to compensation.*

Where an alienation made by the shebaits of a deity is held to be void, and the alienee has spent large sums of money in carrying on litigation against those persons who were in illegal occupation of the *debotter* estate, and but for his efforts the deity would never have got back its properties, and the alienee has also spent money for repairs of the temples and for carrying on *deb-sheba* which was neglected by the shebaits, the plaintiff before he can recover the properties on behalf of the deity must compensate the alienee for all the expenses which he has legitimately incurred. (*Mukherjea and Biswas, JJ.*) ISWAR LAKSHI DURGA HAR JATNESWAR *v.* SURENDRA NATH SARKAR. **45 C.W.N. 665.**

——S. 68—Marriage expenses of male Hindu minor—Advances for—If amounts to supplying him with necessaries. *See* 1940 Dig, Col. 397. TIKKI LAL *v.* KOMAL CHAND. **193 I.C. 178 = 13 R.N. 297.**

——S. 69—*Applicability—Person in possession of estate without title—Payment of Government revenue—Right to sue for reimbursement—Omission to claim set off in prior suit for damages—If bars subsequent suit—* Res judicata.

Where a person in possession of an estate, in good faith, pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. The case of Government revenue would stand on quite a different footing from other outgoings incurred by the person in possession of an estate without title and it would be open to him to maintain an action for the recovery of the amount paid. It may also be open to him to set-off the amount in a suit for damages or mesne profits against him; what could be set off can always be claimed in an independent suit, and the fact that a set-off was not claimed against a demand in a prior suit would not preclude the claim being agitated in an independent action. (*Venkataramana Rao and Somayya, JJ.*) VENUGOPALA PILLAI *v.* THIRUGNANAVALLI AMMAL. **54 L.W. 286 = 1941 M.W.N. 965 = A.I.R. 1941 Mad. 847 = (1941) 2 M.L.J. 866.**

——S. 69—Applicability—Repayment of loan by purchaser of property out of consideration for sale retained with him under agreement to pay—Right to claim reimbursement on loss of property purchased. *See* TRANSFER OF PROPERTY ACT, S. 92.

43 Bom.L.R. 225.

CONTRACT ACT (1872), S. 73.

——S. 69—*Court of Wards paying off creditors of deceased from his pensions and jagirs—Partition suit by some of deceased's heirs not entitled to pensions and jagirs—Such heirs, if bound to reimburse Court of Wards.*

The Court of Wards assumed superintendence of a deceased Mahomedan's property and paid off his creditors from out of his pensions and jagirs. The heirs who instituted the suit for partition of their shares were held not entitled to the pensions and jagirs.

Held, that the heirs could not take advantage of the payments made by the Court of Wards and were bound to recoup the Court of Wards to the extent of the payments made by it and the fact that the pensions and jagirs did not belong to the Court of Wards was a question entirely between it and the head of the deceased's family appointed by the Government. (*Dalip Singh and Sale, JJ.*) QAISAR JAHAN BEGAM *v.* COURT OF WARDS. **193 I.C. 829 = 13 R L. 489 = A I.R. 1941 Lah. 88.**

——S. 69—Surety for Court guardian—Payment of debt incurred by guardian for expenses of minor girl's marriage with sanction of Court—Right to reimbursement from person succeeding to estate. *See* MYS. LIMITATION ACT, ARTS. 61, 81 AND 120.

45 Mys.H.C.R. 403.

——S. 69—Words "interested in payment of money"—Scope. *See* 1940 Dig., Col. 398. JAGARNATH PRASAD *v.* CHUNILAL. **191 I.C. 647 = 13 R.A. 260.**

—— S. 72—Applicability—Payment of taxes and licence fees to Panchayat Board under mistaken belief that properties and business are situate within that Board—Claim for refund—Maintainability. *See* 1940 Dig., Col. 399. AUDINARAYANA NAIDU *v.* PANCHAYAT BOARD OF MUNAGAPAKA.

194 I.C 657 = 14 R.M. 31 = (1940) 1 M.L.J. 582.

——S. 72—*Applicability—Sale of one's property in execution of decree against another—Application by owner to set aside sale under O. 21, R 89, C. P. Code—Suit to recover money deposited under O. 21, R. 89—Maintainability.*

A suit by a person to recover the amount which he deposited in an application under O. 21 R. 89, C. P. Code, on the ground that he was compelled to make the deposit in order to save what he claimed to be his property is maintainable. The payment made into Court by the plaintiff when he applied for an order to set aside the sale of his property in execution of a decree against some one else, though not made under protest, must be considered to be a payment made under coercion within the meaning of S. 72 of the Contract Act. (*Leach, C.J. and Happell, J.*) APPARAO *v.* VENKATA KUTUMBARAO. **53 L.W. 644 = 1941 M.W.N. 499 = A.I.R. 1941 Mad 635 = (1941) 1 M.L.J. 793.**

——S. 72—Payment of tax to municipal council—Tax paid without formal protest—If voluntary payment—Right to sue for refund on ground of levy being illegal. *See* 1940 Dig., Col. 399. TOWN MUNICIPAL COUNCIL, NANJANGUD *v.* NANJUNDAPPA.

46 Mys.H.C.R. 1.

—— S. 72—Scope—Tax paid to Municipality under misapprehension as to liability—Suit for refund—Maintainability. *See* 1940 Dig., Col. 399. RAMJEE RAO *v.* MUNICIPAL COUNCIL, MASULIPATAM.

193 I.C. 559 = 13 R.M. 686 = (1940) 2 M.L.J. 469.

——S 73—Breach—Sale of goods—Breach by purchaser—Right to refund of sale price—Claim by defendant to set-off damages — Sustainability—Burden of proof. *See* 1940 Dig., Col. 401. NARAYANAMURTHI *v.* NAGESWARA RAO. **193 I.C. 751 = 13 R.M. 710 = A.I.R. 1941 Mad. 108.**

CONTRACT ACT (1872), S. 73.

——**S. 73**—Breach—Sale of goods—Default by purchaser—Deposit or earnest — Forfeiture — Right of vendor—Vendor equally in default—Effect. *See* 1940 Dig., Col. 401. NARAYANAMURTHI *v.* NAGESWARA RAO. **193 I C. 751=13 R.M. 710= A.I.R. 1941 Mad. 108.**

——**S. 73**—*Construction—"Which naturally arose in the usual course of things from such breach"—Meaning of—Presumption of damage on breach.*

The words "which naturally arose in the usual course of things from such breach" in S. 73 do not mean that general rules such as those given in the illustrations to the section must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed, that the damages must not be remote. No doubt, ordinarily, loss or damage will be presumed when a contract at a lower rate of freight than the market rate is broken by the shipowner, but there is nothing in the wording of S. 73 which precludes the rebuttal of such a presumption. In the ordinary case of a refusal by a shipowner to convey goods in accordance with a contract of affreightment, the shipper is entitled to recover the necessary additional cost incurred by him or which would be incurred by him in shipping his goods by other means. But if the shipper had no goods and is proved to have had no intention of obtaining goods, and his contract is non-transferable, the shipper is not entitled to recover damages. (*Weston, J.*) HERMAN AND MOHATTA *v.* ASIATIC STEAM NAVIGATION CO., LTD. **196 I.C. 529=14 R.S. 70= A.I.R. 1941 Sind 146.**

——**S. 73**—*Measure of damages—Principles.*

The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should, as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages. (*Weston, J.*) HERMAN AND MOHATTA *v.* ASIATIC STEAM NAVIGATION CO., LTD. **196 I.C 529=14 R.S. 70= A.I.R. 1941 Sind 146.**

——**S. 73, Illustrations**—*Scope of.*

The illustrations to S. 73 are not more than general rules. (*Weston, J.*) HERMAN AND MOHATTA *v.* ASIATIC STEAM NAVIGATION CO., LTD. **196 I.C. 529=14 R.S. 70= A.I.R. 1941 Sind 146.**

——**S. 74**—Applicability—Decree for fixed sum of money—Clause providing for payment of lesser sum in case of regular payment of fixed instalments—Default—Effect—Power of Court to relieve against condition. *See* C. P. CODE, SS. 148 AND 151. **I.L.R. (1941) Kar. 389.**

——**S. 74**—*Penalty—Provision in compromise decree to transfer property in lieu of amount due.*

Where a compromise decree after reciting the amount due to the plaintiff states that it would be paid by the execution of a sale deed in his favour by the other party, the agreement to transfer property in payment of the decretal amount cannot be called a stipulation by way of penalty. (*Thomas, C.J. and Agarwal, J.*) LAL BHAGWAT SINGH *v.* HARI KISHEN DAS. **1941 O.A. 865=1941 A.W.R. (Rev.) 949= 1941 O.W.N. 1138.**

——**Ss. 124 and 126**—Applicability—Contract of guarantee and contract of indemnity—Distinction—Broker and sub-broker—Agreement by latter to save former loss occasioned in effecting transactions of constituents to be introduced by latter—If indemnity or guarantee. *See* 1940 Dig., Col. 403. RAMCHANDRA

CONTRACT ACT (1872), S. 133.

B. LOYALKA *v.* SHAPURJI. **192 I.C. 375= 13 R.B. 246.**

——**Ss. 126 and 134**—A *offering cheque to* B *in satisfaction of* B's *claim against* C—*Position of* A.

Where a decree-holder has attached his judgment-debtor's property and *A* offers a cheque to the decree-holder in satisfaction of his claim against the judgment-debtor *A* is not surety for the judgment debtor and if *A* stops payment of cheque the decree-holder has independent cause of action against *A* and *A* cannot take advantage of S. 134. (*Almond, J.C. and Mir Ahmad, J.*) KARAM DIN *v.* ANANT RAM. **193 I.C. 51=13 R. Pesh. 49= A I.R. 1941 Pesh. 6.**

——**S. 127**—Scope of—Benefit done to principal debtor—If should have been at the desire of the surety—Past benefit, if can be a good consideration for a bond of guarantee. *See* 1940 Dig., Col. 403. GHULAM HUSAIN KHAN *v.* FAIYAZ ALI KHAN. **15 Luck. 656.**

——**Ss. 128 and 34**—Applicability and scope—Principal debtor discharged from liability for part of debt under Madras Agriculturists' Relief Act—Surety not agriculturist—If also discharged *pro tanto*. *See* MADRAS AGRICULTURISTS' RELIEF ACT. **(1941) 2 M.L.J. 751.**

——**S. 128**—*Liability of surety—Contract providing "If you fail to realize the price thereof I and my property will be responsible for that amount."*

Surety's contract of guarantee provided "If you fail to realise the price thereof (goods supplied) I and my property will be responsible for that amount":

Held, that it was impossible to read into the words of the contract of guarantee that the creditor would be entitled to proceed against the surety only if all remedies known to law were first exhausted against the principal debtor. It was an ordinary contract of guarantee and therefore the liability of the surety was co-extensive with that of the principal debtor. (*Tek Chand and Din Mahomed, JJ.*) KUCKREJA, LTD. *v.* SAID ALAM. **I.L.R. (1941) Lah. 323=193 I.C. 206= 13 R.L. 440=43 P.L.R 539= A I.R. 1941 Lah: 16.**

——**Ss. 129 and 130**—Applicability—Surety under S. 55 (4), C. P. Code—Right to apply for discharge at pleasure. *See* C. P. CODE, S. 55 (4). **1941 M.W.N. 793.**

——**S. 133**—*Guarantor—Right to insist on proof of debt as against him—Proof as against or admission by principal debtor—If binds guarantor—Nature and mode of proof.*

It is well-established that a guarantor is *prima facie* entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or award was given, or was party to the admission of the principal debtor. The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself. (*Beaumont, C. J. and Kania, J.*) SREE

CONTRACT ACT (1872), S. 134.

MEENAKSHI MILLS, LTD. *v.* RATILAL TRIBHOVANDAS. **I.L.R. (1941) Bom. 273 = 196 I.C. 732 = 43 Bom.L.R. 53 = A.I.R. 1941 Bom. 108.**

——**Ss. 134 and 137**—*Bar of remedy against principal debtor—Surety, if discharged.*

A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. (*Agarwal, J.*) JAGDAMBIKA PRATAP NARAIN SINGH *v.* TIR SINGH BAHADUR SINGH. **193 I.C. 344 = 1941 O.L.R. 270 = 1941 A.L.W. 358 = 13 R.O. 451 = 1941 O.W.N. 473 = 1941 O.A. 308 = 1941 A.W.R. (C.C.) 123.**

——**S. 143**—Applicability—Surety for debtor to bank—Bank if bound to disclose state of account of debtor to surety—Agreement by surety to be liable in spite of composition between lender and debtor—Effect of. *See* 1940 Dig., Col. 404. KRISHNASWAMI AYYAR *v.* TRAVANCORE NATIONAL BANK, LTD. **193 I.C. 332 = 13 R M. 648 = (1940) 1 M.L J. 424.**

——**Ss. 151 and 167**—Bailee's responsibility—Rival claims to goods bailed—Remedy of bailee—Bailee aware of passing of title in goods bailed to third person—Subsequent delivery to bailor—Bailee's liability to the third person. *See* 1940 Dig., Col. 405. K. J. PATEL *v.* T. K. V. R. V. CHETTYAR. **191 I.C. 532 = 13 R.R 143.**

——**Ss. 172 and 178**—*Pledge—Validity—Conditions—Deposit of share certificates—Sufficiency to create valid pledge.*

As the law stands at present in India, a mere deposit of share certificates would not be enongh to create a valid pledge. In order to constitute a valid pledge there should be such delivery of possession to the pledgee by virtue of which he can effectively exercise the power of sale for realising the debt. Though share certificates would not be "goods" within the meaning of Ss. 172 and 178 of the Contract Act, the Act is not exhaustive. The principle that an assignment is necessary is recognised in S. 178. (*Venkataramana Rao, J.*) KRISHNA PATTAR *v.* KUNHUNNI ELAYA NAYAR. **I.L.R. (1941) Mad. 419 = 53 L.W. 220 = 1941 Comp. C. 63 = 1941 M.W.N. 40 = A.I.R 1941 Mad. 394 = (1941) 1 M.L.J. 178.**

——**Ss. 178, 178-A and 179 (as amended in 1932)**—Applicability and scope—Pledge by husband of wife's property without authority—Validity—Right of wife to recover pledged articles from pawnee. *See* 1940 Dig., Col. 405. MALLAMMA *v.* BASAMMA. **45 Mys.H.C.R. 342.**

——**S. 182**—*Agent—Employment by principal—If necessary.*

Per *Pal, J.*—The definition of an agent in S. 182 of the Contract Act does not limit the employment of an agent to one by the principal only. It will include an employment by any authority authorised by law to make the employment. (*Nasim Ali and Pal, JJ.*) SUKUMARI GUPTA *v.* DHIRENDRA NATH ROY. **73 C.L.J. 356 = A.I.R. 1941 Cal. 643.**

——**S. 189**—Agent acting without principal's instructions—When protected. *See* 1940 Dig., Col. 406. HAR KISHAN SINGH *v.* NATIONAL BANK OF INDIA, LTD., AMRITSAR. **191 I C. 263 = 13 R.L. 278.**

——**S. 200**—Scope—If exhaustive— Ratification—Effect on third parties. *See* 1940 Dig., Col. 406. THINNAPPA CHETTIAR *v.* KRISHNA RAO. **195 I C. 329 = 14 R.M. 173 = A.I.R. 1941 Mad 6 = (1940) 2 M.L.J. 726.**

——**S. 213**—*Agent's liability to account—Agent under suspicion or working under supervision of other agents—If relieved from liability to account.*

CO-OPERATIVE SOCIETIES ACT (1912), S. 23.

Where the defendant has been let into possession of property as agent of the plaintiff, it is not open to the defendant in a suit for accounts against him to challenge the title of the plaintiff (his principal) to receive the moneys which have been realised by the defendant who was appointed as the agent for this purpose by the plaintiff. The mere fact that the defendant is under a suspicion and is working under the supervision of other agents deputed by the principal would not relieve him from liability to account. An agent under suspicion or under supervision is still an agent and must be held liable to account on proof that *prima facie* he has made realisations himself even in the period of suspicion or while subject to supervision. (*Fazl Ali and Manohar Lall, JJ.*) DEB PRASANNA MUKHERJEE *v.* LAKHI NARAIN MANDAL. **1941 P.W.N. 565 = 196 I.C. 641 = 14 R P. 222 = 8 B.R. 67.**

——**S. 230**—Applicability — Claim by purchaser against auctioneer for refund of deposit when sale has failed. *See* AUCTIONEER—POSITION AND LIABILITIES OF. **1941 A.W.R. (H.C.) 365.**

——**S. 230**—*Contract by agent—Personal liability—Extent.*

Per *Pal, J.*—The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of the principal, and if personally, what is the extent of his liability on the contract, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances. (*Nasim Ali and Pal, JJ.*) SUKUMARI GUPTA *v.* DHIRENDRA NATH ROY. **73 C.L.J. 356 = A.I.R. 1941 Cal 643.**

——**Ss. 239 and 240**—*Advance of money to person doing business in consideration of interest and share in profits—No risk to advances—Partnership—If constituted.*

Where all that is established by the evidence is that a person agreed to finance another in business in consideration of receiving interest on the monies advanced and a share of the profits of the business, that he was doing nothing else in common with that other to whom everything is left, and that there was no capital fixed, it cannot be said that there is an agreement to combine property, labour or skill in some business within the meaning of S. 239 of the Contract Act. There is therefore no partnership in such a case especially when the person advancing money never risks his advances in the business. The true test is whether there is really a common business between the parties who claim to be partners. Each of such parties must have the right to control the property the right to receive the profits and the liability to share in losses. (*Abdul Ghani and Subramania Aiyar, JJ.*) BASHETTAPPA *v.* FIRM OF CHANNAVEERAPPA KALYANAPPA. **19 Mys L J. 351 = 46 Mys.H.C.R. 234.**

——**S. 239**—*Partnership—Firm—If can enter into partnership with another individual.*

There is nothing in S. 239 of the Contract Act to preclude a firm from entering into a partnership with another individual. (*Abdul Ghani and Subrahmanya Aiyar, JJ.*) BASHETTAPPA *v.* FIRM OF CHANNAVEERAPPA KALYANAPPA. **19 Mys L J. 351 = 46 Mys.H.C.R. 234.**

CONTRIBUTION. *See* CONTRACT ACT, S. 43.

CO-OPERATIVE SOCIETIES ACT (II OF 1912) S. 23—*Period of two years—Mode of calculation.*

The period of two years mentioned in S. 23 of the Co-operative Societies Act is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that

CO-OPERATIVE SOCIETIES ACT (1912), S. 23.

is the date on which its registration was cancelled. A. I.R. 1937 Lah. 912, Rel. on. (*Tek Chand and Beckett, JJ.*) ALLAH YAR *v.* ANJUMAN IMDAD QARZA, BASTI CHAH KOTWALA DAKHLI JALALPUR.
195 I.C. 688=14 R.L. 83=43 P.L.R. 305= AI R. 1941 Lah. 284.

——**S. 23**—*Scope and applicability.*

The words 'the debts of a registered society as they existed at the time when he ceased to be a member occurring in S.23 of the Co-operative Societies Act clearly refer to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no bearing whatever to the debts of the outgoing members due to the society itself. (*Yorke and Ghulam Hasan, JJ.*) BELAHARI CO-OPERATIVE SOCIETY *v.* PUTTU LAL.
16 Luck 658= 193 I.C. 524=13 R.O. 466=1941 O.L.R. 297= 1941 A L.W. 299=1941 O.W.N. 404= 1941 O.A. 285=1941 A.W.R. (Rev.) 236= AI.R. 1941 Oudh 315.

——**S. 42 (2)**—*Contributory order— Power of Civil Court to examine if it is* ultra vires *of the liquidator— Order when should be made.*

A Civil Court can examine the question whether a liquidator appointed under the Co-operative Societies Act has acted within his powers when he makes a contributory order. The relevant rule limits the power of the liquidator to make a contributory order to a time posterior to the determination of the assets. He cannot make such an order until he has ascertained the assets. He cannot be regarded in law as having ascertained the assets where he is in the course of realising the assets of the individual debtors and until the amount that can be obtained on such realisation is determined. Until then any contributory order made is *ultra vires*. These contributory orders are exceedingly oppressive and should in fairness to the contributories and in the interests of the co-operative society movement generally, only to be resorted to as a last resort. (*Stone, C.J. and Niyogi, J.*) HARISA RAWAJISA *v.* YAOLI CO-OPERATIVE SOCIETY.
1941 N.L.J. 412.

——**S. 42 (2) (e)**—*Debt due to Society—Power of liquidator to make order having force of decree.*

S. 42 (2) (*e*) of the Co-operative Societies Act does not give a liquidator power to make an order having the force of a decree in respect of a debt due to a Co-operative Society in liquidation. (*Beckett, J.*) CO-OPERATIVE SOCIETY, THATHI MUSALIAN *v.* AQIL HUSSAIN.
196 I.C. 688=43 P.L.R. 446= A.I.R. 1941 Lah. 355.

——**S. 43**—Rules under, R. 22—Award—Execution —Limitation—Starting point. *See* LIMITATION ACT, ART. 182.
I.L.R. (1940) 2 Cal. 460.

——**S. 43 (2) (1) and R. 115 of Rules (U.P.) framed under**—Strict construction—Necessity-Personal decree against alleged representative of a past deceased member—If can be passed—Power of Civil Court to set it aside. *See* 1940 Dig., Col. 408. ARYA CO OPERATIVE BANK SOCIETY *v.* SHIV CHARAN.
192 I.C. 33713 R.A. 309.

CO OWNERS—*Abandonment—Four brothers living together—One of them using property as his own— Others leaving the house—Presumption.*

Four brothers lived together and held property belonging to their parents as co-owners. One of them used the property as his own. After a time the rest of the brothers went away and took no interest in the property for a long period, *e.g.*, 25 years,

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Held, that abandonment on the part of the departing brothers of any claim that they might have had to the property might be presumed under Evidence Act, which required rules of commonsense to be applied to the consideration of cases though the mere fact of leaving the house was not sufficient to show ouster of the departing brothers. (*Mackney, J.*) MAUNG PO HLAING *v.* PO NYI.
195 I.C. 234=14 R.R. 34= A.I.R. 1941 Rang. 111.

——*Ejectment of trespasser—Suit for by one co-sharer—Maintainability.*

In a suit by some co-owners to eject certain trespassers on the co-owners' property, the non joinder of the other co-owners does not vitiate the suit. To eject a trespasser one co-owner is at perfect liberty to institute an action. (*Davies.*) WAZIRA *v.* MANA.
1940 A.M.L.J. 78.

——*Joint land—Ejectment of trespasser —Suit by one co-owner without joining others—Maintainability.*

One of several co-owners is entitled to maintain an action in ejectment against a trespasser on the joint property without making the other co-owners parties to the action. (*Agarwala, J.*) SAMBHU GOSAIN *v.* PIGARI MIAN.
193 I.C. 253=13 R.P 561= 1941 P.W.N. 497=7 B.R. 520= A.I.R. 1941 Pat. 351.

——Joint property—Division under unregistered deed —Deed inadmissible—Co-owner in possession disturbed by another co sharer—Remedy—Suit in ejectment— Maintainability. *See* REGISTRATION ACT, S. 17 (1) (*b*).
(1941) 2 M.L.J. 707.

——Joint tenants or tenants-in-common—Possession of one—When adverse to the rest. *See* ADVERSE POSSESSION—CO-OWNERS.
43 Bom.L.R. 971.

——*Partition—Portion of joint estate divided— Presumption.*

Where one portion of a joint estate has been divided, the presumption that the whole of it has been divided is merely a presumption of fact and depends on the particular circumstances of each ease. (*Almond, J.C.*) MIAN SHARIF GUL *v.* SAID GUL.
196 I.C 444= 14 R. Pesh. 30=42 Cr.L.J. 872= A.I.R. 1941 Pesh. 65.

——*Possession of one—Effect of—Common property owned by manager of joint family and member of separated branch—Possession by junior member of joint family and admission by him—Effect on right of other co owner.*

Where the co owners of common property are a manager of a joint Hindu family and a member of a separated branch of the family, possession by one of the junior members of the joint family is the possession of the manager of the family. The possessions by such junior member or any admission by him of the right of the co-owner cannot enure for the benefit of the latter and can give the other co-owner no advantage when the manager denies or in any case has not .been proved to have admitted the other co-owner's rights. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM.
I.L.R. (1940) Kar. 534=194 I.C. 137= 13 R.S. 249=A.I.R. 1941 Sind 50

——Right of suit—Joint property—Suit to eject trespasser by one only or by alienee from one—Maintainability without joining the other co owner. *See* 1940 Dig., Col. 409. MUNISAMY RAJU *v.* MADHAVA RAO.
45 Mys H.C.R. 439.

——*Suit by one—Defendant in exclusive possession for 25 years—Facts to be proved.*

A plaintiff wishing to succeed on the ground that he is co-owner must establish that fact, where the defendant has beyond question been in exclusive and un-

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interrupted possession for a long period, *e.g.*, 25 years. (*Mackney, J.*) MAUNG PO HLAING *v.* PO NYI.
195 I.C. 234 = 14 R R. 34 = A.I.R. 1941 Rang. 111.

———*Undivided village—Co-sharer villages in possession of specific plots of bakasht land—Exchange of plots between one co-sharer and another—Others not parties—Binding character of—Co-sharer lawfully in possession of land of another—Liability for mesne profits.*

The plaintiffs and defendants were co-sharer landlords in a Mauza and in possession of specific plots of bakasht lands, but there had been no partition of the village among the co-sharer landlords by metes and bounds. The plaintiffs gave the defendants 14 decimals of bakasht lands for building a *zanana* house and on 2—12—1935, the defendants executed a deed of exchange by which they declared the plaintiffs' right to be in possession of $50\frac{1}{2}$ decimals of land in exchange for the land given by them to the defendants. There was a house on $3\frac{1}{2}$ decimals of land out of the $50\frac{1}{2}$ decimals and the deed of exchange provided that "the plaintiffs should enter into possession and occupation of the property given to them in exchange, bring it under cultivation, take up their abode in the house and continue to enjoy the same for all time." In 1937, the plaintiffs sued the defendants for arrears of rent and ejectment and mesne profits of the house standing on $3\frac{1}{2}$ decimals of lands alleging that they had let out the house to the defendants after the deed of exchange on a monthly rent of Rs. 10 and that the defendants had committed default in payment of rent. The allegation of the letting out was found to be false, and the suit was dismissed on the ground that since the other co-sharers were not parties to the suit the plaintiffs were not entitled to any relief.

Held, (1) that the arrangement was nothing but a mutual arrangement between the landlords who were in possession of specific plots of bakasht land in the village, though this arrangemen might not be binding on the other co-sharer landlords not parties to it and might be disregarded when there was a partition of the village by metes and bounds, yet so long as the village was not partitioned it must be binding on the plaintiffs and defendants, and the plaintiffs, though they were not entitled to the rent claimed—the letting out being found to be false, were entitled to a decree for possession of the house under the deed of exchange.

Held, further, that the defendants were not liable for mesne profits as they were according to the plaintiffs' case, lawfully in possession of the house as tenants. (*Harries, C.J. and Fazl Ali, J.*) KHAKHAN SINGH *v.* RAM ISHWAR SINGH. **193 I.C. 345 = 13 R.P. 581 = 1941 P.W.N. 561 = 7 B R. 593 = A.I.R. 1941 Pat. 451.**

CO SHARERS—Adverse possession—What will and what will not constitute—Possession of one—Nature of. *See* 1940 Dig., Col. 411. HAIDER HUSAIN *v.* SUBHAN KHAN. **191 I.C. 602 = 13 R.A. 238.**

———Attorney of deceased party—Right to apply to Court for order of payment. *See* 19 0 Dig., Col. 415. SARBA SUNDARI DASI *v.* NANDA RANI DASI.
194 I.C. 13 = 13 R C. 484 = A.I.R. 1941 Cal. 144.

———Commissioners of partition—Right to apply to Court for order for payment—Taxation of bills of Commissioner. *See* 1940 Dig., Col. 415. SARBA SUNDARI DASI *v.* NANDA RANI DASI.
194 I.C. 13 = 13 R.C. 484 = A.I.R. 1941 Cal. 144.

———Common land—Exclusive possession by one in defiance of the rights of others—Claim to compensation

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by others—Maintainability —Limitation applicable—Limitation Act, Arts. 109 and 120—Basis of calculation—Rental basis or produce basis. *See* 1940 Dig., Col. 411. RAJ RANJAN PRASAD SINHA *v.* KHOBHARI LAL. **20 Pat. 162 = 192 I.C. 456 = 13 R.P. 478 = 7 B.R. 425 = A.I.R. 1941 Pat. 90.**

———Co-tenants—Ancestral holding—Loss of right—Absence of proof of abandonment or adverse possession. *See* 1940 Dig., Col. 412. RISAL SINGH *v.* BALDEO SINGH. **1941 O.A (Supp.) 76 = 1941 A.W.R. (Rev.) 88.**

———*Co-tenant—Possession of one—Nature of—Rights of others.*

The possession of one co-tenant means the possession of all the co-tenants unless the possession of the former is openly adverse to the other co-tenants. (*Sathe, A.M.*) RAM SAHAI *v.* DOONGAR SINGH. **1941 R.D 892 = 1941 A W R. (Rev.) 1081 (1) = 1941 O.A. (Supp.) 871 (1).**

———Exclusive possession of common land by one in defiance of rights of others—Compensation to excluded co-sharers — Right to interest on—Mesne profits—Distinction. *See* 1940 Dig., Col. 412. RAJ RANJAN PRASAD SINHA *v.* KHOBHARI LAL.
20 Pat. 162 = 192 I.C. 456 = 13 R.P. 478 = 7 B.R. 425 = A.I R. 1941 Pat. 90.

———Joint land—Dealing by one—If binds all or amounts to ouster—Co sharers allowing one to remain in possession for some time—If lose right to claim partition—If amounts to ouster. *See* 1940 Dig., Col. 413. HARIHAR PRASAD SINGH *v.* HITLAL SINGH.
192 I.C. 502 = 7 B.R 472 = 13 R.P. 491.

———*Land revenue—Arrears of—Payment by lambardar—Charge, if created—Right to interest.*

A lambardar or sadar lambardar who pays arrears of land revenue on behalf of his defaulting co-sharers acquires a charge on the share of the defaulting co-sharer or the patti lambardar and in such cases he is entitled to charge interest. (*Niyogi and Gruer, JJ.*) GULAB *v.* BINDRABAN. **I.L.R. (1941) Nag. 474 = 1941 N.L.J. 311 = A I.R. 1941 Nag. 245.**

———*Lease by one—Right of another to dispossess lessee.*

There is nothing to warrant the supposition that in Oudh an ordinary agricultural lease must be granted by all the co-sharers in the village or patti as the case may be. Hence where a lease is granted by one out of several co-sharers, another co sharer who has not joined in the lease has no right to come and dispossess such a lessee for the lease is a valid one and the lessee acquires tenancy rights under it. (*Sathe, A.M.*) JIWAN LAL *v.* NIZAMUL HAQ. **1941 O.A. (Supp) 806 = 1941 A.W.R. (Rev.) 932 = 1941 R.D. 921.**

———*Lease of specific plots—Validity—No exclusive possession—No partition.*

Where the property is joint and there has been no partition in the village, if a co sharer who is not in exclusive possession of the plots in question purports to transfer a specific area in the plots in question by a perpetual lease authorising the lessee to take possession of that area and to exercise all conceivable rights over the same, the lease is void and inoperative. (*Ghulam Hasan and Madeley, JJ.*) DEBI PRASAD SINGH *v.* SURJAN SINGH. **195 I.C 597 = 14 R O 107 = 1941 A.W.R. (Rev.) 699 = 1941 R D. 747 = 1941 O.L.R. 604 = 1941 O.A. 711 = 1941 O.W N. 989.**

———Liability to pay money order and registration charges incurred by the lambardar. *See* 1939 Dig., Col. 373. DHUNDIRAJ MADHAO *v.* GANAPT VITHAL.
I.L.R. (1941) Nag. 345.

CO-SHARERS.

———*Partition—Suit for—When and when not maintainable.*

Per *Mitter, J.*—As the scope and object of a suit for partition is to convert the joint possession of the co-sharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the property but his co-sharer, the defendant is, and there is no ouster, the suit would be maintainable, for his co-sharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, but a suit for possession, either joint possession or possession after partition must be brought. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

———*Rights* inter se—*Decree entitling one to maintain a garden in a plot—Right to put up a building therein—Others, if prejudiced.*

Where a co-sharer is declared by decree to be entitled to maintain a garden and nursery planted by him in a particular plot, to that extent he is entitled to put that plot under exclusive use. By putting up a small building in it which is absolutely necessary for the purpose of the garden and nursery, he is not enlarging the scope which has been reserved to him for the use of the land, nor are the rest of the co-sharers prejudiced by it. (*Dar, J.*) MAHOMED SHAKIR *v.* KALKA PRASAD.

1941 A.W.R. (Rev.) 638 = 1941 O.A. (Supp.) 592 = 1941 A.L.J. 402 = 1941 R.D. 697 = 1941 A.L.W. 796 = A.I.R. 1941 All 353.

———Right of one co-tenant to deal with property of another. *See* 1940 Dig., Col. 414. NANURAM *v.* RADHABAI. **192 I.C. 630 = 13 R.N. 272.**

———*Right of suit—Right of co-sharer to sue trespasser without impleading other co-sharers.*

One co sharer can maintain a suit against a trespasser without impleading the other co-sharers. (*Almond, J.C and Sooft, JJ.*) MUKARRAM KHAN *v.* S. HARDIT SINGH. **196 I.C. 301 = 14 R. Pesh. 25 = A.I.R. 1941 Pesh. 69.**

———Right to alienate—Other co sharers' rights. *See* 1940 Dig., Col. 414. SUKH DEV *v.* PARSI. **I.L.R. (1941) Lah. 583 = 192 I.C. 266 = 13 R.L. 366 = 43 P.L.R. 626.**

———*Right to profits—Decree for possession not executed.*

Without executing a decree for possession a decree-holder cannot become a shareholder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. (*Almond, J.C. and Mir Ahmad, J.*) RAMESHRI *v.* VAISHNO DITTI. **193 I.C. 819 = 13 R Pesh. 68 = A.I.R. 1941 Pesh. 25.**

———Right to share in commission paid to the lambardar. *See* 1939 Dig., Col. 375. DHUNDIRAJ MADHAO *v.* GANPAT VITHAL. **I.L.R. (1941) Nag. 345.**

———Sale of a fractional share—Meaning. *See* 1940 Dig., Col. 414. IFTIKHAR KHAN *v.* HAYAT KHAN. **192 I.C. 379 = 13 R.O. 354 = 1941 O.L.R. 118 = A.I.R. 1941 Oudh 72.**

———*Severalty—Recognition of holding in severalty by one—Effect.*

COURT-FEES ACT (1870), S. 6 A.

Where the several co-sharers have recognized one of the co-sharers as holding a plot as his severalty, the latter is entitled to undisturbed possession of it. (*Harper, S.M.*) KHALIL AHMAD *v.* RAM CHANDAR. **1941 A.W.R. (Rev.) 556 (1) = 1941 O.A. (Supp.) 487 (1) = 1941 R.D 676.**

———Suit for profits—Right—Excessive use and occupation. *See* 1940 Dig., Col. 415. PUNJAB NATIONAL BANK, LTD. *v.* PARS RAM. **I.L.R. (1941) Lah. 246 = 43 P.L.R. 612.**

COSTS. *See* (i) C. P. CODE, S. 35.
(ii) PRACTICE—LEGAL PRACTITIONER—COSTS.

COURT-FEE—Mesne profits—Claim for—Tentative valuation—If to be given. *See* 1940 Dig., Col. 418. MIDNAPORE ZEMINDARY CO., LTD. *v.* BIJOY SINGH DUDHURIA. **193 I.C. 578 = 13 R C. 420 = A.I.R. 1941 Cal. 1.**

———*Suit for partition—Claim by defendant for share—Liability to Court-fee.*

There is no reason why a defendant in a partition suit should pay Court fees on the share which he claims in the suit. He has to pay his share of Stamp duty on the decree in respect of the property allotted to him at partition. (*Lobo, J.*) KHEMCHAND *v.* DAYARAM. **I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.**

COURT-FEES ACT (VII OF 1870), Ss. 6, 28 and C. P. Code, S. 149—*Insufficiency of stamp—Alternatives before Court.*

Any conflict between S. 6 of the Court-Fees Act and S. 149, C. P. Code, is resolved by S. 28 of the Court-Fees Act. When an insufficiently stamped memorandum of appeal is received and comes before the Court, it falls to be dealt with under S. 149, C. P. Code, read with S. 28 of the Court-Fees Act. The Court acting under S. 149, C. P. Code, may reject the memorandum as inadmissible in cases in which it sees no good ground for extension of time to make good the deficiency or merely return it. In either case representation with proper Court-fee is not precluded. (*Niyogi and Clarke, JJ.*) GOREYLAL *v.* DAYASHANKAR. **I.L.R. (1941) Nag. 467 = 196 I.C. 60 = 14 R.N. 79 = 1941 N.L.J. 258 = A.I.R. 1941 Nag. 220.**

———**S. 6 (2), (3) (4)**—Duty of Courts to follow provisions of. *See* 1940 Dig., Col. 418. BAIJNATH PRASAD *v.* TEJPAL. **193 I.C. 133 = 13 R.A. 394 = 1940 A.L.J. 891 = A.I.R. 1941 All. 55.**

———**S. 6-A, (as amended by United Provinces Act XIX of 1938)**—*Appeal under—Orders incidental to payment of Court-fee—If can be set aside*

When an appeal lies against an order directing payment of Court fee, incidental orders which lead up to it can be set right. (*Ganga Nath and Dar, JJ.*) MOHRI KUNWAR *v.* KESHRI CHANDRA. **I.L.R. (1941) A. 558 = 195 I.C 758 = 14 R.A. 78 = 1941 A.L.J. 376 = 1941 A L W. 550 = 1941 A.W R. (H.C.) 188 = 1941 O.W N. 704 = 1941 O.A. (Supp.) 394 = 1941 R D. 394 = A.I.R 1941 A. 298.**

———**S. 6-A (as amended by United Provinces Act XIX of 1938),**—*Right of appeal under—Nature of—Right coming into existence after the institution of suit—Availability.*

The right of appeal given to a suitor under S. 6 A of U. P. Act XIX of 1938, is a part of procedure relating to determination of Court-fee and is purely a matter in which the Crown is interested and in which neither the plaintiff nor the defendant has such a vested right as can not be affected by a subsequent enactment. The Act

COURT-FEES ACT (1870), S. 6 B.

(IX of 1938) which allows an appeal against the order demanding Court-fee does not take away any right which was vested in the plaintiff on the date when he filed the plaint, it only confers upon him new right, and it does not take away any right which was vested in the defendant either and the defendant has no vested right in the procedure by which the proper Court is determined and thus procedure can be changed and a change in procedure cannot be said to deprive him of any vested right. Where in respect of a suit filed before the Act XIX of 1938 came into force, an order for payment of Court-fee is passed subsequent to the Act coming into force, the right of appeal under S. 6-A is available to the aggrieved party. (*Ganga Nath and Dar, JJ.*) MOHRI KUNWAR *v.* KESHRI CHANDRA.

I.L.R (1941) A. 558 = 195 I.C. 758 = 14 R.A. 78 = 1941 A.L.J. 376 = 1941 A.L.W. 550 = 1941 A.W.R. (H.C.) 188 = 1941 O.W.N. 704 = 1941 O.A. (Supp.) 394 = 1941 R.D. 394 = A.I.R. 1941 All. 298.

——**Ss. 6 B and 6-C**—*Reference by whom competent—Chief Inspector of stamps, how to move High Court.*

Under S. 6-C, Court-Fees Act it is only the Chief Controlling Revenue Authority that is given the power to make a reference to the High Court. The Chief Inspector cannot make a reference under that section. He is only entitled under S. 6-B within the prescribed period to move the prescribed Court "by an application in writing" for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under S. 6-B. (*Iqbal Ahmad and Bajpai, JJ.*) KALLU SINGH *v.* MIR KUNWAR.

I.L.R. (1941) A. 585 = 1941 R.D. 763 = 1941 A.L.W. 867 = 1941 A.W.R. (H.C.) 254 = 1941 O.A. (Supp.) 684 = 1941 A.L.J. 487 = A.I.R. 1941 A. 369.

——**S. 7 and U. P. Court-Fees (Amendment) Act (1938)**—*Suit for injunction prior to but second appeal subsequent to Amending Act—Court-fee payable—Basis for calculation.*

Where a suit for injunction is filed before the amendment of the Court-Fees Act by U. P. Act XIX of 1938 and court-fee paid according to the law then in force but a second appeal is filed after the amendment, on a question as to the court-fee payable on the appeal it was *held* that it was the amount mentioned in the plaint which was the basis of valuation and that one must look back to the date of the institution of the suit to ascertain it. (*Allsop, J.*) CHHAKAURI SINGH *v.* SRI KRISHNA PANDE.

I.L.R.(1940) All 793 = 193 I.C. 747 = 13 R.A. 453 = 1941 O.W.N. 238 = 1941 O.A. (Supp.) 283 = 1941 A.L.W. 170 = 1940 A.L.J. 904 = 1941 A.W.R. (H.C.) 17 = A.I.R. 1941 A. 134.

——**S. 7 (1)**—*Applicability—Co-mortgagees or co-charge holders—Suit by one for share of debt—Court-fee—Valuation for Court-fee and jurisdiction—Entire mortgage debtor share of plaintiff—Suits Valuation Act, S. 8.*

A co-mortgagee suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed and cannot value it according to his own share. One of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage debt, provided he makes his co-mortgagors defendants, if they refuse to join him as plaintiffs. He must ask for a preliminary mortgage decree in respect of the entire debt; he has to ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety, as there can be no redemption in part. The plaint must be stamped accordingly on the value of entire mortgage-debt under S. 7 (1) of the Court-Fees Act; which is also the valuation for purposes of jurisdiction under S. 8 of the Suits Valuation Act. This principle applies also to the case of a charge on immovable property. (*Leach, C.J. and Happell, J.*) KAILASA AIYAR *v.* SUNDARAM PATTAR.

54 L.W. 679 = (1941) 2 M.L.J. 986.

COURT-FEES ACT (1870), S. 7.

——**S. 7 (iv)(a). (as amended in Madras)**—*Applicability—Decree against temple in suit filed on promissory note by hereditary trustee—Suit by worshipper to declare not binding on temple as being collusive—Temple and trustee made defendants—Court-fee payable.*

The worshippers of a temple, representing the temple, brought a suit for a declaration that a decree obtained against the temple properties by a grocer in a suit on a promissory note executed by the hereditary trustee for goods supplied by the grocer, was not binding on the temple as it was collusively obtained. Both the temple and the trustee for the time being were put in the array of defendants.

Held, that in deciding a matter of court-fee, the Court was entitled to examine the substance of the suit, that the plaintiffs were in substance praying on behalf of the temple for cancellation of the decree obtained against the temple, and the suit was therefore liable to court-fee, under S. 7 (iv) (*a*) of the Court-Fees Act as amended in Madras and Art. 17-A (1) of Sch. II did not apply. Though the position of the plaintiffs gave them an interest sufficient to justify the filing of a suit independently of the trustee, they really sued in the right of the temple and its trustee and did not ask for the protection of any interest of their own and hence they should not be permitted to escape the natural consequence of their suit by arraying the temple and its trustee among the defendants.

Wadsworth, J.—It is well settled that when *A* gets a decree against *B* and *B* or his representative wishes to get rid of that decree, *B* must pay court-fee as for the cancellation of the decree whether he drafts his prayer only as one for cancellation or whether he disguises it in the form of a prayer for a declaration. (*Mockett and Wadsworth, JJ.*) RAMASUBBA IYER *v.* AYYALU NAIDU.

I.L.R. (1941) Mad. 708 = 1941 M.W.N. 243 = 53 L.W. 311 = A.I.R. 1941 Mad. 493 = (1941) 1 M.L.J. 414.

——**S. 7 (iv) (a)**—*Applicability—Suit to declare sale fraudulent and fictitious.*

A suit to declare a sale fraudulent and fictitious does not involve a consequential relief and so *ad valorem* court-fee is not necessary. (*Bennett, J.*) SWAMI DAYAL *v.* RAM BAHADUR SINGH.

193 I.C. 363 = 13 R.O. 454 = 1941 O.L.R. 279 = 1941 A.L.W. 356 = 1941 O.W.N. 471 = 1941 O.A. 309 = 1941 A.W.R. (C.C.) 124.

——**S. 7 (iv) (b)**—Applicability—Appeal in suit under S. 33 (3), Agriculturists' Relief Act. *See* **U. P. AGRICULTURISTS RELIEF ACT, S. 33 (3) AND COURT FEES ACT, S. 7 (iv) (*b*).**

1941 O.W.N. 479.

——**S. 7 (iv) (b)**—*Scope of—Suit for delivery of share and accounts and delivery of amount found due—Court-fee payable.*

S. 7 (*iv*) (*b*) of the Court-Fees Act makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Where a plaintiff never alleged that he was in actual or constructive possession but asked for delivery of his share to him and further asks for accounts and delivery to him of his share of the amount that might be found due to the

estate, it clearly is not a case where a ten rupee stamp would be sufficient. (*Mya Bu and Shaw, JJ.*) NARAYANASWAMY KONAR *v.* MUNUSWAMY KONAR.
1941 Rang.L.R. 249=197 I.C. 111=
A.I.R. 1941 Rang. 297.

——**S. 7 (iv) (b)**—Suit by Mahomedan co-sharer for partition—Allegation that he is in constructive possession of entire property and in partial actual possession—Court-fees. *See* COURT-FEES ACT, SCH. II, ART. 17 (VI) AND S. 7 (IV) (*b*). **A.I.R. 1941 Lah. 152 (F.B.).**

——**S. 7 (iv) (b) and Sch. II, Art. 17**—*Suit to recover a sum as profits—Alternative prayer for decree for whatever found due—If makes suit a suit for accounts—Court-fee payable.*

Where a plaintiff brings a suit for recovery of a sum of Rs. 900, the mere fact that he adds a prayer for relief for any other sum that may be found due, cannot have the effect of converting the money suit into a suit for accounts, and S. 7, Cl. (*iv*) (*b*) of the Court-Fees Act will not apply and the case would be governed by Art. 17 of Sch. II. (*Agarwal, J.*) NANHE SINGH *v.* RAM NARAIN. **196 I.C. 441=14 R.O. 171=**
1941 O.W.N. 1095=1941 R.D. 845=
1941 O.L.R. 685=1941 O.A. 810=
1941 A.W.R. (Rev.) 865=A.I.R. 1941 Oudh. 622.

——**S. 7 (iv) (c) and Sch. II, Art. 17 (iii)**—*Applicability—Suit by landlord—Suit by landlord for declaration that order of Revenue Officer fixing rent roll is wrong, illegal and not binding on plaintiffs and for enhancement of reduced rent to old rent—Court-fee—Bihar Tenancy Act, S. 104-H.*

The plaintiffs landlords brought a suit praying, *inter alia* for a declaration that an order of the Revenue Officer fixing a reduced rent roll under S 112 of the Bihar Tenancy Act was wrong, illegal, unenforceable and not binding on the plaintiffs, and for enhancement of the reduced rent to the rent formerly paid; they paid *ad valorem* Court-fee on the basis of one year's rental in respect of these two prayers.

Held, (1) that the suit was in no sense a suit under S. 104-H of the Bihar Tenancy Act; (2) that the first prayer was the only relief which the plaintiff need ask the Court to grant, and the second prayer, being unnecessary, should be disregarded as surplusage; (3) that in substance the suit was for a declaration, pure and simple, (a necessary declaration), and Court-fee was clearly payable under Sch. II, Art. 17 (*iii*) of the Court-Fees Act; (4) that S. 7 (*iv*) (*c*) of the Court-Fees Act did not apply.

Per *Shearer, J.*—The suit was one under S.42, Specific Relief Act for a declaration and for nothing else. (*Meredith and Shearer, JJ.*) BAGESHWARI PRASAD *v.* TULSI GARAIN. **194 I.C. 378=7 B.R. 755=**
22 Pat.L.T. 453=13 R.P. 709=1941 P.W.N. 447=
A.I.R. 1941 Pat. 463.

——**S. 7 (iv) (c)**—*Applicability—Suit for partition of joint family property—Plaintiff claiming to be in joint possession—Allegations in plaint that defendant got up colourable deed of partition executed by plaintiff while a minor and that same was not acted upon or intended to be acted upon—Court-fee.*

If a suit for partition of joint family property is really or actually in the nature of a title suit, *ad valorem* Court-fees are payable, whether the suit be regarded as falling under S. 7 (*iv*) (*c*), 7 (*iii*) or 7 (*v*) of the Court-Fees Act. But where in substance the relief sought is the partition of the property of which the plaintiff claims to be in joint possession, the suit falls under Art. 17 (*vi*) of Sch. II of the Court-Fees Act, and *ad valorem* Court fee is not leviable. The plaint has to be construed as it is and care should be taken not to import into it anything

which it does not contain, either actually or by necessary implication. A relief not asked for cannot be imported so as to charge Court-fee thereon. The plaintiff, a Hindu, brought a suit against his elder brother for partition of joint family properties in which he claimed a partition of the suit property of which he claimed to be in joint possession. There was no prayer in the plaint either for any declaration, cancellation of any document or for possession. There were allegations to the effect that the father of the plaintiff and the defendant died in a state of jointness with them that the defendant then became the karta, the plaintiff being then only about a year old, that the defendant got up a colourable deed of partition, subsequently with false recitals, allotting to himself the best portions of the properties, and got it executed by the plaintiff, as if he were major though he was only a minor, on false representations as to the object of the same, that the deed was never acted upon and did not represent any actual family arrangement, that the family still continued joint in spite of the deed, and that until a short time before suit the joint state continued, when on account of some differences the plaintiff separated in mess from the defendants. The plaintiff paid a Court-fee of Rs. 15 only under Art. 17 (*vi*) of Sch. II of the Court-Fees Act. The trial Court held that the suit was really one for a declaration that the previous deed was not binding on the plaintiff and for cancellation of the same, and therefore fell under S. 7 (*iv*) (*c*) of the Court-Fees Act, and called upon the plaintiff to pay *ad valorem* Court-fee under S. 7 (*iv*) (*c*).

Held, in revision, that if the plaintiff established his case, the document referred to would be void and not voidable, and would be a colourable transaction not intended to be, and never, acted upon, and that neither a prayer for a declaration nor a prayer for cancellation could be imported into the plaint by necessary implication. Hence the plaint did not fall under S. 7 (*iv*) (*c*), but fell under Art. 17 (*vi*) of Sch. II. (*Chatterji and Meredith, JJ.*) RAMAUTAR SAO *v.* RAM GOBIND SAO. **20 Pat. 780.**

——**S. 7 (iv) (c) and (d)**—Applicability—Suit for injunction to restrain defendant alleged to be under raiyat from making permanent constructions on land—Valuation. *See* 1940 Dig., Col. 422. BINODE BEHARI MUKHERJEE *v.* K. C. BISWAS & CO.
191 I.C. 381=13 R.C. 240.

——**S. 7 (iv) (c) and (d)**—Applicability—Suit for injunction in respect of easement as occupier of property situate in Hyderabad—Title of plaintiff in property—If to be gone into—Court-fee payable—Valuation—Right of plaintiff—Plaintiff native of Hyderabad and claiming easement as appurtenant to property in Hyderabad—Law applicable—Jurisdiction of British Indian Court. *See* 1940 Dig., Col. 421. VENKATARANGA RAO BAHADUR *v.* SITA RAMACHANDRA RAO BAHADUR.
I.L.R. (1941) Mad. 157=195 I.C. 439=
14 R.M. 189=A.I.R. 1941 Mad. 91=
(1940) 2 M.L.J. 655.

——**S. 7 (iv) (c) and (v)**—*Applicability—Suit for possession after declaration of title—Court-fee payable—Nature of suit.*

In all cases where possession is claimed, the plaintiff has to establish his title before he can get a decree for possession. Where a suit is in reality one for possession, the fact that the plaintiff asks in his plaint for something in the nature of a declaration will not make it a suit for declaration and consequential relief for the purposes of Court-fee. The suit being really one purely for possession, Court-fee is payable only on that basis. (*Harries, C.J. and Manohar Lall, J.*) BESAR KUAR *v.* RAMHIT SINGH. **193 I.C. 538=7 B.R. 557=**

COURT-FEES ACT (1870), S. 7.

13 R.P. 599=21 Pat.L.T. 1063=A.I.R. 1941 Pat. 167.

——**S. 7 (iv) (c)**—*Applicability—Suit to set aside decree effecting partition by metes and bounds and for fresh partition of all properties held by plaintiff and defendants exclusively since date of prior partition—Court-fee payable—Plaintiff—If in joint possession—Sch. II, Art. 17 (vii).*

In deciding whether a suit falls within the ambit of S. 7 (*iv*) (*c*) of the Court-Fees Act, the substance and not the language of the plaint must be looked at; and in determining the court-fees payable the Court should have regard to the cause of action as stated in the plaint. The defendant's denial of the plaintiff's joint possession at the date of the suit does not alter the character of the suit. Where a plaintiff prays to have a prior partition by metes and bounds effected by a decree set aside as void and not binding on him, and to bring into the hotchpot for the purpose of making a fresh partition, the properties which since the date of the prior partition have been in the exclusive possession of one or other of the defendants and for separate possession thereof to the plaintiff by dispossession of the defendants, the suit is one for a declaratory decree and for consequential relief and is covered by S. 7 (*iv*) (*c*) of the Court-Fees Act. It cannot be said that in such a case the plaintiff is in joint possession with the defendants, so as to take the suit out of S. 7 (*iv*) (*c*), and to bring it under Sch. II. Art. 17 (*vii*), as being liable to a fixed court-fee instead of *ad valorem* court-fee. The fact that the plaintiff is already in possession of a portion of the property of which he seeks a re-partition cannot entitle him to credit for court-fees payable in respect of that part of the property. (*Davis, C.J. and Lobo, J.*) FAZILAT KHATUN *v.* RAHIM BUX.

I.L.R. (1941) Kar. 102=A.I.R. 1941 Sind 154.

——**Ss. 7 (iv) (c) and Sch. II, Art. 17 (iii)**—*Declaratory suits—Determination of court-fee—True criterion—Consequential and substantial reliefs—Distinction—Suit for declaration that property is wakf and its alienation is void—Court-fee payable.*

The true criterion for determining the question of court fee in cases of declaratory suits is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Sch. II, Art. 17 (*iii*) of the Court-Fees Act and the court fee payable would be Rs. 10 only. At the initial stage of determining the court-fees on a plaint, the question whether the declaratory suit is liable to be dismissed, either because it does not fall within the purview of S. 42 of the Specific Relief Act, or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise. That question will arise only after the necessary court-fee on the true relief as disclosed in the plaint is paid and the plaint is properly before the Court. If on the other hand, it is found that, the declaratory relief claimed involves a consequential relief within the meaning of S. 7 (iv) (*c*) of the Act, it will be for the plaintiff to state the amount at which he values the relief as provided in that section. Lastly, there may be cases, where the declaration asked for is merely a surplusage, and the so-called consequential relief is in reality an independent substantial relief. The expression "consequential relief" means some relief, which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration of a "substantial relief." If the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere "consequential relief" in the above sense, the plaintiff must pay court-fee on the substantial relief. Where the plaintiff sues for a two fold declaration, *viz.*, (1) that a certain property is wakf and (*ii*) that the alienations which certain mutwallis have effected are null and void and are ineffectual against the wakf property, the first part of the relief is purely declaratory and it does not involve any consequential relief. But the second part of the relief is tantamount to the setting aside or cancellation of the alienations and cannot be treated as a purely declaratory one. It cannot be treated as a declaration with a consequential relief falling within S. 7 (v) (*c*) of the Act. For, as the alienors had the power to alienate the property for certain purposes, the declaration that the property is wakf would not by itself entitle the plaintiff to ask for the cancellation of the alienations. It is a substantial relief and would require *ad valorem* court-fee on the value of the subject-matter of the alienations under Sch. I, Art. 1 of the Act. (*Monroe, Bhide and Ram Lall, JJ.*) ZEB-UL-NISA *v.* DIN MOHAMMAD.

I.L.R. (1941) Lah. 451=193 I.C. 641=13 R.L. 465=43 P.L.R. 106=A.I.R. 1941 Lah. 97 (F.B.).

——**S. 7 (iv) (c)**—*Suit for declaration and consequential relief—Valuation.*

In substance the relief asked for in a suit were—(1) a declaration that certain properties belonged to the idols, and that the plaintiffs were shebaits under the law, (2) removal of the defendants from shebaitship, (3) the framing of a scheme of management, (4) an injunction against the defendants restraining them from dealing with certain properties as secular properties, and (5) accounts. The plaintiffs valued the claim for accounts tentatively at Rs. 100, and the remaining reliefs at Rs. 2,000. But the Court valued the injunction alone at Rs. 6,975.

Held, that in so far as the suit was one under S. 7 (iv) (*c*) it was not proper to detach the declaration from the consequential relief and value them separately. The declaration asked for as regards the character of the properties in suit, and the status of the plaintiffs as shebaits, taken by itself could not be estimated at a money value, but admitted of such valuation only if it was coupled with the consequential relief prayed for, namely the framing of a scheme of management, and also the injunction, though the latter might be regarded as an independent relief by itself. As the Court had found that the injunction alone should be valued at Rs. 6,975 and as there was no objective standard by which the other part of the relief, namely, the framing of a scheme, could be valued, the total valuation of the suit under S. 7 (iv) (*c*) was Rs. 6,975. In addition to this, the plaintiffs must pay a fixed fee of Rs. 15 on the prayer for removal of the defendants from shebaitship, and as for the prayer for accounts, the plaintiffs were entitled to pay *ad valorem* on their own tentative valuation of Rs. 100. (*Biswas and Roxburgh, JJ.*) KANAKLATA DASSI *v.* RAM GOPAL DAS.

A.I.R. 1941 Cal. 509.

——**S. 7 (iv) (c), Sch. I, Art. 1, Sch. II, Art. 17 (vi)**—*Suit for declaration and for cancellation of instrument—Court fees.*

The delivery and cancellation of an instrument under S. 39 of the Specific Relief Act is something quite distinct from a mere declaration. A person who is put to some inconvenience, through the existence of an instrument to which he is not a party, may seek merely to have his own rights established and treat the instrument as a nullity if he is not affected thereby; but if he chooses to

go further and have the instrument delivered up to the Court for cancellation, he is then asking for a different form of relief. If prayer for this relief is attached to a prayer for a declaration, the question which then arises is whether the cancellation should be regarded as consequential on the declaration or as a substantial relief in itself which requires separate valuation. In the former case, a single Court-fee will have to be paid on the value of the reliefs sought under S. 7 (*iv*) (*c*) of the Court-fees Act. In the other event, a Court fee will have to be paid on the value of the subject-matter in dispute under Art. 1, of Sch. I, if the subject-matter is capable of valuation, otherwise a fixed fee of Rs 10 under Art. 17 (*vi*) of Sch. II. (*Tek Chand and Beckett, JJ.*) GURDWARA PARAM HANS MAHATMA PANAP DASS JI MAHARAJ *v.* GOPICHAND. **196 I.C. 254 = 14 R.L. 146 = 43 P.L.R. 252 = A.I.R. 1941 Lah. 265.**

——**S. 7 (iv) (c)**—*Suit for declaration of title and injunction—Plaintiff claiming to be in possession of suit land—Valuation for court-fees and jurisdiction.*

Where a plaintiff claiming to be in possession of land sues for a declaration of his title to it and for an injunction restraining the defendant from interfering with his possession, the suit is one for declaration and consequential relief, and therefore under S. 7 (*iv*) (*c*) of the Court-Fees Act, the plaintiff is entitled to put his own valuation for purposes of court-fee and under S. 8 of the Suits Valuation Act the value so fixed automatically becomes the value for jurisdiction. (*Tek Chand and Beckett, JJ.*) GHULAM NABI *v.* UMAR BAKHSH. **43 P.L.R. 337 = A.I.R. 1941 Lah. 307.**

——**S. 7 (iv) (c)**—*Suit for declaration that liquidator's order against plaintiff is void and for injunction—Arbitrary valuation.*

A suit for a declaration by a member of a co-operative society that an order passed by the Liquidator of the Society against him is null and void and is not executable against him and for an injunction restraining the defendant from executing it, is a suit for a declaration and consequential relief, and, therefore, under S. 7 (*iv*) (*c*) of the Court-fees Act the plaintiff is entitled to fix any value he likes on the plaint. (*Tek Chand and Beckett, JJ.*) ALLAH YAR *v.* ANJUMAN IMDAD QARZA, BASTI CHAH KOTWALA DAKHLI JALALPUR. **195 I.C. 688 = 14 R.L. 83 = 43 P.L.R. 305 = A.I.R. 1941 Lah. 284.**

——**S. 7 (iv) (c) and (d)**—Suit to set aside decree—Valuation. *See* 1940 Dig., Col. 423. NALINI NATH MALLIK *v.* RADHASHYAM MARWARI. **192 I.C. 574 = 13 R.C. 321.**

——**Ss. 7 (iv) (d) and 8 (c)**—Suit for permanent injunction—Prayer restraining execution of decree against property in plaintiff's possession—Proper valuation. *See* 1940 Dig., Col. 423. MIR AKHTAR HOSSAIN *v.* GURUPADA HALDAR. **192 I.C. 279 = 13 R.C. 306.**

——**S. 7 (iv) (f)**—*Art. 17 B, Sch. II—Administration suit—Court-fee to be paid on market value of property—Jurisdiction of Court should be gone into—Revision proper to correct error at early stage.*

In a suit for the administration of the estate of a Muhammadan lady, for accounts and for division of the assets among the heirs under the Muhammadan Law, on the question whether the provisions of S. 7 (*iv*) (*f*) or Art. 17-B of Sch. II of the Court-Fees Act applied to the case,

Held, that as an administration suit is not merely a suit for accounts and ought not to be so regarded for any purpose relating to Court-fee, especially where the suit is not one by a creditor for the administration of the assets of a deceased but one where a division of properties may

have to be made, it should be valued under Art. 17 B of Sch. II of the Court-Fees Act. Judgment of Wadsworth, J., in C. M. A. No. 235 of 1938, Foll.

Held, *further*, that in such a case the jurisdiction is to be determined by the market value of the property. Where the lower Court had erred in holding that it had jurisdiction the High Court can interfere in revision to correct such error when the suit was still in its earlier stages though if the suit had been decreed in favour of the plaintiff the defendant would have been entitled to raise the question of jurisdiction in appeal. (*Horwill, J.*) KHAJA MOIDEEN SAHIB *v.* ABDUL GAFFOOR SAHIB. **54 L.W. 663 = 1941 M.W.N. 1053 = (1941) 2 M.L.J. 962.**

——**S. 7 (iv) (f) and Sch. I, Art. 1**—*Applicability—Suit for account—Decree for specific amount against plaintiff—Appeal by plaintiff—Valuation—Court-fee payable—If same as in suit—Liability to* ad valorem *Court-fee.*

A plaintiff in a suit for accounts, is no doubt entitled to place his own valuation on the relief claimed. If his suit fails and he appeals against the refusal to take an account, the appeal would relate solely to a right to an account, and the appellant might place his own value on the memorandum of appeal. But if the suit results in a decree for a certain amount against the plaintiff, his appeal against such decree is not merely in relation to an account, but is really an appeal against a money decree and he must pay *ad valorem* Court-fee on the amount fee the decree. He cannot be permitted to place an arbitrary value on his appeal for purposes of Court-fee. (*Beaumont, C. J. and Sen, J.*) KASHI RAM SENU *v.* RANGLAL MOTILALSHET. **I.L.R. (1941) Bom. 477 = 195 I.C. 894 = 14 R.B. 84 = 43 Bom L.R. 475 = A.I.R. 1941 Bom. 242.**

——**S. 7 (iv) (f)**—Final decree in suit for dissolution of partnership and accounts—Appeal—Court-fee payable—Basis. *See* 1938 Dig., Col. 479. SHEO KISAN DAS *v.* DANDAS. **I.L.R. (1941) Nag. 344.**

——**S. 7 (iv) (f)**—*Suit for administration—Valuation of plaintiff—If can be questioned by defendant—Remedy in case of under-valuation.*

A suit for administration is a suit for accounts and falls under sub-paragraph (*f*) of Cl. (*iv*) of S. 7, Court-Fees Act. The valuation for the purposes of jurisdiction must be the same as the valuation for the purposes of Court-fees. In such a suit the valuation for purposes of Court-fees and/or for jurisdiction made by the plaintiff cannot be questioned by the defendant. In the case of its turning out that too small a sum had been paid in Court-fees, provision is made in S 11 for payment of additional Court-fees. (*Roberts, C J., Dunkley and Sharpe, JJ.*) MAUNG YA *v.* MAUNG LU GYAND. **1941 Rang L.R. 512 = A.I.R. 1941 Rang. 322 (F.B.).**

——**S. 7 (v)**—*Land with building thereon—Assessment for Court-fees.*

The distinction which is drawn in S. 7 between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and therefore a mill assessed to land revenue should be assessed for purposes of Court-fee on its market value. (*Almond, J.C. and Soofi, J.*) MUKARRAM KHAN *v.* HARDIT SINGH. **196 I.C. 301 = 14 R. Pesh. 25 = A.I.R. 1941 Pesh. 69.**

——**S. 7 (ix)**—*Suit to recover mortgaged property—Second appeal—Court-fee payable.*

In a second appeal from a decree in a suit against a mortgagee for the recovery of the mortgaged property the Court-fees must according to S. 7 (*ix*) of the Court-fees Act, be calculated *ad valorem* on the principal

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money expressed to be secured by the instrument of mortgage. Though the result may seem to be somewhat extraordinary, the Act has to be construed as it stands. (*Allsop J.*) ABDUL HAQ *v.* SHAMSHUD-DIN. **I.L.R. (1941) All. 469 = 1941 A.L.W. 740 = 1941 R.D. 866 = 1941 A.W.R. (H.C.) 249 = 1941 O.A. (Supp.) 602 = 1941 A L.J. 409 = A.I.R. 1941 All. 357.**

——**S. 7 (xi) (cc)**—*Applicability—Suit for ejectment of tenant served with notice of ejectment.*

A suit for ejectment of a tenant who has been served with a notice of ejectment falls under S. 7 (xi) (*cc*) of the Court-Fees Act. The service of such a notice is not by itself sufficient to alter the status of the tenant into that of a trespasser. His position is that of a tenant holding over. (*Bhide, J.*) CHHABBA RAM *v.* NATHU RAM. **194 I.C. 262 = 13 R.L. 527 = 42 P.L.R. 784 = A.I.R. 1941 Lah. 39.**

——**S. 7 (xi) (d) and Sch. I, Art. 1**—*Suit contesting notice of ejectment—Appeal by tenant—Court-fees.*

Where in a suit to contest a notice of ejectment the tenant files an appeal raising, without disputing the relationship of landlord and tenant, certain points in regard to the time of his ejectment and in regard to the decision that he should be ejected without compensation of any kind, the Court-fees payable on the appeal must be the same as those payable on the original suit under S. 7 (*xi*) (*d*) of the Court-Fees Act (*i.e.*,) must be calculated on the value of the rent of the land for the previous year and not *ad valorem* on the value of the compensation claimed. (*Alan Mitchell, F.C.*) RAJA *v.* SHAM-UD-DIN. **20 Lah.L.T. 155.**

——**S. 8 (c)**—Applicability—Case falling within S. 7 (*iv*) (*c*). *See* 1940 Dig., Col. 425. JARIMON KHATOON *v.* SECRETARY OF STATE. **193 I C. 144 = 13 R.C. 372.**

——**S. 8 (c)**—*Relief under S.* 7 (iv) (c)—*Revised valuation—Revision.*

Where the only question is one of valuation, and not one relating to classification, an appeal being excluded under S. 12 (i), the remedy of revision is open, though the revisional power should be exercised only in a proper case, such as where the valuation is manifestly by wrong standard either because it is contrary to accepted principles of valuation or because of a wrong approach to the question. Consequently in a case falling under S. 7 (iv) (*c*) the application of a wrong standard by the Court in determining the correct valuation under S. 8-C, namely the standard laid down in S. 7 (ii) of the Act which is applicable to a different class of suit altogether will attract the revisional jurisdiction of the High Court under S. 115, C. P. Code. (*Biswas and Roxburgh, JJ.*) KANAKLATA DASSI *v.* RAM GOPAL DAS. **A.I.R. 1941 Cal. 509.**

——**S. 8 (c)**—Suit under S.7 (iv)—Revision of plaintiff's valuation—Duty of Court. *See* 1940 Dig., Col. 425. NALININATH MALLIK *v.* RADHASHYAM MARWARI. **192 I.C. 574 = 13 R.C. 321.**

——**S. 8-B (3) and (c)**—Additional Court-fee found due on enquiry not paid—Proper order—C. P. Code, O. 7, R. 11. *See* 1940 Dig., Col. 425. JARIMON KHATOON *v.* SECRETARY OF STATE. **193 I C. 144 = 13 R.C. 372.**

——**S. 12**—*Decision under—When becomes final—Sufficiency of stamp decided without reference to opposite side—If can be questioned later on by the other side.*

The decision is not final within the meaning of the Court-fees Act, S. 12 unless it is reached after both sides have had a chance to be heard. After a plaint is filed and summons is issued to the other side, it is open to the other side to contend that the Court-fee paid is insufficient. It is on deciding such a plea that the Court would come to a 'decision' which under S. 12 of the Act would be final as between the parties. (*Clarke, J.*) GANGOO *v.* SALOO. **196 I.C. 584 = 14 R.N. 114 = 1941 N.L.J. 303 = A.I.R. 1941 Nag. 217.**

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——**S. 12 (1)**—*Construction and scope—Decision under—Finality—Conditions of—If parties should have been heard before decision—Object of sub section.*

It cannot be held that a decision would be final under S. 12 (1) of the Court-Fees Act only if it has been finally arrived at after both parties have been heard. The words "decided" and "decision" are used without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the Court-fee. The real object of S. 12 (1) is to ensure that the Court at as early a stage as possible should finally determine what was the amount of the Court-fee payable before the subject-matter of the suit itself was to be embarked upon ; and once the Court did so determine, the parties were not to be permitted to raise the question again before it. (*King, J.*) MAHALAKSHMAMMA *v.* VENKATANARAYANAMURTHI. **1941 M.W N. 406 = 53 L.W. 740 = A.I.R 1941 Mad. 626 = (1941) 1 M.L.J. 796.**

——**S. 12 (1)**—Valuation for Court-fees by the trial Court—If can be challenged. *See* 1940 Dig., Col. 426. JARIMON KHATOON *v.* SECRETARY OF STATE. **193 I C. 144 = 13 R.C. 372.**

——**S. 12 (2)**—Applicability—If confined to appeal by plaintiff only. *See* 1940 Dig., Col 426. VENKATARAMA SASTRI *v.* VENKATASUBRAMANIA DIKSHITAR. **193 I.C. 758 = 13 R M. 712 = (1940) 1 M.L.J. 478 (2).**

——**S. 12 (2)**—*Construction—Order under—Power of Court to reconsider.*

There is nothing in S. 12 (2) of the Court-Fees Act to justify the view that a Court may not re-consider an order which it has already passed under the sub-section. (*King, J.*) MAHALAKSHMAMMA *v.* VENKATANARAYANAMURTHI. **1941 M.W.N 406 = 53 L.W. 740 = A.I.R 1941 Mad. 626 = (1941) 1 M.L.J. 796.**

——**S. 12 (2)**—Power of appellate Court under, to demand additional Court-fee when no question was raised in Court below. *See* 1940 Dig., Col. 426. CHIDAMBARAM CHETTIAR *In re.* **193 I C. 490 = 13 R M. 677 = (1940) 2 M L.J. 425.**

——**S. 13, Proviso**—Remand order not covering whole of subject-matter—Refund of the whole Court-fee—Legality. *See* 1940 Dig., Col. 427. SHEOLAL *v.* JUGAL KISHORE. **191 I C. 566 = 13 R N 203.**

——**S. 17**—Distinct subject—Suit for redemption of mortgage with claim for surplus profits—If comprises distinct reliefs *See* 1940 Dig., Col. 427. RADHAKRISHNA CHETTY *v* SCHOMBERG. **A.I.R. 1941 Mad. 115 = (1940) 2 M.L.J. 867.**

——**S. 17 (as amended in Bengal)**—*Suit for possession of colliery, arrears of royalty and mesne profits—Trial Court decreeing claim for royalty in part and dismissing other two claims—Appeal—Court-fee payable.*

Plaintiff filed a memorandum of appeal in a suit for *khas* possession of a colliery, arrears of royalty and mesne profits against the decree of the trial Court dismissing his claim for *khas* possession and mesne profits but decreeing his claim for arrears of royalty in part. He valued the claims for *khas* possession and mesne pro

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fits for purposes of court-fees at the same separate figures as in the plaint, and the claim for arrears of royalty at the difference between the amount claimed in the plaint and the amount decreed in his favour by the trial Court.

Held, that the three reliefs claimed in the memorandum of appeal were based on three separate and distinct causes of action within the meaning of S. 17 of the Court-fees Act, as amended in Bengal, and that the memorandum of appeal was chargeable with the aggregate amount of fees with which the memorandum of appeal would be chargeable under the Act in separate suits in respect of each such cause of action. (*Nasim Ali, J.*) KASHIMBAZAR RAJ WARDS ESTATE *v.* THE JOYRAMDANGA COAL CONCERN, LTD.
45 C W.N. 996.

——**S. 17 and T. P. Act, S. 67-A**—*Suit on more than one mortgage—Court-fee payable—S. 17, if controlled by S. 67 A, T. P. Act—Special Acts—One if can override another.*

The word 'distinct subjects' in S. 17, Court-Fees Act, means distinct causes of action. Where a suit is on more than one mortgage the court-fee shall be paid on each mortgage. S 67-A of the T. P. Act does not control S. 17 of the Court-Fees Act. When a subsequent general enactment cannot override or interfere with a special Act, one special Act cannot override or interfere with, the provisions of another special Act. (*Ba U, J.*) R. M. P L. S. CHETTIAR FIRM *v.* KOORMIAH
1940 Rang. L.R. 767 = 193 I.C. 711 = 13 R.R. 264 = A.I.R. 1941 Rang. 95.

——**S. 19, Cl. (xvii)**—*Petition contemplated by.*

The petition mentioned in Cl. (xvii) of S. 19 of the Court-Fees Act must be a petition in respect of, or connected with or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. (*Verma, J.*) SARDAR SINGH *v.* CHAMPA.
1941 A.W.R. (H.C.) 357 = 1941 A.L.W. 1083.

——**Sch. I, Art. 1**—Applicability—Set-off—Counter-claim—Conditions necessary—Suit to restrain company selling shares for alleged debt—Written statement pleading right to exercise its power of sale—If should be stamped. *See* 1940 Dig., Col. 428. U BA PE *v.* SUN PRESS, LTD.
191 I.C. 644 = 13 R.R. 145.

——**Sch I, Art. 1**—Applicability—Suit for account —Decree for specific sum of money against plaintiff—Appeal by latter—Court fee payable. *See* COURT-FEES ACT, S. 7 (IV) (*f*) AND SCH. I, ART. 1.
43 Bom L R. 475.

——**Sch. I, Art. 1 and Sch. II, Art. 17-B, (as amended in Madras)**—*Applicability- Suit for money claiming first charge on certain assets—Decree for money only without charge—Appeal claiming charge on assets —Court fee payable.*

The word "estimate" in Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras) involves the idea of approximation and cannot be interpreted as meaning accurate valuation. Where in a suit to recover a sum of Rs. 18,897 and odd from the defendant as a first charge from and out of certain properties as trust money, the plaintiff gets only a decree but no charge, and the plaintiff appeals against the decree declining to give a first charge and seeks to get a charge on the properties which are valued in the memorandum of appeal at Rs. 9,500, it cannot be said that the relief is incapable of valuation so as to attract Art. 17 B of Sch. II of the Court-Fees Act. The Court-fee payable on the memorandum of appeal is the amount which would be payable under Art. 1, Sch. I, on the sum of Rs. 9,500, which is the value placed by the plaintiff on the property over

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which the charge is claimed. (*Venkataramana Rao, J.*) VINAITHEERTHAL ACHI, *In re.*
1941 M.W.N. 970 = 54 L.W. 526 = (1941) 2 M.L.J. 774.

—— **Sch. I, Art. 1 and Sch. II, Art. 17-B, (as amended in Madras)**—Applicability—Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee—Court-fee—Payable. *See* 1940 Dig., Col. 429. BALAVENKATARAMA CHETTIAR *v.* MARUTHAMUTHU CHETTIAR.
195 I.C. 298 = 14 R.M. 171 = 1941 M.W.N. 169 = A.I.R 1941 Mad. 313 = (1940) 2 M.L.J. 946.

——**Sch. I, Art. 1**—*Court-fee in appeal by defendant —Fixing of valuation—Principle.*

When a dispute is at the stage of an appeal by a defendant who seeks to set aside the whole decree, then the value of the subject-matter in dispute must necessarily be the value of the relief granted by the decree which the appellant wishes to disembarrass himself of. In such a case one has to ask oneself the question 'what is the value to the appellant of immunity from the decree'. Upon the answer, depends the value at which the appeal ought to be assessed. It is not open to the appellant defendant to avoid assessing his appeal at its full valuation merely because it may prove, as a result of the appeal itself, that the plaintiff's valuation was excessive. (*Braund, J.*) BALMAKUND GUPTA *v.* SECRETARY OF STATE.
195 I.C. 448 = 14 R.A. 35 = 1941 A.L.J. 381 = 1941 A L W. 804 = 1941 A.W.R. (H.C.) 185 = 1941 O.A. (Supp). 391 = A.I.R. 1941 All. 295.

——**Sch. I, Art. 1 and United Provinces Encumbered Estates Act (1934), S. 14 (5) Expl**—*Decree amount increased by amendment—Appeal against order of amendment—Court fee payable.*

Where the amount decreed was subsequently increased by an amendment in virtue of S. 14 (5), Expln. of the U. P. Encumbered Estates Act and an appeal is preferred against the order of amendment, it is in substance on appeal really directed against the amended decree passed by the learned special Judge, though the memorandum of appeal merely purported to appeal against the order amending the decree and the case therefore falls under Art. 1, Sch. I and *ad valorem* court-fee is payable. (*Ghulam Hasan and Agarwal, JJ.*) ABDUL AZIZ *v.* NAWAB KHAN.
16 Luck. 653 = 193 I.C. 354 = 13 R.O. 452 = 1941 O.L R. 277 = 1941 A.L.W. 269 = 1941 R D. 464 = 1941 O.W.N. 355 = 1941 O.A. 275 = 1941 A.W.R. (Rev.) 217 = A.I.R. 1941 Oudh 269.

——**Sch. I, Art 1**—*Order refusing application under O. 34, R. 6, C. P. Code—Appeal—Court-fee.*

An application under O. 34, R. 6 is definitely in the nature of a claim for the recovery from the person or other property of the mortgagor of the balance, left over after the proceeds of the sale of the property have been appropriated. The refusal to recover the amount from the person and other property of the mortgagor amounts to a decree as defined by S. 2 (2), C. P. Code, and therefore an appeal therefrom must bear full *ad valorem* Court-fee under Sch. I, Art. 1, Court-fees Act. (*Mir Ahmad and Soofi, JJ.*) INDAR SAIN *v.* SOHAN CHAND.
195 I.C. 239 = 14 R. Pesh. 14 = A.I.R 1941 Pesh. 56.

——**Sch. I, Art. 1 and Sch. II, Art. 17 (iii)**—Suit to declare decree void and illegal—If involves consequential relief—Court-fee payable. *See* 1940 Dig., Col. 429. BIRENDRA KUMAR *v.* BANSA DEVI.
16 Luck. 526 = 191 I.C. 413 = 13 R.O. 225.

COURT-FEES ACT (1870), Sch. I, Art. 4.

——(as amended in Madras), Sch. I, Art. 4—Applicability—Pauper appeal—Order dispaupering—Dismissal of appeal for failure to pay Court-fee and security for costs within time fixed—Application for review—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 1.

(1941) 2 M.L.J. 500 (F.B.).

——Sch. I, Art. 5 and S. 14—*Review—90 days' time—How to be calculated—Calculation of time according to Limitation Act, if permissible—Power to refund.*

When considering the obligation of an applicant for a review to pay Court-fee according to Art. 5 of Sch. 1 of the Court Fees Act, an obligation that depends to some extent on the time at which the application is made, the calculation of the 90 days' time is not to be according to rules applicable to times laid down in the Limitation Act but the 90 days mentioned in the Court-Fees Act is to be taken as simply 90 days. Holidays and time taken for obtaining copies could not be excluded. But in cases of hardship where delay is not due to laches on the part of the applicant the Court has a discretion under S. 14, Court-Fees Act, to give a certificate directing the refund of the excess fee in proper cases. (*Stone, C.J. and Bose, J.*) GANPATRAO *v.* RAMA GANPATI.

I.L.R. (1941) Nag. 392=196 I.C. 556=14 R.N. 112=1941 N.L.J. 205=A.I.R. 1941 Nag. 236.

——Sch. I, Arts. 6 to 9—*Copies not stamped—Acceptance by Deputy Registrar—Effect—Subsequent objection—Time to furnish stamps.*

Where the Deputy Registrar whose duty is to see that all documents presented in the High Court are duly stamped, accepts copies of judgments and decrees filed with an application under S. 81 (2), Government of Burma Act, which have not been stamped as required by Arts. 6 to 9, Court-Fees Act, it is an implied decision that the copies are in order and when an objection is raised that it is not in order the applicant is entitled to time to furnish the necessary stamps. (*Roberts, C.J. and Dunkley, J.*) U CHIT HLAING *v.* U LUN.

196 I.C. 892=A.I.R. 1941 Rang. 294.

——Sch. I, Art. 7 and C. P. Code, S. 149—*Insufficient stamp on decree—Procedure to be followed.*

Where a copy of the decree bears an insufficient stamp, it is only a minor error and should not be allowed to prejudice an appellant's interests. The appellate Court should immediately after the appeal is filed, point out the deficiency and direct the appellant to affix the proper stamp. S. 149, C. P. Code, permits the District Court to make suitable orders in this respect. (*Davies.*) MANGILAL *v.* MOOL CHAND. **1940 A.M.L.J. 91.**

——Sch. I, Art 11—Applicability—"Property"—Membership of Bombay Native Share and Stock Brokers' Association—Right of—If property liable to probate duty. *See* BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES (1939), RR. 36 (*h*) AND 38. **43 Bom.L.R. 943.**

——(as amended by C. P. Court-Fees (Amendment) Act (1935), Sch. I, Art. 12—Applicability—Aggregate of debts due exceeding Rs. 1,000—Individual items below Rs. 1,000—Court-fee, if payable—'Any', meaning of. *See* 1940 Dig., Col. 430. PREMALABAI *v.* PRIYAKUMARI. **191 I C. 731=13 R N. 207.**

——Sch. I, Art. 14—*Meaning—Court-fee payable in revision in suit under S. 9, Specific Relief Act.*

Sch. 1, Art. 14 means that on an application for revision the same amount of Court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. Therefore on an application for revision arising out of a suit instituted under S. 9, Specific Relief Act, the Court-fee payable is the same as has been paid on the plaint. (*Ba U, J.*) U KYAW ZAN *v.* U TUN HLA U. **1941 Rang. L.R 54=194 I.C. 70=13 R.R. 273=A.I.R. 1941 Rang. 126.**

COURT-FEES ACT (1870), Sch. II, Art. 11.

——Sch. II, Art. 1, (as amended in Madras)—*Applicability—Pauper appeal—Oraer for payment of Court fee and security for costs—Failure to pay in time—Dismissal of appeal—Application for review—Court-fee payable.*

A dispaupered appellant was ordered to pay Court-fee on his memorandum of appeal and security for costs of the respondent. On his default in paying them, his appeal was dismissed. An application for review of the order of dismissal was presented with a Court fee stamp of Rs. 2, but the Taxing Officer held that the application should bear *ad valorem* stamp under Art. 4, Sch. I of the Court-Fees Act, as on a memorandum of appeal.

Held, that an order under O. 41, r. 10 (2), C. P. Code, rejecting an appeal for failure to furnish security within the time ordered by the Court was not a decree; nor was an order, rejecting an appeal for failure to pay court fee within the time prescribed, a decree, as it was only an order of dismissal for default within the meaning of S. 2 (2), C. P. Code. Hence the proper Court-fee on the application for review is Rs. 2 under Art. 1, Sch. II, C. P. Code. (*Leach, C.J., Venkataramana Rao and Horwill, JJ.*) KAYAMBU PILLAI, *In re.*

196 I.C. 894=54 L.W. 349=1941 M.W.N. 835=A.I.R. 1941 Mad. 836=(1941) 2 M.L.J. 500 (F.B.).

——Sch. II, Arts. 5, 17 (iii)—*Suit to declare plaintiff statutory tenant on a certain rental—Article applicable.*

Where a plaintiff prayed that a declaration may be given that he is a statutory tenant on behalf of the defendant No. 1 on a rental of Rs. 2, it cannot be a suit to establish a right of occupancy to fall under Art. 5 and so it must fall under Art. 17 (iii) of the Court-Fees Act. (*Harper, S. M.*) BHIM SEN *v.* MADHO SINGH.

1941 R.D. 24=1941 A.W.R. (Rev.) 29=1941 O.A. (Supp.) 18.

——Sch. II, Art. 11 and C.P. Code, S. 95—*Appeal against order under S. 95, C. P. Code—Court-fee payable.*

An order under S. 95, C. P. Code, is not a decree and so it cannot be an order having the force of a decree and so the fixed Court-fee under Art. 11 of Sch. II is the proper Court-fee payable on such appeal. (*Davies.*) RAMESHWAR LAL *v.* SWAROOP NARAIN.

1940 A.M.L.J. 70.

——Sch. II, Art. 11—Applicability—Appeal against decision under S. 14, U. P. Encumbered Estates Act. *See* 1940 Dig., Col. 430. RAMESHWAR BAKHSH SINGH *v.* GOVIND PRASAD. **16 Luck. 153=A.I.R. 1941 Oudh 60.**

——Sch. II, Art 11—*Applicability—Appeal under R. 9, Madras Agriculturists' Relief Act—Court-fee payable.*

In the case of an appeal filed under R. 9 of the rules framed under the Madras Act IV of 1938 Court-fee is payable under Art. 11 of Sch. II of the Court-Fees Act, which is the proper Article to apply. (*Wadsworth and Patanjali Sastri, JJ.*) VENKATARATNAM, *In re.* **I.L.R. (1941) Mad. 935=1941 M W.N. 564=53 L.W. 637=A.I.R. 1941 Mad 639=(1941) 1 M L.J. 721.**

——Sch. II, Art. 11—Applicability—Order of Special Judge under Encumbered Estates Act rejecting written statement of creditor. *See* U. P. ENCUMBERED ESTATES ACT, SS. 9 AND 13 AND COURT-FEES ACT, ART. 11, SCH. II. **1941 A.W.R. (H.C.) 59=1941 A.L.J. 109.**

——**Sch. II, Art. 17**—*Suit under O. 21, R. 63, C. P. Code—Court-fees.*

The Court-fee payable in a suit under O. 21, R. 63, C. P. Code, is that prescribed by Art. 17 of Sch. II of the Court-Fees Act. (*Sen, J.*) SONARAM DUTTA *v.* SITARAM CHAMARIA. **192 I.C. 679=13 R.C 332=72 C.L.J. 526=45 C.W.N 50=A.I.R. 1941 Cal. 28.**

——**Sch. II, Art. 17 (i) (as amended in U. P.)**—Scope—Suit by defeated claimant under O. 21, R. 63—Prayer for injunction to restrain delivery of possession—Delivery already effected—Liability for levy of *ad valorem* Court fee. *See* 1940 Dig., Col. 430. UDAI CHAND LAL *v.* PANNALAL CHAMPA LAL.
13 R.P. 646=A.I.R. 1941 Pat. 174.

——**Sch. II, Art. 17 (iii)**—Applicability—Suit by landlord—Prayer for declaration that order of Revenue Officer fixing reduced rent roll is wrong, illegal and not binding and for enhancement of reduced rent to old rates—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART 17 (*iii*). **22 Pat.L.T. 453.**

——**Sch. II. Art. 17 (iii)**—*Declaratory decree—When could be passed—Relief of possession not implied in—Court-fee for possession, if necessary.*

The law allows a plaintiff if he is in possession of property or if the defendant is not in possession to get a declaratory decree. If he is out of possession he will not be entitled to take possession under that decree. Where the relief of possession is not implied in the declaratory decree Court-fee for possession need not be paid. (*Agarwal and Madeley, JJ.*) BHABOOTI SINGH *v.* CHANDRAPAL SINGH.
196 I.C. 593=14 R.O. 195=1941 O.L.R. 719=1941 O.W.N. 1107=1941 A.W.R. (Rev.) 877=1941 R.D. 857=1941 O.A. 803.

——**Sch. II, Art. 17 (iii) and S. 7 (iv) (c)**—*Suit for declaration that certain decree is not binding on plaintiff—Plaintiff not party to decree—Court-fee payable.*

A suit for a declaration that a decree passed in a suit between the defendants to which the plaintiff was not a party is not binding on him, is a suit for a pure declaration with no consequential relief falling under Sch. II, Art. 17 (*iii*) of the Court-Fees Act, and a court-fee of Rs 10 only is payable. (*Tek Chand and Beckett, JJ.*) ALAM KHAN *v.* MT. BHAG BHARI. **194 I.C. 613=14 R.L. 3=43 P.L.R. 126=A.I.R. 1941 Lah. 159.**

——**Sch. II, Art. 17 (iv)**—*Applicability—Suit to declare award of Registrar of Co-operative Societies ultra vires—'Award' what is included in.*

Where a suit is for a declaration that an award made by the Registrar of Co-operative Societies which directed the plaintiff to pay the opposite party a sum of Rs. 10,244-1-9, is *ultra vires*, the suit is governed by Art. 17 (*iv*) of Sch. II, and it is only a fixed Court-fee and not *ad valorem* Court-fee that is payable. There is no reason to limit the term 'Award' in the article to an award by arbitrators. Any Judicial decision which is not a decree might be considered to be an award for the purposes of Art. 17 (*iv*) of Sch. II. (*Clarke, J.*). KISANLAL *v.* CO-OPERATIVE CENTRAL BANK LTD. **1941 N.L.J. 254=A.I.R. 1941 Nag. 243**

——**Sch. II, Art. 17 (vi)**—*Appeal in partition suit—Finding by trial Court that plaintiff was not in possession—Court-fee payable.*

The wording of Art. 17, Sch. II, Court-Fees Act shows clearly and indubitably that when a suit falls under any one of the clauses of that article, the plaint as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed court-fee of Rs. 10 only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value.

Therefore, in an appeal arising from a suit for partition of alleged joint properties, of which the plaintiff claimed to be in actual or constructive possession, a court-fee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court has found the plaintiff not to be in possession of some or all such properties. (*Tek Chand, Skemp and Din Mohammad, JJ.*) DIWAN CHAND *v.* DHANI RAM. **I.L.R. (1941) Lah. 234=194 I.C. 230=13 R.L. 521=43 P.L.R 147=A.I.R. 1941 Lah. 123 (F.B.).**

——**Sch. II, Art. 17 (vi)**—Applicability—Partition suit—Appeal against rejection of defence of paramount possession in lieu of dower. *See* 1940 Dig., Col. 431. MUNIRAN *v.* MUKHTAR BEGAM. **192 I.C. 600=13 R.A. 346.**

——**Sch. II, Art. 17 (vi)**—Applicability—Suit for partition by Hindu coparcener—Plaintiff claiming to be in joint possession—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). **20 Pat. 780.**

——**Sch II, Art. 17 (vi) and S. 7 (iv) (b)**—*Suit by Mahomedan co-sharer for partition—Allegation that he is in constructive possession of entire property and in partial actual possession—Court-fees.*

S. 7 (*iv*) (*b*) applies to cases relating to joint family property, where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment, and not where he is in enjoyment of the right, but merely seeks to change the mode of such enjoyment. S. 7 (*iv*) (*b*) does not apply to a suit for partition of joint property by a person alleging himself to be in joint possession, whether he owns the property in coparcenary, or as a tenant-in-common, with the defendants. Hence a Mahomedan co-sharer, who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property, can bring a suit for partition on a stamp of Rs. 10 only and the case falls within Art. 17 (*vi*) and not under S. 7 (*iv*) (*b*), Court-Fees Act. A I.R. 1939 Lah. 568, Overr. (*Tek Chand, Abdul Rashid and Sale, JJ.*) MOHAMMAD SOHAIL *v.* GHULAM RASUL.
I.L.R. (1941) Lah. 308=194 I.C. 125=13 R.L. 511=43 P.L.R. 238=A.I.R. 1941 Lah. 152 (F.B.).

——**Sch. II, Art. 17 (vii) (as amended in Bombay)**—Applicability—Suit to set aside prior decree in suit for partition and for fresh partition of all properties—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). **I.L.R (1941) Kar. 102.**

——**Sch. II, Art. 17 (viii)**—Declaratory suits—Determination of court-fee — True criterion. *See* COURT-FEES ACT, SS. 7 (*iv*) (*c*) AND SCH. II, ART. 17 (*iii*). **43 P.L.R. 106 (F.B.).**

——**Sch. II, Art. 17 (1) (as amended in Bihar and Orissa)**—*Applicability—Suit by defeated claimant under O 21, R. 63, C. P. Code—Prayer for declaration of title and for injunction against defendant to restrain delivery of possession or any illegal act by defendant—Court-fee payable.*

A suit by a defeated claimant under O 21, R. 63, C. P. Code, for a declaration of his title to the property in suit, and for a permanent injunction on the defendant so that no delivery of possession of the property in suit may take place, and to prevent the defendant from taking any illegal action whatsoever to the detriment of the plaintiff, is governed for purposes of court-fee by Sch. II, Art. 17 (1) of the Court-Fees Act as amended in Bihar and Orissa and the court-fee payable is that prescribed by that article and not *ad valorem* court-fee. (*Harries, C.J. and Manohar Lall, J.*) UDAI CHAND

COURT-FEES ACT (1870), Sch. II, Art. 17.

LAL *v.* PANNALAL CHAMPA LAL. **7 B.R. 640 = 193 I.C. 782.**

——**Sch. II, Art. 17 (3)**—*Applicability—Suit to declare plaintiff's interest not affected by gift in favour of defendant—Nature of*—Ad valorem *Court-fee paid by mistake in suit and appeal—Same fee if should be paid in second appeal also.*

Where the plaintiff asks for a declaration that his right, title or interest in the lands in suit is not affected by a deed of gift in favour of the defendant and to which he was not a party, the suit is one for a declaration without consequential relief and falls under Art. 17 (3), Sch. II, Court-Fees Act. Because the plaintiff by mistake overpaid the Court-fees both in the Court of first instance and in the lower appellate Court (*i.e.*) paid *ad valorem* Court-fees, it does not follow that he should be called upon to pay the same fees in second appeal. (*Ba U, J.*) MA WA NU *v.* MA THAN.

1941 Rang.L.R. 387 = A.I.R. 1941 Rang. 269.

——**Sch. II, Art. 17-A (as amended in Madras)**—Suit for declaration filed in District Munsif's Court—Transfer to Subordinate Judge's Court for re-trial—Decree by Sub Court—Appeal—Court-fee payable—Decree—If decree of Munsif's Court. *See* 1940 Dig., Col. 432. CHIDAMBARAM CHETTIAR, *In re.*

193 I.C. 490 = 13 R.M. 677 = (1940) 2 M.L.J. 425.

——**Sch. II, Art. 17-A (1)(as amended in Madras)**—Applicability—Decree against temple in suit on promissory note by hereditary trustee—Suit by worshippers to declare not binding on temple as being collusive—Temple and trustee made defendants to suit—Court-fee payable. *See* COURT FEES ACT (MADRAS), S. 7 (*iv*) (*a*). **53 L.W. 311 = (1941) 1 M.L.J. 414**

——**Sch. II, Art. 17-B (as amended in Madras)**—Applicability—"Estimate"—Meaning of. *See* COURT-FEES ACT, SCH. I, ART. 1 AND SCH. II, ART. 17-B.

54 L W. 526 = (1941) 2 M L.J. 774.

CRIMINAL PROCEDURE CODE (V OF 1898), Ss. 1 (2) and 162—*Construction and scope—Information to police officer leading to discovery of fact—If inadmissible—S. 27, Evidence Act—If repealed by S. 162, Cr. P. Code.*

Information leading to the discovery of a fact made to a police officer and *prima facie* admissible under S. 27 of the Evidence Act is not inadmissible by reason of S. 162, Cr.P. Code. S. 27 of the Evidence Act is not affected by S. 162, Cr. P. Code, being saved by S. 1 (2), Cr. P. Code. S. 1 (2), Cr. P. Code, enacts a rule of construction to be applied in the interpretation of the Code. S. 162 does not contain a specific provision that S. 27 of the Evidence Act is not to prevail over it. To read S. 162, Cr. P. Code, as overriding S. 27 of the Evidence Act, is to ignore the terms of S. 1 (2), Cr. P. Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* BIRAM SARDAR. **I.L.R. (1941) Bom. 333 = 194 I.C. 122 = 42 Cr.L.J. 519 = 13 R.B. 359 = 43 Bom. L R. 157 = A.I.R. 1941 Bom. 146.**

——**S. 2 (1)**—Special law—S. 27 of the Evidence Act—If special law—If affected by S. 162, Cr. P. Code. *See* EVIDENCE ACT, S. 27. **1941 P.W N. 653.**

——**Ss. 4 (1) (h) and 204**—*Complaint merely stating that certain account books used in Court contained false entries, without specifying those entries—If discloses any offence—Process, if can be issued.*

A complaint which consists simply of a statement to the effect that certain account books used before a Court in the course of an enquiry into an offence alleged to have been committed under Ss. 406 and 424, I. P. Code, contained false entries, discloses no offence whatever, when no attempt is made to specify what these entries were and all that was said was that they had been fabricated with the intention that they might appear in evidence in subsequent judicial proceedings. No process can issue upon vague allegations of this character which do not constitute a statement of any definite offence at all. (*Bartley and Lodge, JJ.*) HARI CHARAN BOSE *v.* BHABANI CHARAN CHAKRAVARTY. **45 C.W.N. 1074.**

CR. P. CODE (1898), S. 54.

——**Ss. 9, 193 (2) and 409**—*Combined effect on the powers of Sessions Judge and Assistant Sessions Judge with reference to appeals.*

The effect of Ss. 9, 193 (2) and 409, Cr. P. Code, is that an Additional Sessions Judge can hear all the appeals which lie to the Sessions Judge and the Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge. (*Agarwal, J.*) CHANDRA KUMAR DIKSHIT *v.* RAMESH CHANDRA. **196 I.C. 664 = 1941 A.W.R. (C.C.) 313 = 1941 A.Cr.C. 241 = 1941 O.L.R. 734 = 1941 O.W.N. 1130 = 1941 O A. 822.**

——**S. 9 (3)**—*Appointment of Subordinate Judge as Assistant Sessions Judge—If to be by name—General notification of appointment of Subordinate Judge of Specific Court as Assistant Sessions Judge of particular division—Sufficiency to confer jurisdiction.*

A Sessions case which was pending in the Court of a Subordinate Judge who was appointed as Assistant Sessions Judge by name stood posted to 14—9—1940 for trial. He was succeeded by a Subordinate Judge who was not appointed Assistant Sessions Judge by name. He took charge of his office on 28—8—1940, and took up the trial of the case on 14—9—1940 and convicted the accused. There was a general notification of the Governor-in-Council dated 22—3—1929 appointing the Subordinate Judge of that Court as Assistant Sessions Judge of the particular Division, under S. 9 (3) of the Cr. P. Code.

Held, on reference by the Sessions Judge, that the conviction must be set aside as it was without jurisdiction. (*Lakshmana Rao, J.*) EMPEROR *v* SHAIK SILAR. **1941 M.W.N. 62 = A.I.R. 1941 Mad. 681.**

——**S. 29**—Jurisdiction—Offence under S. 10, Mussalman Wakf Act—Proper Court to try and punish—Ordinary Criminal Court or District Court. *See* MUSSALMAN WAKF ACT, S. 10.

(1941) 2 M.L.J. 541.

——**S. 30**—*Magistrate invested with powers under—Powers of—Magistrate not describing himself as such—Sentence of fine—Limit to—Penal Code, S. 63.*

The power of an Additional District Magistrate who is invested with powers under S. 30, Cr. P. Code is not necessarily limited to the powers of a Magistrate of the first class, although he does not describe himself on the record as exercising such powers. What really matters is not what the Magistrate calls himself but what powers he really does exercise. The power of such a Magistrate to pass a sentence of fine is not specifically limited except as laid down in S. 63, I. P. Code, that it should not be excessive. (*Skemp, J.*) MIAN IFTIKHAR-UD-DIN *v.* EMPEROR. **196 I.C. 485 = 14 R.L. 157 = 42 Cr.L.J. 890 = 43 P L.R. 378 = A.I.R. 1941 Lah. 324.**

——**S. 54**—Applicability—Non-cognizable offence. *See* PENAL CODE, S. 323. **22 Pat.L.T. 29.**

——**Ss. 54 and 56**—*Cognizable offence—Arrest without warrant, when justified—Arrest under orders of superior officer—Procedure—Absence of written order—Legality of arrest.*

A police officer may act under S. 54, Cr. P. Code, and arrest without a warrant any person concerned in a cognizable offence, if he is acting on his own initiative or independently in the course of his duty. But if he is

CR. P. CODE (1898), S. 54.

merely doing what his superior officer tells him to do, an order in writing must be delivered to him under S. 56 In the absence of such an order there is no valid or legal arrest. (*Sharpe, J.*) THE KING *v.* SRIDHAR.

1941 Rang.L.R. 148 = 194 I.C. 843 = 14 R R. 23 = 42 Cr.L.J. 629 = A.I.R. 1941 Rang. 180.

——**S. 54**—Village Chowkidar—If police officer—Powers of arrest—Arrest of person by Chowkidar on mere oral direction of Police Sub-Inspector—Legality—Rescue of such person—Hurt caused to chaukidar—Offence—Penal Code, Ss. 225 and 323. *See* 1940 Dig., Col. 434. JOGRAJ *v.* EMPEROR. **191 I C. 590 = 13 R.P. 358 = 22 Pat.L.T. 80 = 7 B.R. 236 = 42 Cr.L.J. 199.**

——**S. 54 (2)**—*Arrest under—When justified.*

S. 54 (2), Cr. P. Code, contemplates that the police officer acting in the exercise of the powers given by it must have definite knowledge or at least definite information that a certain person is in possession of an implement of house breaking before putting that person under arrest. An arrest cannot be made when there is no such information and it could not be justified on the ground that on search, such an implement happened to be found in the possession of the person arrested. (*Ismail and Mulla, JJ.*) EMPEROR *v.* ABDUL HAKIM.

1941 A.W.R. (H.C.) 353 = 1941 A.L.W. 999 = 1941 A.Cr.C. 263.

——**Ss. 75 to 86**—Duty of Court—Arrest of persons residing outside local limits of jurisdiction of Court issuing warrant—When to be directed—Duty of Court to satisfy itself that the persons to be arrested have committed offence. *See* 1940 Dig., Col. 434. SAGARMAL KHEMRAJ, *In re.* **I.L.R. (1941) Bom. 16 = 191 I.C. 605 = 13 R.B. 199 = 42 Cr.L.J. 205.**

——**S. 75** — Warrant under — Execution outside British India. *See* 1940 Dig., Col. 435. EMPEROR *v.* KARIMBUX. **13 R.S. 121 = 42 Cr.L.J. 49.**

——**Ss. 77 and 83**—Relative scope—Latter if overrides former. *See* 1940 Dig., Col. 436. SAGARMAL KHEMRAJ, *In re.* **I.L.R. (1941) Bom. 16 = 191 I.C. 605 = 13 R.B. 199 = 42 Cr.L.J. 205.**

——**Ss. 77 and 83**—Warrants—Form and contents of—Warrant not addressed to any definite officer and not containing address, description and occupation of persons to be arrested—Validity of. *See* 1940 Dig., Col. 436. SAGARMAL KHEMRAJ, *In re.* **I.L.R. (1941) Bom. 16 = 191 I.C. 605 = 13 R.B. 199 = 42 Cr.L.J. 205.**

——**Ss. 82 and 83**—*Magistrate exercising jurisdiction in Baluchistan—Power to issue warrant for arrest of person in British India.*

The Baluchistan Agency Territories are not part of British India, but are areas in which by lease, treaty or otherwise the Governor-General in Council, now to be replaced by the Crown representative, has acquired jurisdiction. Hence a Magistrate exercising jurisdiction in those places cannot issue a warrant for the arrest of a person in British India, and require its execution under S. 83, Cr. P. Code. (*Davis, C.J., Lobo and Weston, JJ.*) EMPEROR *v.* KARIMBAKSH.

I.L.R. (1941) Kar. 247 = 192 I.C. 806 = 42 Cr.L.J. 326 = 13 R.S. 206 = A.I.R. 1941 Sind 20 (F.B.).

——**Ss. 82 and 83**—Magistrate in British Baluchistan or Baluchistan Agency Territories—Power to issue warrant to be executed outside British Baluchistan or Baluchistan Agency Territories. *See* 1940 Dig., Col. 437. EMPEROR *v.* KARIMBUX. **13 R.S 121 = 42 Cr.L.J. 49.**

——**Ss. 82 and 83**—*Warrants issued by Courts in British Baluchistan—Execution in British India.*

CR. P. CODE (1898), S. 88.

British Baluchistan is part of British India. Hence warrants issued by Courts in British Baluchistan can be executed under S. 82, Cr. P. Code, at any place in British India. Therefore the warrant issued by the District Magistrate of Sibi for the arrest of an accused in the district of Nawabshah can be lawfully executed in that District. (*Davis, C.J., Lobo and Weston, JJ.*) EMPEROR *v.* KARIMBAKSH.

I.L.R. (1941) Kar. 247 = 192 I.C. 806 = 42 Cr.L.J. 326 = 13 R S. 206 = A.I.R. 1941 Sind 20 (F.B.).

——**Ss. 87 and 88**—*Orders under—Condition precedent to.*

Unless it is clearly shown and found that the accused has absconded or is concealing himself so that the warrant against him cannot be executed, which is a condition precedent under Ss. 87 and 88, Cr. P. Code, neither a proclamation under S. 87 nor an attachment under S. 88 can issue. Where the accused is shown to have left British India long before and is not shown to have left so, knowing of the warrant, an order of proclamation under S 87 and an order of attachment under S. 88 are without jurisdiction. (*Somayya, J.*) VELLAYAPPA CHETTIAR *v.* ALAGAPPA CHETTIAR. **197 I.C. 102 = 54 L.W. 478 = 1941 M.W.N. 763.**

——**S. 88 (6-D)**—*Scope—Parties to suit under—Frame of—Relief—Attachment of paddy in execution of order under S. 488, Cr. P. Code—Claim—Rejection—Property sold and proceeds kept in Court—Suit for recovery of money by defeated claimant—Competency—Government—If necessary party—Failure to ask for declaration—If fatal.*

The respondent obtained an order for maintenance against her husband under S. 488, Cr. P. Code, and got some paddy attached in execution of that order. The paddy was subsequently sold by the Magistrate and the sale proceeds were kept in his Court. The appellant, the 2nd wife of the respondent's husband, had preferred a claim to the paddy attached but it was rejected. She then brought a suit to recover the money (sale proceeds) either from the Magistrate's Court or from the respondent in the event of the money having been paid over to her by the Magistrate. The suit was dismissed on the ground that the appellant failed to establish her title. In appeal, the appellate Court without going into the question of title, dismissed the appeal on the ground that the suit was not competent as the Secretary of State had not been impleaded as a party to the suit. It was also pleaded that the suit should have been framed as one for a declaration and not for recovery of money.

Held, (1) that the Government did not and could not lay any claim to any portion of the money realised by the sale of paddy and that the only party interested in the result was the respondent and the suit was against her, and since the Government was not a necessary party, the suit was maintainable without impleading the Government under S. 88 (6-D), Cr. P. Code; (2) that the mere fact that on account of the sale of the attached property the appellant (claimant) asked for recovery of the money instead of a declaration, did not take the suit out of the category of suits contemplated by S. 88 (6-D), Cr. P. Code; (3) that even assuming that the prayer in a suit under S. 88 (6-D) should be one for a declaration, since all the necessary facts had been given in the plaint, it was the duty of the Court to grant the relief to which a party was found entitled even if it had not been by a mistake asked for by the party concerned. (*Abdur Rahman, J.*) GANGAYYA *v.* LAKSHMI DEVI. **54 L.W. 362 = 1941 M.W.N. 865 = (1941) 2 M.L.J. 510.**

CR. P. CODE (1898), S. 90.

——**S. 90 (b)**—*Power to issue warrant of arrest—Conditions.*

The power to issue a warrant of arrest under S. 90 *b*), Cr. P. Code, depends on due service of summons, n the absence of anything to show that the requirements of S. 70 of the Cr. P. Code have been complied with, a Magistrate has no power to issue a warrant of arrest against a witness. (*Dhavle, J.*) CHANDER KUER *v.* EMPEROR. **191 I.C. 193=13 R.P. 314=42 Cr.L.J. 103=7 B.R. 166=A.I.R. 1941 Pat. 206.**

——**S. 94**—*Application under—Discretion of Magistrate to grant prayer in.*

When an application is made under S. 94, Cr. P. Code asking that the record of the inquiry made under S. 144, Cr. P. Code should, be sent for from the District Magistrate's office, it is clearly within the discretion of the Magistrate, having details already on the record to refuse, if he so sees fit, to call for the further details. (*Davies, J.*) KRISHNA GOPAL *v.* CROWN.
1940 A.M.L.J. 96.

——**S. 94**—*Construction—Order for production of account books—Duty of Court—Right of complainant to inspect all books—Court, if bound to give unrestricted inspection.*

S. 94, Cr. P. Code, cannot be construed as meaning that an order for production under the section involves as a necessary consequence a right on the part of the complainant to inspect all the books produced. The true view is that when an application is made to a Court, or to a police officer in the mofussil under S. 94 for production of documents, the Court is bound to consider whether there is a *prima facie* case for supposing that the documents are relevant. All that the Court can do is to consider whether books of a particular type are likely to have a bearing on the matter. If it thinks they are, then it can order production. But such an order for production cannot be held as involving an obligation on the Court to give inspection of all the books produced to the complainant, though the Court has power to order such inspection. The Magistrate must consider the question at a later stage, either at the trial or inquiry, or on a special application, at which the Magistrate can hear the accused as well as the complainant, and he can only order inspection of those books which the complainant satisfies him are really relevant. (*Beaumont, C. J., Divatia and Macklin, JJ.*) HUSSENBHOY ABDOOLABHOY *v.* RASHID B. VERSHI.
I.L.R. (1941) Bom. 492=196 I.C. 267=14 R.B. 120=42 Cr.L.J. 831=43 Bom.L.R. 523=A.I.R. 1941 Bom 259 (F.B.).

——**S. 94**—Discretion of Court—Limits to exercise of—If controlled by S. 162, Cr P. Code—Interference in revision with order for production of documents. *See* 1940 Dig., Col. 437. EMPEROR *v.* BILAL MAHOMED.
42 Cr.L.J. 58.

——**S. 103**—Applicability—Search under Opium Act. *See* OPIUM ACT, S. 15 AND CR.P. CODE, SS. 102 AND 103. **1941 Rang.L.R. 552.**

——**S. 103**—*Legality of search—One of witnesses alone coming from immediate neighbourhood.*

The provision in S. 103, Cr. P. Code, that the officer making the search shall take with him two respectable persons "of the locality", must be regarded as directory rather than mandatory so far as the word "locality" goes. The fact that only one witness came from the immediate neighbourhood and the others came from some little distance does not render the search illegal. (*Young, C J. and Blacker, J.*) EMPEROR *v.* DARSHAN SINGH. **I.L.R. (1941) Lah. 370=196 I.C. 106=14 R.L. 136=43 P.L.R. 536=42 Cr.L.J. 812=A.I.R. 1941 Lah. 297.**

CR. P. CODE (1898), S. 112.

——**S. 106**—*Applicability — Case under S. 75, Madras City Police Act.*

In the case of a conviction under S. 75 of the Madras City Police Act, an order under S. 106, Cr. P. Code, is not called for. (*Lakshmana Rao, J.*) SIVAKALATHI GRAMANI *v.* EMPEROR. **196 I.C. 575=1941 M.W.N. 221 (2)=A.I.R. 1941 Mad. 488.**

——**S. 106**—Applicability—Person convicted under S. 510, Indian Penal Code—Order against him under S. 106, Cr. P. Code—Legality. *See* 1940 Dig., Col.438. VENKATAPPA, *In re.* **191 I.C. 240=42 Cr.L.J. 16.**

——**S. 107**—*Applicability—Dispute about land or water—Power to take action under S. 107 instead of under S. 145.*

In the case of disputes about land or water, etc., Magistrates have power to proceed under S. 107, Cr. P. Code, in preference to S. 145, Cr. P. Code, if they think it desirable (*Horwill, J.*) KRISHNASWAMI GOUNDAN *v.* CHINNASWAMI. **1941 M.W.N. 960.**

——**S. 107**—*Offence under S. 396, I. P. Code—If involves breach of peace.*

The commission of an offence by a person under S. 396, Penal Code, involves a breach of the peace, especially where fire-arms are used and death is caused and therefore entails a forfeiture of the bond executed by him under S. 107, Cr. P. Code. In such a case the forfeiture of the whole amount of the security is justified. (*Almond, J.C.*) SHER MAHOMED *v.* EMPEROR.
195 I.C. 588=14 R. Pesh. 19=42 Cr.L.J. 754=A.I.R. 1941 Pesh. 63.

——**S. 108 and Penal Code, S. 153-A**—Isolated seditious or objectionable speech—Under what provision of law to be proceeded against. *See* 1940 Dig., Col. 440. EMPEROR *v.* SWAMI SARUPANAND.
16 Luck. 260=42 Cr.L.J. 35=A.I.R. 1941 Oudh 98.

——**S. 109 (a)**—*Applicability—Conditions—Definite attempt at concealment—Necessity for finding.*

In order to apply S. 109 (*a*), Cr. P. Code, there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise indicating a desire to hide the fact that the person in question is present within the local limits of the Magistrate's jurisdiction. The clause should be applied with proper discretion. It cannot be applied to a person who is merely found talking at night time with bad characters in a place open to the public or to a person who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. (*Manohar Lall, J.*) LAKHMAN KURMI *v.* EMPEROR. **194 I.C. 295=13 R.P. 700=7 B.R. 747=22 Pat L.T. 545=1941 P.W.N. 443=42 Cr.L J. 554=A.I.R. 1941 Pat. 478.**

——**S. 109 (a)**—*Applicability—Requisites.*

S. 109 (*a*), Cr. P. Code, is applicable to a person who being or coming within the local limits of the jurisdiction of a certain Magistrate takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate. (*Ghulam Hasan, J.*) CHHUTAI *v.* EMPEROR. **194 I.C. 740=14 R.O. 38=1941 O.W N. 867=1941 O.L R. 521=1941 A L.W. 767=1941 A.Cr.C. 180=1941 A.W.R. (C.C.) 241=42 Cr..L.J. 617=1941 O.A 564=A.I.R 1941 Oudh 509.**

——**S. 112**—*Jurisdiction — Subsequent events—Magistrate's power to take notice of—Supplementary order based on subsequent events and on subsequent conduct of person proceeded against—Legality.*

CR. P CODE (1898), S. 112.

It is open to a Magistrate holding an enquiry after the passing of a preliminary order under S. 112, Cr. P. Code to take judicial notice of what has taken place after the institution of proceedings and the behaviour of a person proceeded against after the institution of proceedings and to pass a supplementary order under S. 112. There is nothing in the Code which prohibits the issuing of a supplementary order under S. 112. It is not illegal or objectionable. (*Horwill, J.*) SRINIVASALU REDDIAR. *In re.* (1941) 2 M.L.J. 1036.

——**S. 112**—*Order under—Contents of—Particulars required not set forth—Effect of—Order for security for good behaviour—Legality.*

Where an order served under S. 112, Cr. P. Code, does not set forth the particulars required, namely, the circumstances of the charges against him, the amount of the bond to be executed by him, the term for which it is to be in force and the number, class and character of the sureties required, it is defective; and it is not lawful for the Magistrate to pass an order for security for good behaviour under S. 110, Cr. P. Code (*Horwill, J.*) MANICKAM *v.* EMPEROR. **1941 M.W.N. 512 = 54 L.W. 63.**

——**Ss. 112 and 107**—*Proceeding under S. 107 drawn up only after preliminary hearing—Notice not specifying any wrongful act—Validity of proceeding.*

Proceedings under S. 107, Cr. P. Code, are liable to be quashed on the ground that the notice does not specify any particular wrongful act that the Magistrate was satisfied was likely to be committed by the accused, but not after the whole matter has been enquired into, unless there is a reasonable suggestion of possible prejudice, or unless the defect goes to the jurisdiction. But where such proceedings were drawn up only after a preliminary hearing in which the accused were made aware of what it was for which they were going to be proceeded against, the accused could not be prejudiced in any way by an omission to set forth the substance of the information in the initial proceeding nor could such omission affect the jurisdiction of the Magistrate in the matter so as to make the proceeding void. (*Dhavle, J.*) BANGALI AHIR *v.* CHATURBHUJ PRASAD. **192 I.C. 463 = 13 R P. 505 = 7 B.R. 430 = 42 Cr.L J. 296 = 22 P.L.T. 967 = A.I.R. 1941 Pat. 241.**

——**Ss. 118, 120 and 123**—*Construction—Substantive sentences for theft and under Criminal Tribes Act—Separate sentence for failure to give security under S. 118—How to run—Cr. P. Code, S. 397.*

A Magistrate who convicted a person under the Criminal Tribes Act directed a sentence of six months' rigorous imprisonment under S. 22 (2) (*a*) of that Act to run after the expiry of two other sentences of imprisonment, one of twelve months for an offence of theft, and another of one year's rigorous imprisonment passed in default of giving security under an order made under S. 118, Cr. P. Code.

Held, on a reference by the District Magistrate, (*i*) that neither the first proviso nor the second proviso to S. 397, Cr. P. Code, would apply to the case; (*ii*) that under Ss. 120 and 123, Cr. P. Code, an accused who is sentenced to undergo imprisonment in default of security and at the same time is undergoing a substantive sentence of imprisonment for another offence, shall be called upon to give security only after the expiry of the substantive sentence and the order for imprisonment under S. 123 should not be made until after the sentence of substantive imprisonment has been undergone; (*iii*) that since no special order was made under S. 397, Cr. P. Code, the imprisonment for theft and that in default of giving security would be governed by Ss. 118, 120 and 123, Cr. P. Code, and the sentence under the Criminal Tribes Act must be considered apart from the special provisions of S. 120 or 123 Cr. P. Code, and would take its course according to the ordinary rule of law laid down in S. 327, Cr. P. Code, namely, that the sentences should be consecutive unless specially directed to run concurrently; and (*iv*) that therefore the sentence of imprisonment for the offence under the Criminal Tribes Act should commence on the expiry of the sentence for theft, and the order of imprisonment for failure to give security should be passed and the period of imprisonment for default should commence to run from the date of expiry of the sentence of imprisonment for the offence of theft. (*Davis, C.J. and Lobo, J.*) EMPEROR *v.* FAZUL KHUSH MAHOMED. **I.L.R. (1941) Kar. 63 = 196 I.C. 891 = A.I.R. 1941 Sind 190.**

CR. P. CODE (1898), S. 139.

——**Ss. 123 (6) and 108**—Rigorous imprisonment for failure to give security in proceedings under S. 108—Legality. *See* 1940 Dig., Col. 442. EMPEROR *v.* SWAMI SARUPANAND. **16 Luck. 260 = 42 Cr L.J. 35 = A.I.R. 1941 Oudh 98.**

——**Ss. 133, 139, 139-A**—*Order under S. 133—Proper procedure thereafter—Failure to proceed under S. 139-A in the first instance—Enquiry if proper.*

S. 139-A, Cr. P. Code, provides that where an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of any way, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, and if he does so, the Magistrate shall, before proceeding under Ss. 137 or 138, inquire into the matter. If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and if he finds that there is no such evidence he shall proceed as laid down under S. 137 or 138 as the case may require. Where the Magistrate had proceeded under S. 137 without first proceeding under S. 139-A it was *held* that there was no proper enquiry. (*Bennett, J.*) PRATAP NARAIN *v.* RAM KUMAR. **192 I.C. 70 = 13 R.O. 333 = 1941 A.Cr.C. 8 = 1941 O L R. 55 = 1941 A W R. (C.C.) 90 = 42 Cr.L J. 241 = 1941 O.W.N. 54 = 1941 O.A. 35 = A.I.R. 1941 Oudh 271.**

——**Ss. 135 and 139-A**—*Procedure—Denial of right of public way—Magistrate deciding against plea—Subsequent entertainment of prayer for jury—If justified.*

Where the magistrate in proceedings under S. 135, Cr. P. Code, finds that the petition filed by the party called upon to show cause is practically a denial of the right of public passage, if after deciding it under S. 139-A, Cr. P. Code, against that party, he entertains his prayer for appointment of a jury, he acts rightly and his order cannot be interfered with in revision. (*Dhavle, J.*) HARILAL SINGH *v.* DEO NARAIN SINGH. **195 I.C. 602 = 14 R.P. 166 = 7 B.R. 954 = 1941 P.W.N. 625 = 42 Cr.L.J 784 = 22 Pat.L.T. 312 = A.I.R 1941 Pat. 370.**

——**S. 139**—Scope—Power of Court—Juror expressing opinion before completion of appointment of jury—Effect—Jury with such juror—If proper—Report—Legality—Power of Court to appoint fresh jury. *See* 1940 Dig., Col. 442. KEWAL SARAN SINGH *v.* KAMLA PATI LAL. **191 I.C. 595 = 13 R P 361 = 7 B R. 239 = 42 Cr.L.J. 202.**

——**Ss. 139 (2) and 140**—*Applicability—Order under S. 133 not made absolute—Procedure.*

CR. P. CODE (1898), S. 139-A.

Where an order under S. 133, Cr. P. Code, is not made absolute under S. 139 (1), Cr. P. Code, S. 140, Cr.P Code, does not apply and further proceedings must be dropped under S. 139 (2). (*Lakshmana Rao, J.*) MANICKAVASAGA NADAR *v.* KRISHNASWAMI IYER. **1941 M.W.N. 813.**

——**S. 139 A**—Scope—Duty of Magistrate—Denial of public right of way—Long user by private person of alleged public way—*Bona fide* assertion of claim—Procedure. *See* 1940 Dig., Col. 443. BHAJOO GOPE *v.* GHOLAM HAIDER. **193 I.C. 336=13 R.P. 589=42 Cr L.J. 401=7 B.R 504.**

——**S. 139-A**—Scope—Non-compliance — Effect—Magistrate not ascertaining whether there is evidence in support of denial of public right but deciding question of existence of public right—Propriety of. *See* 1940 Dig., Col. 443. MUNI LAL AGARWALA *v.* PUBLIC OF BHAGALPUR. **42 Cr.L.J. 34=A.I.R. 1941 Pat, 38.**

——**S. 139-A**—Scope — Non-compliance—Effect on proceedings. *See* 1940 Dig., Col. 443. NIRSU RAUT *v.* SOMAR NONIA. **193 I.C. 371=13 R.P. 592=42 Cr.L.J. 413=7 B.R. 601.**

——**S. 141**—Applicability—Jury defectively constituted or exceeding its functions. *See* 1940 Dig., Col. 443. KEWAL SARAN SINGH *v.* KAMLA PATI LAL. **191 I.C. 595=13 R.P. 361=7 B.R. 239=42 Cr.L.J. 202.**

——**S. 144**—Interpretation—'Or to the public generally when frequenting or visiting a particular place'. *See* 1940 Dig., Col. 446 BHAGWATI PRASAD *v.* EMPEROR. **I.L.R. (1940) All. 662=191 I C 360=13 R.A. 230=42 Cr.L.J. 120.**

——**S. 144**—Order under—Effect of—Exercise of right of possession under—If can give rise to adverse possession. *See* LIMITATION ACT, ART. 120. **(1941) 1 M.L.J. 322.**

——**S. 144**—'Particular place'—What is meant by. *See* 1940 Dig., Col. 446. BHAGWATI PRASAD *v.* EMPEROR. **I.L.R. 1940 All. 662=191 I C 360=13 R.A. 230=42 Cr.L.J 120.**

——**Ss. 144, 145 and 147**—*Procedure—Duty of Magistrate—Proceedings under S. 147—Dispute about right exercisable at particular seasons - Magistrate dropping proceedings after season was over without taking evidence—Jurisdiction—Revision.*

It is clear from the terms of Ss. 144, 145 and 146, Cr. P. Code, that whether a dispute is likely or not is a matter for the Magistrate, but where the Magistrate is satisfied that a dispute requiring to be dealt with under these sections does exist, it is clearly necessary that he should proceed with the matter in accordance with the law and should not abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order against one of the parties which he could not directly have passed without hearing all the evidence. In the case of a right exercisable only at particular seasons or on particular occasions, it is not the law that it is open to Magistrate, when such a dispute arises, to start a proceeding under S. 147, Cr. P. Code, not only to drop it when the season is over but in addition to pass an order against one of the parties which could only be properly passed after hearing all the evidence that the parties may desire to produce in the case. To drop the proceedings after some time on the ground that there was no imminent danger of a breach of the peace as the season was over, is not in the spirit of Ss. 144, 145 and 147 and the High Court will interfere in revision and set aside the order dropping the proceedings. (*Dhavle, J.*) DWARKA SINGH *v.* JAMUNA SINGH. **194 I.C. 793=**

CR. P. CODE (1898), S. 144.

14 R.P. 72=7 B.R. 860=42 Cr.L.J. 620=1941 P.W.N. 188=A.I.R. 1941 Pat. 281.

——**S. 144**—Proper order under. *See* 1940 Dig., Col. 446. BHAGWATI PRASAD *v.* EMPEROR. **I L.R. 1940 All. 662=191 I C. 360=13 R.A. 230=42 Cr.L.J. 120.**

——**Ss. 144 and 145**—*Scope—Breach of peace likely about possession of land—Proper proceedings.*

If there is a dispute likely to lead to a breach of the peace about the possession of land, proceedings should be drawn up under S. 145, Cr. P. Code. If, instead, the Magistrate passes an *ex parte* order under S. 144, Cr. P. Code, and directs the police to reap the paddy, his order is absolutely illegal. (*Henderson, J.*) KALIPADA ROY *v* SUNIL K. GHOSE. **45 C W.N 1090.**

——**S. 144 (1)**—*Jurisdiction—Subordinate Magistrate refusing to pass order—Power of superior Magistrate to pass order on same materials.*

There is nothing in S. 144, Cr. P. Code, which prohibits a superior Magistrate from re-enquiring into a matter and making an order under S. 144 (1), when a Subordinate Magistrate had already refused to pass an order on the same matter. Whether the material is gathered by himself or by a Subordinate Magistrate is irrelevant. (*Horwill, J.*) NAINAMALAI GOUNDAN *v.* RAMASAMY GOUNDAN. **1941 M.W.N. 867 (1).**

——**S. 144 (3)**—*Construction and scope of.*

To say that sub-S. (3) of S. 144 contemplates only orders issued to the general public when it is apprehended that the public may come in crowds from elsewhere and frequent or visit some specified public places and it is desired to have some check over them while they are there, is to put a narrow construction on that provision. The better way is to put a wider construction on it so as to make it include also cases where individual members of the public disobey the order in any part of the place specified, whether public or private, and whether they live in the locality specified or visit it from elsewhere. (*Bennett and Madeley, JJ.*) EMPEROR *v.* TURAB KHAN. **196 I.C. 488=14 R.O. 189=1941 A.L.W. 934=1941 A.W.R (C.C.) 306=1941 A.Cr.C. 233=42 Cr.L.J. 884=1941 O.L.R. 701=1941 O.W.N. 1087=1941 O A. 787.**

——**S 144 (3)**—*Construction—'Frequenting or visiting'—Scope of order that could be passed under.*

The act of residing in a place includes the acts of frequenting or visiting it. To live in a particular place is to frequent it. A person residing in a prohibited area is one who 'frequents or visits' it. The power of the Magistrate under S. 144 (3), Cr. P. Code, is confined to the direction to a particular person to abstain from acts of a certain character or to the public generally to abstain from similar acts when frequenting a particular place It contemplates prohibition of some act on the occasion when the particular place referred to in the order is frequented or visited. Where an order is directed to the public generally when frequenting or visiting particular places or specified areas, there is no defect or illegality in the order. (*Thom, C.J., Ganga Nath and Braund, JJ.*) EMPEROR *v.* AFAQ HUSAIN JAUHAR. **I.L.R. (1941) A. 186=192 I C. 466=13 R.A. 337=1941 O.A. (Supp.) 4=42 Cr.L.J. 298=1940 A.W.R (H.C.) 642=1940 A.L.J. 885=A.I.R. 1941 All. 70 (F.B.).**

——**S. 144 (3)**—*Construction—'Particular place'.*

A 'particular place' referred to in sub S. (3) of S. 144, Cr. P. Code may be a large area and all that is necessary is that the place should be so sufficiently defined that the public is reasonably notified of its extent. Where an order was directed to the public residing in the areas ad-

CR. P. CODE (1898), S. 144.

ministered by the Cawnpore Municipality, the Cawnpore Cantonment Authority and the Juhi Notified Area Committee, it was held that there could be no doubt as to the areas covered by the order and that the delimitation was reasonably clear and description sufficiently detailed as to leave no doubt in the minds of the residents therein. (*Thom, C.J., Ganga Nath and Braund, JJ.*) EMPEROR *v.* AFAQ HUSAIN JAUHAR.

I.L.R. (1941) All. 186=192 I C. 466= 13 R A. 337=1941 O A (Supp.) 4= 42 Cr.L J. 298=1940 A.W.R. (H C.) 642= 1940 A.L.J 885=A.I.R. 1941 All. 70 (F.B.).

——**S. 144 (6)**—Extension of order after its expiry —Power of Local Government. *See* 1940 Dig., Col. 448. CHANAN SINGH *v.* EMPEROR. **191 I.C. 162= 13 R.L. 272=42 Cr.L.J. 90.**

——**Ss. 145 and 147** — *Applicability — Dispute regarding right to receive offerings.*

Where a dispute regarding the right to receive the offerings at a shrine centres around and depends upon the right to sit in a particular spot the dispute relates either to the possession of the land or to its use. Hence an order can be made under S. 145 or S. 147, Cr. P. Code. (*Bose, J.*) ABDUL MAJID *v.* MAHOMED SAHIB. **1941 N.L.J. 110=195 I.C. 122= 14 R.N. 37=42 Cr.L.J. 675=A.I R. 1941 Nag. 171.**

——**S. 145**—*Applicability—Facts necessary for.*

When a person comes forward and complains about being forcibly ousted from possession by the other side and asks for attachment of the property and for the appointment of a receiver and asks for action to be taken under S. 145 (which relates to land alone), there can be no reasonable doubt that he is setting forth all the necessary facts to invest the Court with jurisdiction to proceed under S. 145. (*Bose, J.*) ABDUL MAJID *v.* MAHOMED SAHIB. **195 I.C. 122=14 R.N. 37= 42 Cr.L.J. 675=1941 N.L J. 110= A.I.R. 1941 Nag. 171.**

——**S. 145**—*Foundation of jurisdiction—Breach of peace not likely—Procedure to be followed.*

When once a magistrate has found that the dispute is not of such a nature as to cause a breach of peace, all proceedings with regard to the property should cease immediately. The attachment, if any on the property, should be removed and the party claiming possession or ownership or both of the property should be directed to the competent Civil Court. It is not proper to direct any particular party to file a suit. (*Davies.*) HASHIM ALI *v.* EMPEROR. **1940 A.M.L.J. 62.**

——**S. 145**—*Jurisdiction—Decision on question of possession by Land Registration Court—If deprives Magistrate of jurisdiction to go into question of possession.*

A Magistrate has jurisdiction to proceed under S. 145, Cr. P. Code, notwithstanding there being a decision of the Land Registration Court as to possession. Even when the Land Registration Court has given a decision on the question of possession, a Magistrate is not incompetent to investigate the question of possession in a proceeding under S. 145, Cr. P. Code. (*Fazl Ali, J.*) RAM KRIPAL *v.* SIDHESHWAR SINGH. **196 I.C. 469= 14 R P. 203=8 B R. 25=42 Cr.L.J. 876= 1941 P.W.N. 89=A.I R. 1941 Pat. 516.**

——**Ss. 145 and 146**—*Jurisdiction—Dispute as to land—Order declaring two persons in possession of half of land—Subsequent dispute—Fresh proceeding under S. 145—Magistrate attaching land being unable to decide possession—Jurisdiction—Duty of Magistrate to maintain possession awarded under earlier order.*

S took a settlement of a land measuring 45 bighas of land from the proprietors of a village and subsequently

CR. P. CODE (1898), S. 145.

sold half of it (22 ½ bighas) forming the northern half of it to *R*. In a dispute between these lessees and the landlords on the one hand and certain persons on the other hand who claimed occupancy rights in the land, a proceeding under S. 145, Cr. P. Code, was instituted in respect of the entire area including the 45 bighas, *R* and *S* were made parties. An order was passed by which *R* and *S* were declared to be in possession of the 45 bighas. Six months later *R* complained to the Magistrate that *S* was attempting to dispossess him from the 22½ bighas which he had purchased from him. The Magistrate after some inquiries drew up another proceeding under S. 145, Cr.P. Code, *S* pleaded in this proceeding that he had been in exclusive possession of the entire 45 bighas, that the sale deed by him to *R* was only benami. The Magistrate was unable to decide who was in possession of the land in dispute and therefore attached the land under S. 146, Cr. P. Code.

Held, in revision, (1) that the Magistrate had no jurisdiction to institute a second proceeding under S. 145, Cr. P. Code, after having made an order in the earlier proceeding putting *R* in possession of 22½ bighas of land, he was bound to maintain him in possession of it; (2) that even if the earlier order be construed as one putting both *R* and *S* in joint possession of the 45 bighas, it was the Magistrate's duty to bind both of them down until the matter was decided by the Civil Court or settled by arbitration. (*Shearer, J.*) RAMRACHYA SINGH *v.* SINGESHWAR RAI. **195 I.C 854=14 R.P. 176= 42 Cr.L.J. 791=7 B.R. 982= 22 Pat.L.T. 731=A.I.R. 1941 Pat. 607.**

——**S. 145**—*Possession contemplated by—Nature of.*

The possession contemplated under S. 145, Cr. P. Code, is not only actual possession but the exclusive possession of the subject in dispute. There is no room whatever for the application of the doctrine of joint possession under that section. The question of joint possession or constructive possession are both foreign to the scope of S. 145. (*Ghulam Hasan, J.*) MAHOMED BEG *v.* EHSAN BEG. **195 I.C. 236=14 R.O. 69= 1941 O.L.R. 556=1941 O W.N. 848 (2)= 1941 A.Cr C. 149=1941 A.L.W. 749= 1941 A.W.R. (C.C.) 247=42 Cr.L.J 710= 1941 O.A 570=A.I.R. 1941 Oudh 515.**

——**S. 145**—Powers of Court—Matter in dispute—If can be referred to arbitration. *See* 1940 Dig., Col. 449. AHMAD ULLAH *v.* SRINIWAS JOSHI.

I.L.R. (1941) All. 14=13 R.A. 304= 192 I.C. 16=42 Cr.L.J. 246=A.I.R. 1941 All. 42.

——**S. 145**—Scope—Claim to possession of entire village—Order declaring party to be entitled to possession of undivided share—Legality. *See* 1940 Dig., Col. 450. MUTHUSWAMI THEVAR *v.* RAJARAM PANDIAN.

42 Cr.L.J. 67=13 R.M. 542=(1940) 2 M.L J. 355.

——**S. 145**—*Scope—Order based on statements to police not on record—Legality.*

An order under S. 145, Cr. P. Code, which is to a large extent based on statements alleged to have been made to the police officers which are not on record and about which the persons who are alleged to have made them are not questioned, cannot be supported and must be set aside. (*Lakshmana Rao, J.*) RAJU *v.* ABDUL RAHIMAN SAHIB. **1941 M.W.N. 678= 54 L.W. 392 (1)=A.I.R 1941 Mad. 751 (1).**

——**S. 145**—Scope—Power of Magistrate to proceed under S. 107 instead of under S. 145. *See* CR. P. CODE, S. 107. **1941 M.W.N. 960.**

——**S. 145 (2)**—*Land—If includes movable property.*

The definition of land in S. 145 (2) of Cr. P. Code cannot include the movable property such as the stock of

CR. P. CODE (1898), S. 145.

medicines in a shop and so no order could be passed in respect of them. (*Ghulam Hasan, J.*) MAHOMED BEG *v.* EHSAN BEG

195 I.C. 236 = 14 R.O. 69 = 1941 O.L.R. 556 = 1941 O W.N. 848 (2) = 1941 A.Cr.C. 149 = 1941 A.L.W. 749 = 1941 A.W.R. (C.C) 247 = 42 Cr.L.J. 710 = 1941 O.A. 570 = A.I.R. 1941 Oudh 515.

——**S. 145 (4)**—*Duty of Magistrate under.*

A Magistrate acting under S. 145 (4) of the Cr. P. Code has to decide the possession of the subject of the dispute without reference to the merits of the claims of any party. It is not within his province to determine the title of the parties or the question whether the possession was founded upon title or not. His only concern is to see who is in *de facto* possession of the subject of dispute. The Magistrate is entitled to take notice only of exclusive actual physical possession and has nothing to do with constructive possession or joint possession. (*Ghulam Hasan, J.*) MAHOMED BEG *v.* EHSAN BEG. **195 I C. 236 = 14 R.O. 69 = 1941 O.L.R. 556 = 1941 O.W N. 848 (2) = 1941 A.Cr.C. 149 = 1941 A.L.W. 749 = 1941 A W R. (C.C) 247 = 42 Cr L J. 710 = 1941 O.A. 570 = A.I.R. 1941 Oudh 515.**

——**S. 145 (4)**—*Period of possession—Two months—Computation.*

The two months mentioned in the proviso to Cl. (4) of S. 145, Cr. P. Code, mean two months from the date of the preliminary order and not two months from the date of the complaint. (*Ghulam Hasan, J.*) MAHOMED BEG *v.* EHSAN BEG. **195 I.C. 236 = 14 R.O. 69 = 1941 O.L R. 556 = 1941 O.W.N. 848 (2) = 1941 A.Cr.C. 149 = 1941 A.L.W. 749 = 1941 A.W.R. (C.C.) 247 = 42 Cr.L.J. 710 = 1941 O.A 570 = A.I.R. 1941 Oudh 515.**

——**S. 145 (6)**—Possession—Possession of well in railway property—Railway authority entitled to eject person as trespasser—Order declaring Railway authority in possession—If justified. *See* 1940 Dig., Col. 453. HOTCHAND RAMCHAND *v.* EMPEROR. **42 Cr.L.J. 27.**

——**S. 146**—*Temple trusteeship—Dispute as to—Receiver appointed for properties by Magistrate—Subsequent appointment of trustee by Hindu Religious Endowments Board—Right of trustee to possession of properties.*

Pending a dispute as regards the trusteeship of a temple, proceedings were started under S. 145, Cr. P. Code, and the Magistrate appointed a receiver under S. 146, Cr. P.Code, and handed over the temple properties to him till a competent authority decided the dispute. Subsequently the Madras Hindu Religious Endowments Board, after enquiry, appointed a person as the hereditary trustee of the temple. The latter's application for possession of the property and the income thereof was rejected by the Magistrate on the ground that a mere declaration that he was the trustee of the temple was not enough and that he should obtain also a declaration of his right to possession of the property.

Held, that the applicant having been declared to be the trustee, the lands under attachment should be restored to him and the order of the Magistrate could not therefore be sustained. (*Lakshmana Rao, J.*) SESHA REDDI *v.* NARASIMHA REDDI.

1941 M.W N. 767 = A.I.R. 1941 Mad. 803 (2).

——**Ss. 146 (1) and 147**—*Applicability—Dispute as to existence of right of easement—Magistrate unable to decide—Procedure—Order attaching land—Legality.*

Where the question in dispute before a Magistrate is whether a right existed in the counter-petitioners to take

CR. P. CODE (1898), S. 147.

rain water from the field of the petitioner through a bund separating the petitioner's field from the counter-petitioner's field, the Magistrate cannot, after an inquiry under S. 145, Cr. P. Code, pass an order under S. 146 (1) or lering attachment on the ground that he is unable to decide whether such right exists or not. The Magistrate in such a case should act under S. 147 which deals with disputes with regard to easements. Merely because the Magistrate is not satisfied that either S. 147 (2) or S. 147 (3) applies and is unable to pass an order, either prohibiting interference or prohibiting the exercise of the alleged right, he cannot pass an order attaching the land, as such an order can only be passed where there is a dispute with regard to immovable property which can be dealt with under Ss. 145 and 146. (*Horwill, J.*) CHELLIAH PILLAI *v.* RAMIAH THEVAR.

196 I.C. 887 = 54 L.W. 314 = (1941) 2 M L.J. 375.

——**S. 146 (1)**—*Undivided share in village—Attachability.*

The attachment of an undivided share in a village is not permissible under S. 146 (1), Cr. P. Code. (*Lakshmana Rao, J.*) MUTHUSAMI TEVAR *v.* RAJA RAM PANDIAN. **1941 M.W.N. 703 = A.I.R 1941 Mad. 744.**

——**S. 147**—*Applicability and scope—Dam on surplus weir of tank causing submersion of crops and damage to same—Order for removal of dam—Further order that no submersion or damage to crops be caused by putting obstruction—If justified.*

Where a person puts up a bund or dam on the surplus weir of a tank, resulting in the obstruction of the flow of water and submersion of another's crops and damage thereto, S. 147, Cr.P. Code, is applicable and an order directing removal of the dam can be passed. But the Magistrate cannot further direct that the party shall not cause any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the other party. Such a direction is beyond the scope of S. 147, Cr. P. Code. (*Lakshmana Rao, J.*) THOONGA VADAN *v.* PERUMAL GOUNDAN.

195 I.C. 607 = 42 Cr.L.J. 780 = 1941 M.W.N. 481 = A.I.R. 1941 Mad. 752.

——**S. 147**—*Costs—Subsequent order for—Legality.*

Where there has been no order as to costs in a decision under S. 147, Cr. P. Code, the award of costs by a subsequent order cannot be supported. (*Lakshmana Rao, J.*) THOONGA VELAN *v.* PERUMAL GOUNDAN.

194 I.C. 32 = 13 R.M. 768 = 42 Cr.L.J. 518 = 1941 M.W.N. 63 = 14 R.M. 240 = 53 L.W. 66 = A.I.R. 1941 Mad. 374 = (1941) 1 M.L.J. 43.

——**S. 147**—*Order directing Police to maintain* status quo—*If authorises them to demolish wall and reopen drain.*

On a complaint that the next door neighbour of the complainant was about to close a drain through which the complainant had been in the habit of discharging the rainwater from his house, the Magistrate directed that a proceeding under S. 147, Cr. P. Code, should be instituted and also made the following order: "Local Police to see that the *status quo* is maintained." The Police went to the spot, demolished the wall constructed over the drain and reopened the drain.

Held, that the Magistrate had not authorised the Police to do what they did, and even if he had so authorised them it is very doubtful if his order would have been a proper and legal one. (*Shearer, J.*) SUKAR SAO *v.* EMPEROR. **7 B R. 945 = 195 I.C 593 = 14 R.P 150 = 1941 P.W.N. 620 = 42 Cr.L.J. 753 = A.I.R. 1941 Pat. 560.**

CR. P. CODE (1898), S. 147.

——**S. 147**—*Scope—Obstruction caused by person not party to proceedings—Order for removal—If can be passed.*

An order under S. 147, Cr. P. Code, directing the removal of an obstruction, such as a dam across a water-course obstructing the right of another to the user of the water, cannot be used when the person who has caused the obstruction is a person not a party to the proceedings and who is not on the record. (*Lakshmana Rao, J.*) MAHALAKSHMI NAIDU *v.* SATYAM.
1941 M.W.N. 764 = A.I.R. 1941 Mad. 939.

——**S. 147 (2)**—*Mandatory injunction—Power of Magistrate.*

S. 147 (2), Cr. P. Code, empowers the Magistrate in a proper case, to order a person to do something or, in other words, to direct a mandatory injunction. (*Skemp, J.*) GHUMANDA SINGH *v.* EMPEROR.
195 I.C. 10 = 14 R.L. 27 = 42 Cr.L.J. 651 = 43 P.L.R. 166 = A.I.R. 1941 Lah. 210.

——**S. 147 (2)**—Mandatory injunction— Power of Magistrate. *See* 1940 Dig., Col. 454. BADRIDAS AGARWALLA *v.* SOHAN LAL OSWAL.
191 I.C. 171 = 13 R.C. 217 = 42 Cr.L.J. 94.

——**S. 154**—*First information report—Evidentiary value.*

The first information report is not a piece of substantive evidence. Its chief purpose is to acquaint the Court with the case which the prosecution has set out at the earliest stage and the statement is admissible merely to corroborate or contradict the maker thereof. (*Manohar Lall and Rowland, JJ.*) EMPEROR *v.* DUBAI.
196 I.C. 852.

——**S. 154**—*First information report—Value—Corroboration of depositions of witnesses referred to therein.*

The first information report cannot be used to corroborate the depositions of the witnesses referred to in it. (*Bartley and Akram, JJ.*) ABDUL LATIF *v.* EMPEROR.
196 I C. 439 = 42 Cr.L J. 871 = 45 C.W.N. 763 = A.I.R. 1941 Cal. 533.

——**Ss. 154 and 162**—*First information report—What may constitute—Statement if falls under S. 154 or S. 162—Question of fact.*

Where information which if first given to the police is of such a vague and indefinite character that it cannot be treated as coming under S. 154, Cr. P. Code, so as to make it incumbent on the officer in charge of the police station to start an investigation and he may reasonably require more information before doing so, further information given to him in such circumstances may fall within S. 154. It is a question of fact in each case whether a statement made to a police officer in the course of investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. (*Agarwal, J.*) QAMRUL HASAN *v.* EMPEROR.
1941 O.A. 843 = 1941 O.W.N. 1166 = 1941 A.W.R. (C.C.) 322 = 1941 A.Cr.C. 247.

——**Ss. 154 and 162**—*First information—Telephone message—Subsequent statements—Nature of.*

Where a station writer receives a telephone message as to the commission of a cognizable offence, it might be recorded by the writer as a first information report and he himself might sign it, as the first information report may be merely hearsay and need not necessarily be given by a person who has had first hand knowledge of the facts. All subsequent statements made to the police are statements made during the course of investigation and is inadmissible under S. 162, Cr. P. Code. Any such statement cannot be put in as a first information report. (*Roberts, C.J. and Dunkley, J.*) SHWE PRU *v.* THE KING.
1941 Rang.L.R. 346 = A.I.R. 1941 Rang. 209.

CR. P. CODE (1898), S. 162.

——**S. 155 (2)**—Prohibition contained in—Nature of. *See* 1940 Dig., Col. 454. EMPEROR *v.* THAKURI.
16 Luck. 55.

——**S. 156 (3)**—Scope—Power of Magistrate to refuse to take cognizance of offence on presentation of complaint—Duty of Magistrate on presentation of complaint. *See* 1940 Dig., Col. 454. SHAHDAD GADAI *v.* EMPEROR.
191 I.C. 400 = 13 R.S. 161 = 42 Cr.L.J. 162.

——**S. 162**—*Applicability—Departmental inquiry.*

Where the proceedings are only a departmental inquiry and not an investigation under Chap. XIV of the Cr. P. Code, S. 162 of the Cr. P. Code has no bearing. (*Thomas, C.J.*) JAGDISH NARAIN *v.* EMPEROR.
1941 A.W.R. (C.C.) 358 = 1941 O.A. 947 = 1941 O.W.N. 1255.

——**S. 162**—*Identification parades by police during investigation—Statements by witnesses—Admissibility—Mediators' reports drawn up at the parade—Admissibility.*

Where identification parades are held by the police in the course of investigation of an offence, S. 162, Cr. P. Code, excludes any evidence about the statements made by witnesses at the identification parades. The fact that witnesses have identified persons at parades held by the police may be proved; but that fact can only be considered important evidence against the accused if the Court is satisfied that the parades have been held fairly. Mediators' reports containing the record of the proceedings at the parades and drawn up at the parades are wholly inadmissible in evidence. (*Burn and Happell, JJ.*) EMPEROR *v.* RAM SINGH. **196 I.C. 342 = 14 R.M. 299 = 42 Cr.L.J. 848 = 1941 M.W.N 521 = 54 L.W. 69 = A.I.R. 1941 Mad. 675.**

——**S. 162**—*Police diary—Proof.*

Entries in a police diary, or parts of entries, in the diary as are admissible in evidence, that is to say which do not include statements made to the police during the course of an investigation, should ordinarily be proved by calling the station writer who recorded them to state orally the particulars recorded in each entry and then to produce the diary in corroboration of his oral evidence. (*Roberts, C.J. and Dunkley, J.*) SHWE PRU *v.* THE KING.
1941 Rang.L.R. 346 = A.I.R. 1941 Rang. 209.

——**S. 162**—Scope—If overrides S. 27 of the Evidence Act. *See* CR. P. CODE, SS. 1 (2) AND 162.
43 Bom.L.R. 157.

——**S. 162**—Scope—If repeals S. 27, Evidence Act. *See* EVIDENCE ACT, S. 27. **1941 P.W.N. 653.**

——**Ss. 162 and 164**—Statement by accused to Magistrate—Admissibility—Self-exculpatory statement—If to be treated as confession statement. *See* 1940 Dig., Col. 456. APPALANARASAYYA, *In re.*
I.L.R. (1941) Mad. 81 = 192 I.C. 586 = 13 R.M. 581 = 42 Cr.L.J. 308 = A.I.R. 1941 Mad. 101 = (1940) 2 M.L.J. 715.

——**S. 162 and Evidence Act (1872), S. 8**—*Voluntary report to police by accused, subsequent to first information report—Admissibility.*

Where subsequent to the first information report in respect of a murder, one of the accused voluntarily makes a report to the police which is by way of a defence or reply, the report is not one made in the course of the police investigation and is admissible in evidence under S. 8 of the Evidence Act. (*Bennett and Ghulam Hasan, JJ.*) EMPEROR *v.* BHAGI. **194 I.C. 236 = 1941 A.W.R. (C.C.) 188 = 1941 A Cr C. 127 = 13 R.O. 578 = 1941 O.L.R. 441 =**

CR. P. CODE (1898), S. 164.

42 Cr L J. 539 = 1941 A.L.W. 581 = 1941 O.A. 483 = 1941 O W N. 722 = A.I.R. 1941 Oudh 359.

——S. 164 and Evidence Act, S. 29—*Non-compliance with regarding warning to accused—If fatal to the confession.*

Although a Magistrate does not comply with the requirements of law as laid down by S. 164 (3), Cr. P. Code, in respect of the warning to be given to the accused, the defect is not fatal in view of S. 29 of the Evidence Act. (*Ismail and Hamilton, JJ.*) EMPEROR *v.* NANUA. **I L.R. (1941) All. 280 = 1941 O.A. (Supp.) 229 = 193 I.C. 873 = 1941 O.W.N 337 = 1941 A.Cr.C. 91 = 13 R.A. 463 = 1941 A L.W. 241 = 42 Cr.L J. 485 = 1941 A.L.J. 86 = 1941 A.W.R. (H.C.) 65 = A.I.R. 1941 All. 145.**

——Ss. 164 and 533—Omission to take accused's signature to statement—If curable under S. 533. *See* 1940 Dig., Col. 458. SAMLA HARDEO *v.* EMPEROR. **I.L.R. (1941) Nag. 104 = 191 I.C. 300 = 13 R.N. 196 = 42 Cr L.J. 117 = A.I.R. 1941 Nag. 17.**

——S. 164—*Recording of confession—Question as to motive for confession—Duty of Magistrate to put.*

Per *Meredith, J.*—The Magistrate recording a confession should not omit to ask the one simple and obvious but vital question "why are you making this confession, knowing that it may be used against you?" (*Manohar Lall and Meredith, JJ.*) DIKSON MALI *v.* EMPEROR. **196 I.C. 597 = 8 B.R. 49.**

——S. 164—Recording of statement under—Inference—Value to be attached to. *See* 1940 Dig., Col. 458. PARMANAND *v* EMPEROR. **I.L R. (1941) Nag. 110 = 42 Cr.L.J. 17.**

——S. 164—*Recording of statements under—Reflection on reliability of witness—Procedure when justified.*

The fact that the police have considered it necessary for the statement of a witness to be recorded under S. 164, Cr. P. Code, only suggests that they do not consider him altogether a reliable witness, that is to say, they apprehend that he may be tampered with. But there is no objection to the procedure being followed in appropriate cases. Where all of the persons accused in the first information report disappeared from the village immediately after the occurrence, and it was, therefore, not improbable that some attempt would be made by one or more of them to tamper with the witnesses while the accused were at large, it was held that there was no objection under those circumstances to the police sending the witnesses to have their statements recorded by the Magistrate under S. 164, Cr. P. Code. (*Bennett and Ghulam Hasan, JJ.*) PARMESHWAR DIN *v.* EMPEROR. **195 I.C. 630 = 1941 O.A. 689 = 1941 O.L.R. 609 = 1941 A.W.R. (C C) 265 = 1941 A.L.W. 856 = 14 R.O. 110 = 42 Cr.L.J. 758 = 1941 A.Cr.C. 198 = 1941 O.W.N. 981 = A.I.R. 1941 Oudh 517.**

——S. 164—Statement of accused after acceptance of pardon—Record of—Oath, if can be administered. *See* 1940 Dig., Col. 458. HORI LAL *v.* EMPEROR. **I.L.R (1941) Nag. 372.**

——S. 164—*Statement of witness—Use of—Evidence Act, Ss. 157 and 165 (3).*

In a murder case the prosecution witness in the Sessions Court did not even state that the accused was at the place of murder on the night of the occurrence, whereas under S. 164, Cr. P. Code, she explicitly made a statement that the accused had killed the deceased. The statements under S. 164, Cr. P. Code, were put in at the instance of the Public Prosecutor after objection by the defence pleader and it was noted in the order sheet that they were put in under S. 157, Evidence Act, to corroborate the witness.

Held, that the statement of the witness under S. 164, Cr. P. Code, cannot be said to corroborate her statement in Sessions Court but in fact it clearly contradic ed it, and the prosecution could only put in the statement under S. 164, Cr. P. Code, with the permission of the Court in order to impeach the credit of their own witness under S. 165 (3), Evidence Act. The statement under S. 164, Cr. P. Code, was itself not substantive evidence at all against the accused and its only purpose could have been to negative the evidence of the witness as given in Sessions Court. (*Henderson and Roxburgh, JJ.*) EMPEROR *v.* SEKENDAR ALI SHAH. **195 I.C. 774 = 14 R.C. 137 = 42 Cr L.J. 781 = A.I.R. 1941 Cal. 406.**

CR. P. CODE (1898), S. 190.

——S. 164—*Statement under—Admissibility—Evidence Act, Ss. 145 and 157.*

A statement made under S. 164, Cr. P. Code, is not inadmissible in evidence and may be used to corroborate or contradict a statement made in Court in the manner provided by Ss. 145 and 157 of the Evidence Act. (*Bartley and Akram, JJ.*) EMPEROR *v.* MANIK GAZI. **74 C.L.J. 208.**

——S. 164—*Voluntariness of confession—Questions to be put.*

No form of questions is prescribed by S. 164 (3), Cr. P. Code, from which the Magistrate must satisfy himself that he believes the confession was made voluntarily. All that the law requires is that the Magistrate should put some questions to the accused so that it may appear satisfactorily that the accused was making a voluntary statement. (*Manohar Lall and Rowland, JJ.*) EMPEROR *v.* DUBAI. **196 I.C. 852.**

——S. 164 (3)—Duty of Magistrate recording confession—Asking accused to think over matter and state what really happened as otherwise statement would be used against him—If sufficient. *See* 1940 Dig., Col. 459. PERUMAL KUDUMBAN *v.* EMPEROR. **191 I.C. 37 = 13 R.N. 481 = 42 Cr.L.J. 64.**

——S. 164 (3)—Scope—Compliance with—Duty of Magistrate recording confession—Warning to confessor—Nature of. *See* 1940 Dig., Col. 460 PERUMAL KUDUMBAN *v.* EMPEROR. **191 I.C. 37 = 13 R.M. 481 = 42 Cr.L.J. 64.**

——S. 165 (3)—*Applicability—Search made by subordinate in officer's presence.*

S. 165 (3), Cr. P. Code, refers to a case where the officer is himself unable to conduct the search and deputes somebody else to do so. It has no application to a case in which the officer in the process of conducting that search himself has a part of it actually done under his own direction and in his own presence by one of his subordinates. (*Young C.J. and Blacker, J.*) EMPEROR *v.* DARSHAN SINGH. **I.L.R. (1941) Lah. 370 = 196 I C. 106 = 14 R.L. 136 = 42 Cr.L.J 812 = 43 P.L.R. 536 = A.I.R. 1941 Lah. 297.**

——S. 172—*Police diaries—Use of.*

The only legitimate purpose for which the police diary may be used is to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. 44 Cal. 876 (P.C.), Ref. to. (*Manohar Lall and Meredith, JJ.*) DIKSON MALI *v.* EMPEROR. **196 I.C. 597 = 8 B.R. 49.**

——Ss. 190, 191 and 351—Relative applicability of Ss. 190 and 351—Detention of witness and trial under

CR. P. CODE (1898), S. 192.

S. 351—Legality—Jurisdiction. *See* 1940 Dig., Col. 461. MAUNG THET *v.* MAUNG CHIT KYWE.
191 I.C. 894=13 R.R. 168=42 Cr.L.J. 244=A.I.R. 1941 Rang. 30.

——**S. 192 (1)**—Cases that can be transferred. *See* 1940 Dig., Col. 462. HAFIZAR RAHMAN *v.* AMINAL HOQUE. **I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.**

——**S. 192 (1)**—Cases transferred after issuing process to one of accused persons—Death of that accused—If terminates proceedings in the case. *See* 1940 Dig., Col. 462. HAFIZAR RAHMAN *v.* AMINAL HOQUE.
I.L.R. (1941) 1 Cal. 67=194 I.C 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——**S. 192 (1)**—"Inquiry"—If means inquiry under S. 202—Transferee Magistrate—If can return case to transferring Magistrate for issue of process. *See* 1940 Dig., Col. 462. HAFIZAR RAHMAN *v.* AMINAL HOQUE. **I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.**

——**S. 192 (1)**—Powers of transferee Magistrate—Case transferred after summoning one of accused persons—Jurisdiction of transferee Magistrate to summon the otners. *See* 1940 Dig., Col 463. HAFIZAR RAHMAN *v.* AMINAL HOQUE. **I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.**

——**S. 192 (1)**—Transfer of case—Powers of transferring Magistrate thereafter. *See* 1940 Dig., Col. 463. HAFIZAR RAHMAN *v.* AMINAL HOQUE.
I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185

——**S. 192 (1)**—Transfer of case—When may be made. *See* 1940 Dig., Col. 463. HAFIZAR RAHMAN *v.* AMINAL HOQUE. **I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.**

——**S. 192 (1)**—Transfer of case—Whole case, if transferred—Piecemeal transfer—Legality. *See* 1940 Dig., Col. 463. HAFIZAR RAHMAN *v.* AMINAL HOQUE.
I.L.R. (1941) 1 Cal. 67=194 I.C 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——**S. 195**—*Applicability—Defamation by witness in criminal case—Prosecution—Sanction or complaint by Court—Necessity for.*

The provisions of S. 195, Cr. P. Code, do not apply to defamation, and a person, who is defamed by a witness when in the witness-box, is at liberty to file a complaint against the defamer under the provisions of I. P. Code. The mere fact that the defamation is committed in or in relation to criminal proceedings in a Court is no reason for requiring the sanction of the Court or for requiring the Court to prefer a complaint. (*Leach, C.J. and Chandrasekhara Ayyar, J.*) NALLAPPA GOUNDAN *v.* CHINNAMMAL. **54 L.W. 445=1941 M.W.N. 1076=(1941) 2 M.L.J. 618.**

——**Ss. 195 and 476**—*Applicability—Inquiry under Legal Practitioners' Act against* A—*Use by* A *of a receipt found to have been forged by* B *and attested by* C *and* D—*Prosecution—Complaint by Court—Whether necessary.*

Where a complaint was that in the course of proceedings under the Legal Practitioners' Act against *A*, *A* made use of a receipt which was found to have been forged by *B* and attested by *C* and *D* and also that *B*, *C* and *D* swore to the truth of the document in the proceedings,

Held, that a complaint of the Court was not necessary for prosecuting the accused for offences under Ss. 403 and 467 of the Indian Penal Code. (*Lakshmana Rao, J.*) GURUSWAMI CHETTIAR, *In re*.
193 I.C. 322=42 Cr.L.J. 468=13 R.M. 731=1940 M.W.N. 1270=A.I.R. 1941 Mad. 323=(1940) 2 M.L.J. 1063.

CR. P. CODE (1898), S. 195.

——**Ss. 195 and 476**—*Offences under Ss.* 193 *and* 471, *I. P. Code, during proceedings which were* ultra vires—*Complaint—Legality.*

If during proceedings which are *ultra vires* and illegal, any offence under S. 193 or S. 471, I. P. Code, is committed, it cannot be said that it was committed in or in relation to, or by a party to, any judicial proceedings—and a complaint in respect of it is not a valid one. (*Ganga Nath, J.*) SUMAT PRASAD *v.* EMPEROR. **1941 A.W.R. (H.C.) 351=1941 A.L.W. 998=1941 A.Cr.C. 262=1941 A.L.J. 682.**

——**S. 195 (1) (a)**—Offence under S. 182, I.P. Code—Initiation of proceedings—Procedure. *See* 1940 Dig., Col. 465. TEJNARAIN LALL *v.* EMPEROR.
1941 P.W.N. 9 (1)=42 Cr.L.J. 57.

——**S. 195 (1) (a) & (b)**—*Offences under Ss.* 182 *and* 211, *I. P. Code—False information to Police followed up by complaint before Magistrate—Complaint under S.* 182 *by Police officer—If can be taken cognizance of.*

If a person not merely gives false information to the Police but also files a complaint making a false charge before a Magistrate after the Police refuse to take any action, the case comes within the purview of S 211, I. P. Code and not merely that of S. 182, I. P. Code. When there is a specific section dealing with a false charge, that section must be considered to be the one applicable to the circumstances of the case. A complaint under S. 182, I. P. Code, instituted by the Inspector of Police cannot be taken cognizance of, as under S. 195 (1) (*b*), Cr. P. Code, no Court can take cognizance of an offence falling under S. 211, I. P. Code, except on a complaint by the Court concerned. (*Bhide, J.*) SHAH MOHAMMAD *v.* EMPEROR. **195 I.C. 102=14 R.L. 34=42 Cr.L.J. 667=43 P.L.R. 191=A.I.R. 1941 Lah. 216.**

——**S. 195 (1) (a)**—Offence under S. 186, I. P. Code—Proper procedure to be followed—Complaint by the officer concerned—Appeal, if lies. *See* 1940 Dig., Col 466. BHOOP RAM *v.* EMPEROR.
192 I.C. 860=42 Cr.L.J. 323=13 R.A. 372=1941 O.A. (Supp.) 111=A.I.R. 1941 All. 100

——**S. 195 (1) (a)**—"*Public servant concerned*"—*Suit before Village Court—Application to District Munsif for transfer—Allegations made against President of Village Court—Complaint by latter under S.* 182, *I. P. Code—Maintainability—Proper person to complain.*

Where a party to a suit in a Village Panchayat Court files a petition for transfer of that case before the District Munsif and in that petition makes certain allegations against the President of the Village Panchayat Court, the President of the Village Panchayat Court cannot file a complaint against that party under S. 182, I. P. Code, on account of those allegations. The information is not given to the complainant or public servant subordinate to him and an offence under S. 182, I. P. Code, cannot be taken cognizance of except on complaint in writing of the public servant concerned or some other public servant to whom he is subordinate. A complaint of the District Munsif would be necessary for a prosecution for an offence under S. 193, I. P. Code, because he is the proper person to whom the allegations are made. (*Lakshmana Rao, J.*) OYYAPPA KONE *v.* CHIDAMBARAM CHETTIAR. **1941 M.W.N. 523=A.I.R. 1941 Mad. 764.**

CR. P. CODE (1898), S. 195.

——S. 195 (1) (b)—Applicability and construction—"In relation to"—Meaning of—Offence committed in relation to proceedings subsequently instituted in Court—Complaint by Court—Competency. *See* 1940 Dig., Col. 466. EMPEROR *v.* NABIBUX KHAIR MAHOMED.
191 I.C. 325=13 R.S. 140=42 Cr.L.J. 141.

——S. 195 (1) (b)—*Applicability—False complaint of dacoity—Police referring complaint—Notice to complainant—Failure to appear before Magistrate—Prosecution under S. 211, I. P. Code—Complaint by Magistrate, if necessary.*

Where a complaint of dacoity made by the accused to a village Magistrate is referred as false by the police, and the accused does not appear before the Magistrate in answer to a notice issued to him, a prosecution of the accused under S. 211, I. P. Code, is not bad for want of a complaint by the Magistrate. Since there has been no proceeding in any Court, no complaint by the Magistrate is necessary. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* SALMA BEEVI. **195 I.C. 233=42 Cr L.J. 640=14 R.M. 160=53 L.W. 358=1941 M.W.N. 222=A.I.R. 1941 Mad. 579.**

——S. 195 (1) (b)—*Applicability—"In or in relation to a proceeding in Court"—Complaint of cheating—Accused arrested and released on bail—Police later reporting no offence—Discharge—False charge under S. 211—Complaint by magistrate—Necessity.*

Where on the complaint of a person charging another with cheating him, the accused is arrested and released on bail, but subsequently the police report that there is no case against him and invite the Magistrate to discharge him, the Magistrate may either discharge the accused or direct further investigation. In either case the Magistrate takes cognizance of the case. Where the Magistrate acting on the police report discharges the accused, the order is a judicial order, and the complainant cannot be prosecuted under S. 211, I. P. Code, without a complaint by the Magistrate, for the alleged false charge is made in, or in relation to a proceeding in Court within the meaning of S. 195 (1) (*b*), Cr. P. Code. (*Beaumont, C.J. and Macklin, J.*) J. D. BOYWALLA *v.* SORAB RUSTOMJI. **196 I.C. 104=42 Cr.L.J. 814=14 R.B. 97=43 Bom L.R. 529=A.I.R. 1941 Bom. 294.**

——S. 195 (1) (b)—*"In or in relation to" a proceeding in Court—Proceeding before Official Assignee for composition or scheme—Offence under S. 200, I P. Code, committed in such proceeding—Complaint by Insolvency Court—If necessary—Presideney Towns Insolvency Act, S. 28.*

The Official Assignee, while convening and conducting a meeting of creditors for the consideration of a proposal for a composition or scheme under S. 28 of the Presidency Towns Insolvency Act, discharges a purely administrative function, and in accepting or rejecting the proof of debt for the purposes of S. 28 (2) he discharges his function as the chairman of the meeting. He is, therefore, not a Court within the meaning of S. 195 (1) (*b*), Cr. P. Code. But the proceeding before the Official Assignee for a composition or scheme is one in relation to the original insolvency proceeding, which is a proceeding in a Court. It follows, therefore, that an offence under S. 200 read with S. 199, I. P. Code, alleged to have been committed by the insolvent in such a proceeding must be taken as "alleged to have been committed in relation to a proceeding in a Court" within the meaning of S. 195 (1) (*b*), Cr. P. Code and consequently in the absence of any complaint in writing of the Insolvency Court, the Magistrate is debarred from taking cognizance of the same. (*Lodge and Pal, JJ.*) KEDAR NATH SEN *v.* AMULYA RASAN SANYAL.
45 C.W.N. 1124=74 C.L.J. 38.

CR. P. CODE (1898), S. 202.

——S. 197—*Applicability—Beating of person by Sub-Inspectors of Police under orders of Assistant Commissioner—Prosecution of latter—Sanction of Governor—Necessity.*

The house of the complainant was raided by the Assistant Commissioner of Police under S. 42 of the Madras City Police Act. Instruments of gaming were found, but the complainant escaped. He was, however, arrested later and taken to the police station where, it was alleged, that two Sub Inspectors under the orders of the Assistant Commissioner beat him. The complainant preferred a complaint under Ss. 323 and 352, I. P. Code, read with Ss. 109 and 114, against the Assistant Commissioner and the constables.

Held, that the Assistant Commissioner gave the order to beat while acting or purporting to act in the discharge of his official duty, and as he was not removable from his office save by or with the sanction of the Secretary of State, S. 197, Cr. P. Code, applied and barred the prosecution of that accused without the sanction of the Governor. (*Lakshmana Rao, J.*) AHMED MOHIDEEN *v.* YASUF ALI SYED. **54 L.W. 737=1941 M.W.N. 809=(1941) 2 M.L.J. 486.**

——S 197—Applicability—District Local Board under Bombay Local Boards Act—Elected member who is also chairman of works committee—Prosecution for fraudulent and dishonest submission of bill for works in name of bogus contractor—Prosecution—Sanction of Local Government—If condition precedent. *See* BOMBAY LOCAL BOARDS ACT (AS AMENDED IN 1935) S. 136 (2). **42 Bom L.R. 1193.**

——S. 197—Arbitrator—Prosecution of—Sanction, if necessary. *See* 1940 Dig., Col. 469. PEAREY LAL *v.* EMPEROR. **13 R. Pesh. 28=42 Cr L.J. 68.**

——S. 197—*Port trust—Chief store-keeper and assistant superintendent of machinery — If public servants—Prosecution—Sanction—If necessary.*

The port trust estate does not fall within the term "village, town or district" within the meaning of Cl. 10 of S. 21, I. P. Code. The chief store-keeper and assistant superintendent of machinery for the port trust estate entrusted with the keeping and the expending of property by the trustees of the port on their behalf upon their estate are not therefore public servants. Hence no sanction of the Central Government is necessary for their prosecution. (*Davis, C.J. and Lobo, J.*) S E. NAYLOR *v* EMPEROR.
I.L.R. (1941) Kar. 184=193 I.C. 358=13 R.S 224=42 Cr.L.J. 422=A.I.R. 1941 Sind 30.

——S. 197 and Police Act (1861), S. 7—Sanction of Provincial Government—If necessary, for prosecution of a Sub-Inspector of Police. *See* 1940 Dig. Col. 470. MAQBOOL HUSAIN *v.* EMPEROR. **15 Luck. 740**

——S. 197—*Scope—Prosecution of M.L.A. under S. 476—Sanction if necessary.*

No sanction under S. 197 is required for the prosecution of a Member of Legislative Assembly under S. 476. (*Davis, C.J.*) IMAMDINO *v.* EMPEROR.
193 I.C. 557=13 R.S. 226=42 Cr.L.J. 437=A.I.R. 1941 Sind 39.

——S. 202—*Direction for investigation under—Police papers and report—Right of accused to inspect and to get copies.*

The accused is entitled to have inspection and copies of the police papers forming the inquiry or investigation made by a police officer when so directed by a Magistrate under S. 202, Cr. P. Code, as well as of the statements of persons examined and the report of the officer

CR. P. CODE (1898), S. 202.

concerned, thereon. (*Mosely, J.*) MAUNG SHEIN *v.* THE KING. **1941 Rang.L.R. 590.**

——**Ss. 202 and 203**—*Procedure—Examination of accused and witnesses—Cross-examination of prosecution witness—Legality—Dismissal of complaint—If to be set aside.*

Although the practice of examining the accused and the latter's witnesses and letting the prosecution witness be cross examined by the defence in an inquiry under S. 202, Cr. P. Code, is irregular and ought to be condemned, it is not illegal; and an order dismissing a complaint under S. 203 cannot be set aside in revision on the sole ground that the Magistrate adopted a procedure which has been condemned. (*Dhavle, J.*) JINILAL MANDAL *v.* CHANDERDEO PRASAD.

192 I.C. 836=7 B R. 420=42 Cr L.J. 332=13 R.P. 531=1941 P.W.N. 312=A.I.R. 1941 Pat. 419.

——**S. 202**—Scope—If applies to transfer under S. 528. *See* 1938 Dig., Col. 523. QAMARALI *v.* TULSI. **I.L R. (1941) Nag. 320.**

——**Ss. 203 and 204**—Complaint merely stating that certain account books used in Court contained false entries, without specifying those entries—If discloses any offence—Process, if can be issued. *See* CR. P CODE, SS. 4 (1) (*h*) AND 204. **45 C.W.N. 1074.**

——**S. 203**—Dismissal of complaint—Fresh complaint—When may be entertained. *See* 1940 Dig,, Col. 471. PEAREY LAL *v.* EMPEROR. **13 R. Pesh 28=42 Cr.L.J. 68.**

——**S. 203**—*Dismissal under—Fresh complaint on same facts—Complainant, if bound to disclose prior dismissal.*

Though the Code nowhere forbids the filing of a second complaint arising out of the same facts, it is the duty of the complainant whose earlier complaint had been dismissed, to inform the Court in which the subsequent complaint is filed that an earlier complaint arising out of the same facts has already been dismissed. (*Davies.*) HIRA *v.* GOGALAL. **1941 A.M.L.J. 10.**

——**S. 204**—Opinion of Magistrate—If should be based on evidence. *See* 1940 Dig., Col. 472. HAFIZAR RAHMAN *v.* AMINAL HOQUE

I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——**S. 208**—*Defence witnesses not examined—No request by accused—Commitment, if liable to be quashed.*

All that S. 208 requires is that if the accused wishes to produce evidence, the Magistrate must record the same. Consequently a commitment by the Magistrate cannot be quashed for not examining the defence witnesses when there was no request by the accused to produce evidence, especially when after being asked to put in a list of defence witnesses the accused states that he does not wish to examine any witnesses. (*Bhide, J.*) AHMAD DIN *v.* EMPEROR. **196 I C. 893=43 P.L.R. 640=A.I.R. 1941 Lah. 371.**

——**Ss. 208, 209 and 210**—*Scope—Committal proceedings—Examination of defence witnesses before charge—Permissibility.*

Ss. 208, 209 and 210 make it perfectly clear that defence witnesses may be examined in commitment proceedings even before the time comes to frame a charge. (*Dhavle, J.*) GANGA PRASAD NAEK *v.* BHAGWAT DEO. **195 I.C. 682=7 B.R. 962=14 R P. 161=1941 P.W.N. 615=42 Cr.L.J. 767.**

——**S. 208**—*Scope—Committal proceedings — Failure to examine all prosecution witnesses—If vitiates trial.*

CR. P. CODE (1898), S. 209.

As a general rule it is the duty of the prosecution to put before the committing Magistrate the case that is put before the Sessions Court and through the same witnesses. S. 208, Cr. P. Code, contemplates that the prosecution shall place before the committing Magistrate, through the same witnesses the case they intend to place before the Sessions Court. But there can be no invariable rule that all the witnesses in the Sessions Court must be examined in the committing Magistrate's Court and failure to do so will not necessarily vitiate the trial or the committal so as to render the proceedings liable to be quashed. The final consideration is that of prejudice to the accused, and in the absence of prejudice to the accused, the trial cannot be held to be bad or illegal. (*Davis, C.J. and Weston, J.*) ALI MURAD GANJURO *v.* EMPEROR.

I.L.R. (1941) Kar. 270=196 I.C. 363=14 R.S. 66=42 Cr.L.J. 850=A.I.R. 1941 Sind 168.

—— **S. 209**—*Applicability—Magistrate having no jurisdiction to try case—Order of discharge—Legality—Proper course.*

Once a Magistrate is of opinion that he has no jurisdiction to try a case, the proper course for him is to submit the records to the District Magistrate for transfer to the Court of competent jurisdiction or to return the complaint for presentation to the proper Court. It is not proper or legal for the Magistrate to discharge the accused on the ground that he has no jurisdiction to try the case. (*Lakshmana Rao, J.*) NANJI REDDI *v.* NARASAMMA. **1941 M.W.N. 765 (2)=A.I.R. 1941 Mad. 833 (2).**

——**S. 209** — *Duty of Committing Magistrate in inquiry—Grounds for commitment and for discharge.*

It is the duty of a Magistrate making an inquiry under Ch. XVIII of the Cr. P. Code to decide on the materials before him whether or not there are sufficient materials for committing the accused for trial, he is not only entitled but also bound to consider the evidence and weigh it. But he has to do so only for the limited purpose of seeing whether there is a *prima facie* case and not by way of trying the case. He has to be satisfied before committing the accused that there is a fit case to be tried. If he comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial, and he ought not to discharge the accused merely because he thinks that if he were to try the case himself, he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal, whether a Judge or Jury, could be expected to convict the accused, then he ought to discharge the accused. (*Dhavle, J.*) GANGA PRASAD NAEK *v.* BHAGWAT DEO. **195 I.C. 682=7 B. R. 962=14 R.P. 161=1941 P.W.N. 615=42 Cr.L.J. 767.**

——**S. 209**—*Duty of committing Magistrate—Procedure in case of charge against a number of persons.*

A committing Magistrate is clearly empowered under the law to weigh the evidence and to exercise his discretion judicially, and the law plainly contemplates that he should do so. But it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment under S. 209, Cr. P. Code, and another to balance the evidence, as it is the duty of the Sessions Judge to do, in order to decide upon the guilt of the accused after considering the case as a whole. It is not for the committing Magistrate to usurp the functions of the Sessions Court. If the Magistrate, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Court could

CR. P. CODE (1898), S. 209.

convict, it is his duty to discharge the accused ; but if it is a case of balancing probabilities, estimating *pros* and *cons*, then it is his duty to commit where the evidence, if believed, is sufficient for conviction, even though he may himself not think the evidence sufficient for conviction. In a case where there are a number of accused and the evidence led by the prosecution is practically identical against all, if any of the accused are able to satisfy the Magistrate that the evidence is not at all fit to be believed, as it is open to them to do so, the Magistrate should discharge all the accused and should not take the course of committing some and discharging others. If the Magistrate does not find that the prosecution witnesses cannot be believed and are giving false evidence, he should properly commit all the accused. (*Meredith J.*) MOIMUDDIN *v.* SHEOGOBIND SAHU. **194 I.C. 399 = 14 R P. 4 = 42 Cr.L.J. 576 = 7 B R. 761 = 1941 P.W.N. 541 = A.I.R. 1941 Pat. 505.**

——**S. 209 (1)**—*Committal—Desirability—Test—Offence, doubtful if under S.* 302 *or S.* 304, *I.P. Code—Course to be adopted.*

The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this—assuming that the whole of the evidence telling against accused is true, is there a case which a Judge at a trial could leave to a jury—If there is such a case committal is proper and if there is no evidence to go before a jury then a committal ought not to be made. The question whether an offence falls under S. 302 or S. 304, I.P. Code, is as a rule a difficult question which a Magistrate is as a rule not qualified by training or experience to decide, and it should therefore be left to the Sessions Court. (*Pollock, J.*) HIMLOO *v.* EMPEROR. **195 I.C. 184 = 14 R.N. 41 = 42 Cr.L J. 689 = 1941 N.L.J. 309 = A I.R. 1941 Nag. 224.**

——**S. 215**—*Ground for quashing commitment—Competency of Magistrate to inflict adequate punishment.*

A commitment to a Court of Session made by a competent Magistrate can only be quashed on a point of law. It cannot be quashed in revision on the ground that the committing Magistrate was competent to try the case himself and inflict adequate punishment. The question of adequate sentence cannot be properly decided without going into the evidence and the High Court, sitting as a Court of revision, will not enter into the facts of a particular case (*Bartley and Lodge, JJ*) DANA MIA *v.* MAMTAZAL KARIM. **45 C.W.N. 383 = 73 C.L J. 187 = A.I.R. 1941 Cal. 271.**

——**S. 215**—*Magistrate convicting accused under S.* 220, *Penal Code, and his confederate under S.* 384, *read with S.* 114, *Penal Code—Quashing proceedings and committing case to Sessions Court—Order to drop proceedings against confederate—Jurisdiction of High Court.*

Where a Magistrate by usurping jurisdiction convicts an accused for an offence falling under S 220, Penal Code, and his confederate under S. 384 read with S. 114, Penal Code, the High Court cannot, while quashing proceedings and committing the case to the Court of Session, order that no further proceedings be taken against the confederate merely because he has served a part of his sentence. It is in the interests of all concerned that the confederate and the accused should be tried together for offences which form part of the same transaction. (*Davis, C.J.*) MANSHARAM GIAN CHAND *v.* EMPEROR. **193 I.C. 454 = 13 R.S. 231 = 42 Cr.L.J. 460 = A.I.R. 1941 Sind 36.**

——**S. 222**—Offence under S. 408, I. P. Code—Charge if should give time and item. *See* PENAL CODE, S. 408 AND CR. P. CODE, S. 222. **1941 O.A. 918 = 1941 O.W.N. 1208.**

CR. P. CODE (1898), S. 235.

——**S. 233**—Scope of—Joinder of charges in respect of three offences under S. 409, I. P. Code, and three offences knder S. 477-A, I. P. Code—Legality. *See* 1940 Dig., Col. 474. BHUPRAKASH *v.* EMPEROR. **I.L.R. (1941) All. 36 = 1941 A.Cr.C. 1.**

——**S. 234**—*Charges under Ss.* 420, 467 *and* 477-*A, I. P. Code—Joint trial—Legality.*

Under S 234, Cr. P. Code, the joinder in one trial of three charges under S. 420, I. P. Code, or three charges under S. 467, I. P. Code, or three charges under S. 477-A, I. P. Code, is perfectly legal. But the section does not sanction the joinder in one trial of a charge under S. 420 with a charge under S. 467 or a charge under S. 477-A, I. P. Code. (*Lodge and Akram, JJ.*) HUGH FRANCIS BELLGARD *v.* EMPEROR. **I.L.R. (1941) 2 Cal. 319 = 45 C.W.N. 839 = A.I.R. 1941 Cal. 707.**

——**Ss. 234, 239 (d) and 537**—*Joinder of charges—What is prohibited—Curability under S.* 537.

The provisions of S. 239 (*d*), Cr. P. Code, cannot be combined with those of S.234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together. If such an illegality is committed then the trial is bad. S.537 only deals with mere errors and irregularities in the charge, and not with illegalities such as trials for plurality of offences in a manner not allowed by law. (*Mosely, J.*) G. H. ASTELL *v* ENG. TAKE. **1941 Rang. L.R. 559 = A.I.R. 1941 Rang. 337.**

——**Ss. 234 and 235**—*Joint effect—Joinder of charges arising out of three transactions of same kind carried out within* 12 *months—Legality.*

The joint effect of Ss. 234 and 235, Cr. P. Code, is not to sanction the joinder of all charges arising out of three transactions of the same kind carried out within the space of twelve months and unless it is clearly alleged at the trial that the three transactions were carried out in furtherance of a general conspiracy to commit such offences, their joinder in one trial is not sanctioned by the provisions of S. 235, Cr. P. Code. (*Lodge and Akram, JJ.*) HUGH FRANCIS BELLGARD *v.* EMPEROR. **I.L.R. (1941) 2 Cal. 319 = 45 C.W N. 839 = A.I.R 1941 Cal. 707.**

——**S. 235**—*Applicability—Three offences of cheating—Advances on misrepresentation—Subsequent advances on same misrepresentation—Same transaction.*

Where on the strength of a misrepresentation a person obtains an advance of money and on the strength of the same or original misrepresentation he obtains further advances in accordance with the original agreement between parties, the obtaining of the advances form part of the same transaction and constitutes one transaction and could be charged together under S. 235, Cr. P. Code. (*Mosely, J.*) G. H. ASTELL *v.* ENG. TAKE **1941 Rang.L.R 559 = A.I.R. 1941 Rang. 337.**

——**S. 235**—*Charges under Ss.* 468 *and* 408, *I. P. Code—Joinder—Legality.*

The offence of forging a document for the purpose of cheating cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant. Therefore, the joinder of three charges under S. 468 with a charge under S. 408, I. P. Code, cannot come within S. 235, Cr P. Code, and is contrary to the direct provisions of S. 233, Cr. P. Code. (*Lodge and Pal, JJ.*) JUGOL KRISHNA DEY SARKAR *v.* WILCOX LTD. **74 C.L.J. 400.**

——**S. 235**—Joinder of charges—Offence of cheating and offence under S. 6, Merchandise Marks Act. *See* 1940 Dig., Col. 475. A. K. SEN *v.* MADHU MONGAL DAS. **192 I.C. 835 = 13 R.C. 355 = 42 Cr.L.J. 334.**

CR. P. CODE (1898), S. 235.

——**S. 235**—Scope—Charges under Ss. 395, 148 and 460 in respect of same facts—Charges under Ss. 148 and 460 based on no acts other than those necessary to be proved under S. 460—Distinct charges and trial—If justified. *See* CR. P. CODE, SS. 297 AND 298.

7 Cut.L.T. 82.

——**S. 235 and Penal Code (1860), Ss. 124-A and 153-A**—Separate trials in respect of same speech for different offences—Necessity—Legality. *See* 1940 Dig., Col. 475. VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. **42 Cr L.J. 40 = A.I.R. 1941 Oudh 33**

——**S. 236**—Alternative charges under Ss. 302 and 201—Propriety—Accused not free from suspicion of being guilty of main offence—Conviction under S. 201, I. P. Code—Legality. *See* 1940 Dig., Col. 475. NEBTI MANDAL *v.* EMPEROR. **22 Pat.L.T. 98.**

——**S. 236**—Same transaction—Statement under S. 164, Cr. P. Code and contradictory statement at trial—Charge of perjury in the alternative—If justified. *See* 1940 Dig., Col. 476. EMPEROR *v.* SULTANSHA SIDISHA. **13 R.B. 187 = 191 I.C. 336 = 42 Cr.L.J. 155.**

——**Ss. 237 and 238**—*Charge for murder of* A—*Conviction for attempt to murder* B—*Legality.*

A person who is charged under S. 302, I. P. Code, with murder of *A*, cannot be convicted under S. 307, I. P. Code, for attempting to murder *B*. (*Young, C.J. and Blacker, J.*) WAKYAM SINGH *v.* CROWN.

I.L.R. (1941) Lah. 423 = 195 I.C. 58 = 14 R.L. 28 = 42 Cr.L.J. 660 = 43 P.L.R. 159 = A.I.R. 1941 Lah. 214.

——**S. 239**—*Joint trial—Legality—Manager and accountant—Charge under S.* 408, *I. P. Code and charges under S.* 408 *and S* 408/109, *I. P. Code.*

Where the manager and accountant are said to have jointly misappropriated certain sums of money and a community of design and object is suggested they could both be charged and tried jointly in respect of offences under S. 408 and under S. 408 and S. 408/109, I. P. Code. This is permissible under Cls. (*a*) and (*b*) of S. 239, Cr. P. Code. (*Thomas, C.J.*) WAZIR SINGH *v.* EMPEROR. **1941 A.W.R. (C.C.) 343 = 1941 A.Cr.C. 257 = 1941 O.W.N. 1208 = 1941 O.A. 918**

——**S. 239**—*Misjoinder—Joint trial of two sets of accused—Absence of common object or intention—Effect—Conviction—If to be set aside—Presumption of prejudice.*

Two sets of accused cut trees in different parts of a forest in the possession of the complaint. Separate charges were framed against each of the two sets of accused, but they were tried jointly at one trial and convicted. It was not found that there was any intention or object common to the two sets of persons cutting trees in the forest.

Held, in revision, that there was misjoinder of parties; and though it could not be said that by such misjoinder, by itself, was a sufficient ground for setting aside the conviction, the Court should ordinarily presume prejudice until it was quite certain that there could have been none. There was always a possibility, when there was a misjoinder of accused, that the Court would be unconsciously prejudiced by evidence which would be irrelevant if the accused were tried separately and therefore the conviction should be set aside if the Court was not quite sure that there was no prejudice, and separate trials should be ordered. (*Horwill, J.*) MOONGAN *v.* MIR ROSHAN ALI SAHIB. **54 L.W. 387 (2) = 1941 M.W.N. 869 = A.I.R. 1941 Mad. 910 = (1941) 2 M.L.J. 534.**

——**S. 239**—"Same transaction"—Meaning of—Joint trial in respect of large number of counts—Propriety. *See* 1940 Dig., Col. 477. PATEVYA, *In re.*

193 I C. 375 = 13 R.M. 687 = 42 Cr.L J 414 = A.I.R. 1941 Mad. 339.

CR. P. CODE (1898), S 239.

——**S. 239**—*Same transaction—One offence complete before another was committed—Joint trial—Permissibility.*

As long as the offences charged are committed in the course of the same transaction it is immaterial that one offence was complete before the other was committed. A girl was kidnapped and taken away by *P*. On the following morning while the girl was still with *P* and his companion, that companion fetched *K* and the three men proceeded to escort the girl to a neighbouring village. From there they took her to Dacca and *K* actually stayed there until both of them were arrested by the police. *P* was charged with an offence under S. 366, Penal Code, and *K* with offence under S. 368, Penal Code, and both were tried jointly.

Held, that the offences were committed in the course of the same transaction and the accused therefore were rightly tried together. (*Bartley and Lodge, JJ.*) KAMALA PRASAD *v.* EMPEROR. **195 I.C. 12 = 14 R.C. 37 = 42 Cr.L.J. 649 = A.I.R. 1941 Cal. 315.**

——**S. 239 (d)**—*Joinder of charges under Ss.* 211, 323 *and* 342, *I. P. Code—Legality.*

Where the offence of making a false charge, of wrongfully confining and of causing injuries to a person are committed in the course of the same transaction, a joint trial in respect of the offences under Ss. 211, 323 and 342, I. P. Code, is quite legal. Such a joinder of charges is clearly permitted by S. 239 (*d*), Cr. P. Code. (*Ghulam Hasan, J.*) BALAK RAM *v.* EMPEROR.

196 I.C. 262 = 1941 O.W.N. 1072 = 1941 A.Cr.C. 224 = 1941 O.L.R. 665 = 14 R.O. 161 = 1941 A.W.R. (C.C.) 298 = 42 Cr.L.J. 833 = 1941 O.A. 776

——**S. 239 (d)**—Joinder of charges under Ss. 302 and 311 with charges under S. 330, I. P. Code—When justified—Sameness of transaction—Relevant point of time. *See* 1940 Dig., Col. 477. PARMANAND *v.* EMPEROR. **I.L.R. (1941) Nag. 110 = 42 Cr.L.J. 17.**

——**S. 239 (d)**—*Joint trial—When justified.*

Under S. 239 (*d*), Cr. P. Code, joint trial is justified not by the fact that the offences were committed in the course of the same transactions but by the fact that an accusation is made in good faith that the offences were so committed. If the accusation is made in good faith, the fact that it subsequently transpired that the offences were not committed in the course of the same transaction does not render the trial illegal. The corollary to this proposition is that if no such accusation is made explicitly or implicitly—the mere fact that it subsequently appears that the offences were committed in the course of the same transaction, will not render legal the joint trial. (*Lodge and Akram, JJ.*) HUGH FRANCIS BELLGARD *v.* EMPEROR.

I.L.R. (1941) 2 Cal. 319 = 45 C.W.N. 839 = A.I.R. 1941 Cal. 707.

——**S. 239 (d)**—*Same transaction—Joint trial of several persons for different offences—Principle applicable to trial of single person under S.* 235 (1) *is extended by S.* 239 (*d*) *to trial of several persons jointly—Five persons charged under S.* 366, *Penal Code, kidnapping girl in order that she should submit to illicit intercourse—After being kidnapped girl forced to illicit intercourse with accused who was one of afore said five persons—Accused charged under S.* 376, *Penal Code, also—Offences under Ss.* 366 *and* 376, *Penal Code, held committed in course of same transaction—Joint trial of all five accused persons held justified under S.* 239 (*d*).

CR. P. CODE (1898), S. 242.

The principle contained in S. 235 (1) which applies to the trial of a single person is extended by S. 239 (*d*) to the trial of several persons jointly. Just as one person can under S. 235 (1) be tried for several distinct offences if they are committed in one series of acts so connectted together as to form the same transaction, under S. 239 (*d*), several persons can be tried for different offences provided the different offences are committed in the course of the same transaction. Five persons who were charged under S. 366, Penal Code, kidnapped a girl with the object that she should be submitted to illicit intercourse. After being thus kidnapped, the girl was forced to illicit intercourse with the accused who was one of the five persons aforesaid. The accused was charged under S 376, Penal Code, as well. All the five accused persons were tried jointly.

Held, that the two offences under Ss. 366 and 376, Penal Code, were committed in the course of the same transaction, and therefore the joint trial of the five accused persons was justified under S. 239 (*d*). (*Lobo and Weston, JJ.*) MOUJALI *v.* EMPEROR.

195 I.C. 267 = 14 R.S. 20 = 42 Cr.L.J. 715 = A.I.R. 1941 Sind 121.

——**Ss. 242 and 537**—*Non-compliance with section —Irregularity, when curable.*

The primary object of the proceeding prescribed by S. 242, Cr. P. Code, is to determine whether the accused pleads guilty to the charge or demands to be tried. Where the facts on which the case under S. 172, Punjab Municipal Act, was based were fully set out by the prosecution and the accused was specifically asked to explain the case.

Held, that in the circumstances failure to comply with the provisions of S. 242, Cr. P. Code, amounted merely to an irregularity which was cured under S. 537. (*Almond, J.C.*) DOST MOHAMMAD *v* HARIPUR EAZARA MUNICIPALITY. **193 I.C. 365 = 13 R. Pesh. 60 = 42 Cr.L.J. 420 = A.I.R. 1941 Pesh. 9.**

——**S. 245**—Applicability—Proceeding under S. 198, Bihar and Orissa Municipal Act. *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 198. **22 Pat.L.T. 510.**

——**Ss. 247 and 259**—Applicability—Charge of summons case and charge of warrant case arising from same transaction—Trial of both as warrant cases—Absence of complainant—Discharge of accused—Effect of—If bar to fresh complaint. *See* 1940 Dig., Col. 478. KANJI VIJPAL *v.* PANDURANG KESHAV.

191 I.C. 397 = 13 R B. 188 = 42 Cr.L.J. 153.

——**S. 247**—*Complainant absent—Magistrate proceeding with case—Legality of procedure.*

Under S. 247, Cr. P. Code, if the complainant is not present in Court on the date fixed for the hearing of the case the only course which is open to the Magistrate is to acquit the accused or to adjourn the hearing of the case and not to proceed with the hearing. If the Magistrate proceeds with the hearing and convicts the accused, the procedure adopted by him is entirely illegal and the conviction is liable to be quashed. (*Fazl Ali, J.*) SUDHIR KUMAR NEOGI *v.* EMPEROR.

8 B.R. 33 = 196 I.C. 548 = 14 R.P. 214.

——**Ss. 247 and 259**—Relative scope and applicability. *See* PENAL CODE, S. 500 AND CR. P. CODE, Ss. 198, 247 AND 259. **1941 Rang.L.R. 224.**

——**Ss. 250 and 423 (1) (d)**—Appellate or revisional Court—If can direct compensation to be paid on acquittal—Such order if incidental to order of acquittal. *See* 1940 Dig., Col. 479. KING *v.* MAUNG KHIN MAUNG. **191 I.C. 694 = 13 R.R. 155 = 42 Cr.L.J. 218.**

CR P. CODE (1898), S. 253.

——**S. 250**—*Applicability—False and frivolous or vexatious—Meaning.*

On a complaint under S 426 and S. 447, I. P. Code, in respect of cutting of the leaves of trees, it was found that the accused were entitled to the leaves, the complaint was therefore dismissed and compensation was awarded under S. 250, Cr. P. Code.

Held, that the finding that the accused were entitled to the leaves did not make the complaint false and frivolous or vexatious, and the order of compensation was therefore unsustainable. (*Lakshmana Rao, J.*) VENKAYYA *v.* SEETHAYYA. **1941 M.W.N. 669 (2) = A.I.R. 1941 Mad. 884.**

——**S. 250**—*Applicability—Warrant cases.*

S. 250 clearly applies to trial of warrant cases as well as summons cases. (*Almond, J.C.*) GOKAL CHAND *v.* SAID ALI. **193 I C. 468 = 13 R. Pesh. 59 = 42 Cr.L.J. 423 = A.I R. 1941 Pesh. 24.**

——**S. 250**—*Charge by police after investigation—Order of compensation—Legality of.*

In a case charged by the police after investigation, an order awarding compensation under S. 250, Cr.P. Code, cannot be upheld. (*Lakshmana Rao, J.*) RAYUDU BAPIAH *v.* JAKARAYYA. **53 L W. 63 = 1941 M.W.N. 61.**

——**S. 250**—False complaint—Finding as to—Necessity for. *See* 1940 Dig., Col. 480. DAROPTI *v.* PARAS RAM. **192 I.C. 295 = 13 R.L. 375 = 42 Cr L.J. 266 = A.I.R. 1941 Lah. 19.**

——**S. 250**—*Order of compensation—Sustainability —Conditions—Duty of Magistrate.*

S. 250, Cr. P. Code, requires that the Magistrate should, if he considers a case to be false, frivolous or vexatious, call upon the complainant to show cause why he should not pay compensation. It is necessary under S. 250 (2) that the Magistrate should at least indicate in his judgment that he had asked the complainant the requisite questions and he should set out the explanation which the complainant gave and say whether he thought the explanation satisfactory, and if so, why. If the Magistrate has not complied with these requirements, his order for payment of compensation cannot be sustained. (*Horwill, J.*) NAMBERUMAL NAIDU *v.* MUTHU KALATHI MUDALI. **(1940) 2 M.L.J. 1038.**

——**S. 252**—Applicability—Case started on police challan. *See* 1940 Dig., Col. 480. HANSRAJ *v.* EMPEROR. **191 I.C. 636 = 13 R.N. 212 = 42 Cr.L.J. 208.**

——**S. 252 (2)**—Powers under—If can be exercised only once. *See* 1940 Dig., Col. 480. HANSRAJ *v.* EMPEROR. **191 I.C. 636 = 13 R N. 212 = 42 Cr.L.J. 208.**

——**S. 253 (2)**—*Applicability—Test to determine whether charge is "groundless"—Duty of Magistrate—If bound to examine all witness named by complainant.*

The application of S. 253 (2), Cr. P. Code, depends upon the evidence already recorded where the Magistrate takes action under that section; the material word is "groundless" and each case must be taken on its own facts. "Groundless" means that there are no grounds for the charge. It is not always necessary to call all the witnesses named by the complainant; but the Magistrate should not come to a conclusion that the charge is groundless unless he has at least ascertained from the complainant what is the nature of the evidence which the other witnesses are going to give. He is to arrive at his conclusion judicially and not capriciously, and no general rule can be laid down as to the amount of evidence to be taken to enable the Magistrate to say that a charge is groundless. (*Davis, C.J.*) MAHOMED

CR. P. CODE (1898), S. 256.

IBRAHIM *v.* T.C.H. NAUGHTON.
I.L.R. (1941) Kar. 345=
196 I.C. 755 = A.I.R. 1941 Sind 198.

——**S. 256**—Any remaining witnesses'—Meaning. *See* 1940 Dig., Col. 481. HANSRAJ *v.* EMPEROR.
191 I.C. 636 = 13 R.N. 212 = 42 Cr.L.J. 208.

——**Ss. 256 and 510**—*Wish to cross-examine chemical examiner—Request when to be made.*

If an accused denies or questions the accuracy of a chemical analyser's report, he should do so at the earliest possible moment (*i.e.*,) when under the provisions of S. 256, Cr. P. Code, he is required to state whether he wishes to cross-examine any of the witnesses for the prosecution whose evidence has been taken and the chemical analyser whose report is admissible under S. 540 is included amongst such witnesses. (*Davies.*) EMPEROR *v.* ZAHOOR ALI. 1940 A. M.L.J. 98.

—— **S. 257**—Court, if bound to summon all witnesses. *See* 1940 Dig., Col. 481. VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. 42 Cr.L.J. 40 = A.I.R. 1941 Oudh 33.

——**S. 257 (1)**—*Duty of Magistrate—Application by accused for process to witnesses—Rejection on ground that many witnesses have been already examined and that the case would be prolonged—If justified.*

Under S. 257 (1), Cr. P. Code, a Magistrate is not entitled to refuse to call witnesses whom an accused desires to be summoned in his defence because their number is large or the result would be to delay the case. Before a Magistrate refuses to summon a witness he should ascertain from the accused briefly the substance of the witness's evidence or the point which the witness is to be summoned to prove, and then if he comes to the conclusion that a witness is to be summoned for the purpose of vexation or delay for defeating the ends of justice, he is entitled, after giving his grounds in writing, to refuse to issue process. But to reject an application to call witnesses on behalf of an accused merely because enough witnesses have been examined is not in itself a sufficient compliance with S. 257; and although a case may have been already prolonged, the accused is not always responsible for the prolongation of a case. (*Davis, C.J. and Lobo, J.*) JUMO LAL BAKHSH *v.* EMPEROR. I.L.R. (1941) Kar. 66 = A.I.R. 1941 Sind 177.

——**S. 257 (1)**—*Recall of prosecution witnesses for cross-examination—Accused, when may be allowed.*

The challan in the case was placed by the investigating officer before the Prosecuting Inspector on 22nd February, 1941 and the very same day it was placed before the Sub-Divisional Magistrate in camp together with the prosecution witnesses, all of whom were examined. On the following day, 23rd February, 1941, the Magistrate directed the release of the accused on bail and fixed 5th March, 1941, for defence evidence. The accused were only released on 4th March, 1941 and on the 5th asked for an adjournment in order that the prosecution witnesses might be recalled for "cross-examination." The Magistrate rejected this application on the ground that the accused "have had the legal opportunities of cross-examination."

Held, that in the circumstances it was reasonable that the accused should be allowed to recall the prosecution witnesses for cross-examination. (*Skemp, J.*) KARAM DAD *v.* EMPEROR. A.I.R. 1941 Lah. 414.

——**Ss. 258 (1) and 367 (2) (4)**—*Mandatory character of S. 258 (1)—Judgment neither acquitting nor convicting one of the accused—Effect.*

Under S. 258 (1), Cr. P. Code, it is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record

CR. P. CODE (1898), S. 288.

an order of acquittal. The provisions of this section are mandatory. Further Cls. (2) and (4) of S. 367 require that the judgment should state in the case of a conviction, the offence of which the accused is convicted, and in the case of an acquittal, the offence of which the accused is acquitted. Where a judgment does not contain either an order of conviction of acquittal of one of the accused, it amounts to a flagrant disregard of the provisions of Ss. 258 and 367—and is likely to be set aside. (*Ghulam Hasan, J.*) DIWAN *v.* RAJA RAM. 194 I.C. 872 = 1941 O.W.N. 889 = 14 R.O. 55 = 1941 O.L.R. 532 = 1941 A.L.W. 783 = 42 Cr.L.J. 633 = 1941 A.W.R. (C.C.) 245 = 1941 A.Cr.C. 185 = 1941 O.A. 568 = A.I.R. 1941 Oudh 575.

——**S. 261 (b)**—*"Municipal Acts"—Meaning of—Bengal Food Adulteration Act—If a Municipal Act.*

The intention of the Legislature in referring to Municipal Acts under S. 261 (*b*), Cr. P. Code, was to provide that offences against Acts such as the Calcutta Municipal Act or the Bengal Municipal Act should be tried by Benches of Magistrates duly empowered, but this provision would not cover an Act of general application like the Bengal Food Adulteration Act. (*Edgley, J.*) JAGNARAYAN HALUWAI *v.* BHATPARA MUNICIPALITY. 45 C.W.N. 139.

——**S. 263**—*Summary procedure if adopted—Use of summary trial forms—Evidence recorded in full—Exhaustive judgment delivered.*

Where the evidence of all the witnesses was recorded in full together with their cross-examination and an exhaustive judgment was delivered, the mere fact that at the top of the record appears a "Form kept under S. 263 of Act X of 1862" cannot be taken to mean that the summary procedure was actually adopted. (*Edgley, J.*) JAGNARAYAN HALUWAI *v.* BHATPARA MUNICIPALITY. 45 C.W.N. 139.

——**S. 274**—Trial with seven jurors—Presumption. *See* 1940 Dig., Col. 482. MIRZA AKBAR *v.* EMPEROR. 67 I.A. 336 = I.L.R. (1940) Lah. 612 = I.L.R. (1940) Kar. (P.C.) 302 = 1941 O.W.N. 43 = 43 Bom.L.R. 20 = 45 C.W.N. 269 = 43 P.L.R. 69 = 1941 A.L.W. 48 = 1941 A. Cr C. 11 = 73 C.L.J. 252 = (1940) 2 M.L.J. 811 (P.C.).

——**S. 275**—Construction—Finding as to accused being European or Indian subject—What amounts to—Application for trial by majority of European or Indian jurors at trial in Sessions Court—Maintainability—Duty of Magistrate holding enquiry—Cr. P. Code, Ss. 443 and 447. *See* 1940 Dig., Col. 483. EMPEROR *v.* ALBERT BARNEY. 191 I.C. 487 = 13 R.P. 323 = 7 B.R. 202 = A.I.R. 1941 Pat. 163.

——**S. 287**—"Duly recorded"—Meaning of—Examination of accused—Object of—Evidence insufficient to implicate accused—Answers elicited by Court and recorded—If "duly" recorded—Admissibility in evidence at trial. *See* 1940 Dig., Col. 484. EMPEROR *v.* KUPPAMMAL. 195 I.C. 129 = 14 R.M. 133 = 42 Cr.L.J. 677 = A.I.R. 1941 Mad. 1.

——**S. 287**—"Duly recorded"—Meaning—Preliminary inquiry—Magistrate questioning accused under S. 209—Accused filing written statement—Such statement—If one "duly recorded"—Admissibility—Ss. 209 and 342. *See* 1940 Dig., Col. 484. KRISHNAN, *In re.* 193 I.C. 339 = 13 R.M. 665 = 42 Cr.L.J. 402 = A.I.R. 1941 Mad. 296.

——**S. 288**—Construction—Evidence given by witness in Committing Magistrate's Court—Use of in preference to evidence in Sessions Court—If justified. *See* 1940 Dig., Col. 485. NEBTI MANDAL *v.* EMPEROR. 22 Pat.L.T. 98.

CR. P. CODE (1898), S. 288.

——S. 288— Scope—Witnesses giving evidence before Committing Magistrate as to certain facts—Subsequent change of evidence in Sessions Court—Depositions before Committing Magistrate—Admissibility at trial. *See* 1940 Dig., Col. 485. PACHAYANNA GOUNDAN, *In re.* **I.L.R. (1941) Mad. 172=192 I.C. 299=13 R.M. 551=42 Cr.L.J. 265=A.I.R. 1941 Mad. 258=(1940) 2 M.L.J. 767.**

——S. 288—Transfer of evidence in the Committing Court to the Sessions Court—Value to be attached—Corroboration—Necessity. *See* 1940 Dig., Col. 485. PARMANAND *v.* EMPEROR. **I.L.R. (1941) Nag. 110=42 Cr.L.J. 17.**

——S. 289—*Duty of Judge—Absence of evidence against accused—Duty to direct jury to return verdict of acquittal.*

Under S. 289, Cr. P. Code, in a case tried by the jury, it is well-settled that if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. There are always cases on the border line and it may be difficult sometimes to say on which side the particular case falls. But the general principle clearly is that it is the function of the jury, in a trial by jury to determine whether the evidence is true and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution case is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable, for example, the evidence of discharged servants; but if he thinks that though weak, the evidence, if true, will justify a conviction, he must leave the case to the jury, cautioning them about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury. (*Beaumont, C.J., Broomfield and Wassoodew, JJ.*) EMPEROR *v.* THOKARSI NARSI. **194 I.C. 5=42 Cr.L.J. 513=13 R.B. 355=43 Bom.L.R. 238=A.I.R. 1941 Bom. 125.**

——S. 289—*Duty of Judge—No evidence to go to jury—Withdrawal of case from jury—Discretion—Exercise of.*

S. 289, Cr. P. Code, confers in terms a discretion on the Judge, but it is discretion which must be exercised judicially; it is quite clear that where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty. All questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the notice of the jury, but if the evidence is such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believe the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty. (*Beaumont, C.J., Wadia and Sen, JJ.*) EMPEROR *v.* DAWOOD HASHAM. **193 I.C. 859=13 R.B. 351=42 Cr.L.J. 470=43 Bom.L.R. 245=A.I.R. 1941 Bom. 123 (F.B.).**

CR. P. CODE (1898), S. 297.

——S. 289 (2)—*Duty of Judge under—Offence not made out on facts found and evidence recorded—Duty to direct jury to return verdict of not guilty—Reference to High Court after perverse verdict of guilty—Propriety.*

Where on the evidence recorded and the facts found, the Sessions Judge is of opinion that the essential elements of the offence charged are wanting in the case and that the act of the accused did not constitute any offence, it is the duty of the Judge under S. 289 (2), Cr. P. Code, to direct the jury to return a verdict of not guilty. The Judge ought to tell the jury that even if they believed every word that the prosecution witness said, the accused were not guilty of any offence and therefore they must return a verdict of not guilty. It is not fair or proper for him to charge the jury at length discussing all the elements of the offence, and then to make a reference to the High Court after the jury has returned a perverse verdict of guilty. Such a reference need not be made, for it is the duty of the Judge to find whether the elements of an offence had been made out. (*Burn and Happell, JJ.*) CHITRAVELU THEVAR, *In re.* **197 I.C. 71=54 L.W. 482=1941 M.W.N. 679 (2)=A.I.R. 1941 Mad. 763=(1941) 2 M.L.J. 207.**

——Ss. 297 and 423 (2)—*Charge to the jury—Directions on the question of law—Failure to give—Effect.*

It is the clear duty of the Judge to explain the ingredients of the offence with which the accused are charged and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. The mere reading of the sections to the jury does not amount to explanation of the law. The omission of the Judge in these matters vitiates the verdict and it should be considered erroneous within the meaning of S. 423 (2), Cr. P. Code. (*Ghulam Hasan, J.*) ISRAR HUSAIN *v.* EMPEROR. **195 I.C. 371=1941 O.W.N. 874=14 R.O. 88=1941 O.L.R. 574=1941 A.W.R. (C.C.) 260=42 Cr.L.J. 728=1941 A.Cr.C. 175=1941 O.A. 573=A.I.R. 1941 Oudh 567.**

——S. 297—*Charge to jury—Kidnapping and abduction—Verdict under both heads—If can be asked for.*

It is a complete misunderstanding of S. 366, I. P. Code, to ask the jury for a verdict under both heads of kidnapping and of abduction. There cannot be any such verdict. A person kidnaps a woman with the intent or knowledge specified in the section and thereby commits an offence under S. 366, if the evidence establishes that the woman is under 16: if she is not, the offence under the section is abduction. (*Bartley and Sen, JJ.*) KRISHNA CHANDRA SARDAR *v.* EMPEROR. **45 C.W.N. 27.**

——S. 297—*Charge to jury—Sexual offences—Proper direction.*

In the case of offences of the nature of kidnapping or abduction or sexual offences, the Judge should direct the jury that it is unsafe to convict the accused on the uncorroborated testimony of the prosecutrix but he should tell the jury that in spite of the warning if they are satisfied that she is telling the truth, they are at liberty to convict him. If the Judge tells the jury that the girl is obviously lying and therefore her evidence is defective, this direction is clearly most inadequate. (*Bartley and*

CR. P. CODE (1898), S. 297.

Sen, JJ.) KRISHNA CHANDRA SARDAR *v.* EMPEROR.
45 C.W.N. 27.

——**S. 297**—Defective charge—Summarising evidence against each accused and asking jury if he is falsely implicated. *See* 1940 Dig., Col. 486. MUJJAFFAR SHAIKH *v.* EMPEROR. **193 I.C. 302= 42 Cr.L.J. 385=13 R.C. 391=72 C.L.J 533= A.I.R. 1941 Cal. 106.**

——**S. 297**—*Duty of Court—Summing up of evidence and statement of law—What the Judge should do.*

Under S. 297, Cr. P. Code, the Court's duty is to sum up the evidence for the prosecution and the defence and then lay down the law by which the jury are to be guided. The section nowhere requires that all the arguments addressed by the respective parties should be gone over again. To do so at length is to confuse the jury. What the jury really require is assistance in applying their minds to the ascertainment of the true state of the facts so far as it can be determined from the evidence. In many cases it will be found a more convenient method to state first to the jury the things which the accused are said to have done, and to tell them in as concrete terms as possible what offences particular alleged acts will constitute in the presence or absence of the particular intentions imputed. The tests for determining the facts are to see not only whether the evidence is consistent but how far it agrees with established and admitted facts and the probabilities of the case. To enable the jury to apply these tests it will assist the jury if the Court presents clearly to them the facts which can be said to be admitted or established and then takes them to the evidence to see how far the case of each party fits in with the probabilities and with those facts. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM.
195 I C. 107=7 B.R. 875=14 R.P. 84= 1941 P.W.N. 255=22 Pat.L.T. 327= A.I R. 1941 Pat 362.

——**Ss. 297 and 298**—*Duty of Judge—Charge against several persons—Considerable body of evidence adduced—Duty of Judge to marshal evidence against each accused.*

Where several persons are tried together on a charge under S. 401, I. P. Code, and there is a considerable body of evidence it is the duty of the judge to marshal the evidence against each of the accused and should conclude his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there is against each of the accused. (*Horwill, J.*) SUBBARAYA AYYAR *v.* EMPEROR. **194 I.C. 857 =42 Cr.L.J. 631= 14 R.M. 138=53 L.W. 567=1941 M W N. 371= A.I.R. 1941 Mad. 658.**

——**S. 297**—*Duty of Judge—Charge open to criticism in some respects, but fair as a whole—If ground for reversal of unanimous verdict of jury.*

Although a Judge's charge to the jury is open to criticism in certain respects, if read as a whole, it is an honest attempt to place before the jury the considerations favouring the prosecution as well as the defence and to ask the jury to choose between them, a unanimous verdict of acquittal ought not to be set aside on that ground, especially when the trial has lasted for a long time and the jury had been addressed at length by both sides. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I.C. 107=7 B.R. 875=14 R.P. 84= 1941 P.W.N. 255=22 Pat.L.T. 327= A.I.R. 1941 Pat. 362**

——**Ss 297 and 298**—*Duty of Judge—Several persons charged with offences triable by jury and offences triable with Judge with aid of assessors—Duty to sum up evidence against each accused—Charges under Ss.* 395 148 *and* 460, *I. P. Code, on same facts—Judge failing to place evidence against each accused or to express definite opinion as to credibility of witness—Verdict of guilty—Sustainability.*

In the case of a trial before a jury of several accused persons, it is the duty of the Judge to sum up and place before the jury the evidence against each of the individual persons. He must also point out to the jury the defects in the evidence in respect of the individual accused persons. In a trial with jury, the Judge is not a Judge of fact at all, and any observations which he makes as to the credibility of the witnesses are not binding on the jury. But in a trial with the aid of assessors the Judge is a Judge of fact and he is bound to give his opinion on the credibility of witnesses. Where on the same facts, several persons are tried on charges under S. 395, I. P. Code, and also under Ss. 148 and 480, the charges under the latter sections not being based on any acts other than the acts necessary to be established by the prosecution for the offence under S. 395, if the Judge does not sum up the evidence against each of the accused and fails to point out the defects in the evidence and also omits to express any definite opinion on the credibility of the witnesses, and the jury return a verdict of guilty under S. 395, and they as assessors also find the accused guilty under Ss 148 and 460, the verdicts must be considered to be vitiated and the convictions must be set aside. While there should be a retrial under S. 395, I. P. Code, there should be no retrial in respect of the charges under Ss. 148 and 460, because the charges under these latter sections need not be framed at all. (*Agarwala and Meredith, JJ.*) ARJUN PANDA *v.* EMPEROR. **7 Cut.L.T. 82.**

——**S. 297**—Evidence—Case depending on circumstantial evidence—Absence of motive—Duty of Judge to emphasise. *See* 1940 Dig., Col. 487. UPENDRANATH GHOSE *v.* EMPEROR. **192 I.C. 352= 13 R.C 329=42 Cr.L.J. 285.**

——**S. 297**—Evidence — Circumstantial evidence—Proper direction. *See* 1940 Dig., Col. 487. MUJJAFFAR SHEIKH *v.* EMPEROR. **193 I C. 302= 42 Cr.L.J. 385=13 R.C. 391=72 C.L.J. 533= A.I.R. 1941 Cal. 106.**

——**S. 297**—*Laying down the law—Meaning of—Citation of authority and reading of headnotes of reported decisions—Propriety of.*

Although there is no rigid rule of law against the citation of authority by the Judge to the jury, the practice of reading out headnotes or other portions of the report of a case not before them to the members of a jury is a dangerous practice. It is also preferable to avoid the practice of citing recorded authority in support of observations which are the fruit of the experience of Judges in matters of fact and are not expressions regarding questions of law. The unnecessary citation of decisions ought to be deprecated. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM.
195 I.C. 107=7 B.R. 875=14 R.P. 84= 1941 P.W.N. 255=22 Pat.L.T. 327= A.I.R. 1941 Pat. 362.

——**Ss 297 and 298**—Misdirection—Exclusion of relevant evidence of accused—Omission to stress that prosecution witnesses were interested. *See* 1940 Dig., Col. 488 PATEVYA. *In re.*
193 I.C. 375=13 R.M. 687=42 Cr L.J. 414= A.I.R 1941 Mad. 339.

——**S. 297**—*Misdirection—Offence under S.* 411, *I. P. Code—Accused found in possession of stolen property—Direction that burden of proving innocence lies on him.*

CR. P. CODE (1898), S. 297.

If in a trial for an offence under S. 411, I. P. Code, the Judge says in explaining the law to the jury that if a person is found in the possession of stolen property under circumstances which point to his having the knowledge that the property is stolen or reason to believe it to be stolen, then the burden of proof that he is innocently in possession of it or that he has not got the guilty knowledge rests upon him, it is a clear misdirection. In such circumstances, the jury should be told that they must, in the absence of any reasonable explanation, find the accused guilty but that if an explanation is given and the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the accused is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury, beyond reasonable doubt of the accused's guilt, which onus never changes and always rests on the prosecution. (*Bartley and Lodge JJ.*) FATEH ALI *v.* EMPEROR. **46 C.W.N. 54.**

——**Ss. 297 and 298**—Misdirection—Omission to state evidence against each accused in respect of particular counts. *See* 1940 Dig., Col. 488. PATEYYA, *In re.* **193 I.C. 375 = 13 R.M. 687 = 42 Cr L.J. 414 = A.I.R. 1941 Mad. 339.**

——**S. 297**—*Misdirection—Question of reasonable doubt—Judge stating that jury must have reasons for doubt.*

Where the charge of a Judge to the jury almost assumes that the prosecution case is proved and throws the onus on the accused to establish his innocence, and the Judge repeats more than once that the jury must have reasons for their doubts before they can consider that they have a reasonable doubt, the charge is open to serious objection. (*Henderson and Roxburgh, JJ.*) EMPEROR *v.* SEKANDAR ALI SHAH.
195 I.C. 774 = 14 R.C. 137 = 42 Cr L.J. 781 = A.I.R. 1941 Cal. 406.

——**S. 297**—*Non-direction—Offence under S. 368, Penal Code—Failure to explain offence.*

In the case of a trial of an offence under S. 368 Penal Code, when there is no evidence establishing the charge under that section, the failure of the Judge to put clearly to the jury and to indicate that an offence under S. 368, Penal Code, consists in something more than the wrongful concealment or confinement of a woman amounts to a material non-direction in the charge and therefore a conviction under S. 368, Penal Code, cannot be sustained. (*Bartley and Lodge, JJ.*) KAMALA PRASAD *v.* EMPEROR. **195 I.C. 12 = 14 R.C. 37 = 42 Cr.L.J. 649 = A.I.R. 1941 Cal. 315.**

——**S. 298 (1) (c)**—*Misdirection—Duty of Judge—Confession—Judge satisfying himself as to voluntary nature—Charge to jury—Judge saying that it was for the jury to decide whether it was voluntary—Propriety.*

Under S. 298 (1) (*c*), Cr. P. Code, the Judge should take upon himself for the purpose of admitting a confession into evidence, that it was voluntarily made while at the same time leaving it to the jury, for the purpose of determining what weight should be given to it, to decide both whether it was true and whether it was voluntary. A sessions Judge trying a case of dacoity with a jury, after Satisfying himself that a confession was voluntary before allowing it to go to the jury, in the course of his charge to the jury said: "It is for you to decide whether this statement was made voluntarily or not."

Held, that there was no misdirection in the charge to the jury. (*Rowland and Shearer, JJ.*) SUKER DUSADH *v.* EMPEROR. **20 Pat. 547 = 192 I.C. 888 = 22 Pat.L.T. 297 = 7 B.R. 495 = 42 Cr.L.J. 343 =**

CR. P. CODE (1898), S. 342.

13 R.P 563 = 1941 P.W.N. 69 = A.I.R. 1941 Pat. 303.

——**Ss. 326 and 327**—*Power of Assistant Sessions Judge to issue precept for summoning jurors—Case adjourned to next month—Fresh set of jurors—If to be summoned.*

It cannot be said that an Assistant Sessions Judge to whom the Sessions Judge has transferred a case has no power to issue the precept for summoning jurors under S. 326, Cr. P. Code. The Assistant Sessions Judge has certainly the powers conferred on the Court of Session under S. 327. If a set of jurors have been summoned by the Sessions Judge for a whole Session, it is still open to the presiding officer of any of the Courts holding Sessions to summon another set of jurors for a particular trial if it is not convenient or practicable for the trial to be held by jurors of the set summoned by the Sessions Judge under S. 326. It is not, in practice, usual for the Sessions Judge to act under S. 326, summoning a single set of jurors to hear all the cases set down for hearing in a particular Session, but rather to summon one set of jurors for each trial that has to be held, and this is in accordance with and authorised by S. 327. When a case is being adjourned to the next month after the jurors have been summoned, an Assistant Sessions Judge has power under S. 327 to summon a fesh set of jurors, if he thinks fit to do; but it is not imperative, though desirable. The trial cannot be challenged as illegal on the ground that the Assistant Sessions Judge did not summon a fresh set of jurors. *Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM.
195 I.C. 107 = 7 B.R. 875 = 14 R.P. 84 = 1941 P.W.N. 255 = 22 Pat L.T. 327 = A.I.R. 1941 Pat. 302

——**S. 339 (2)**—Statement contemplated by. *See* 1940 Dig., Col. 492. HORI LAL *v.* EMPEROR.
I.L.R. (1941) Nag. 372.

——**S. 341**—*Powers of High Court—Woman charged with murder—Accused becoming unable to hear towards end of sessions trial—Judge unable to question accused under S. 342, Cr. P. Code—Conviction supported by evidence and confession—Power of High Court to confirm.*

The accused, a woman, was charged with murder under S. 302, I. P. Code. Towards the end of the trial the Sessions Judge felt that she was unable to understand the proceedings as she was unable to hear the questions put to her under S. 342. She was represented by a vakil, and she followed the proceedings up to that stage and pleaded that the case was foisted on her. There was strong evidence of her guilt and there was besides a confession of the accused duly recorded on which the Sessions Judge based his conviction.

Held, on reference under S. 341, Cr. P. Code, that no injustice had resulted from the fact that the Sessions Judge felt himself unable to question the accused further with regard to the evidence appearing against her, and therefore the conviction should be confirmed under S. 341, Cr. P. Code. (*Lakshmana Rao and Horwill, JJ.*) BOYA PALAMMA, *In re.* **192 I.C. 674 = 1940 M.W.N. 1269 = 42 Cr.L.J. 315 = 13 R.M. 590 = 52 L.W. 924 = A.I.R. 1941 Mad 225 = (1941) 1 M.L.J. 20.**

——**S. 342**—Applicability — Additional evidence taken under S. 428. *See* 1940 Dig., Col. 493. NATHU SINGH *v* EMPEROR. **A.I.R. 1941 Nag. 66.**

——**S. 342**—Applicability—Summary trial in summons case—Case under S. 22, Cattle Trespass Act. *See* 1940 Dig., Col. 493. EMPEROR *v.* KONDIBA BALAJI. **13 R.D. 153 = 42 Cr.L.J. 71.**

CR. P CODE (1898), S. 342.

——**S. 342**—*Examination of accused—Scope and object of.*

When the accused is questioned under S. 342, Cr. P. Code, it is generally expedient that he should have his attention drawn to circumstances which appear to strengthen the prosecution case against him, so that he may be expressly given an opportunity of explaining them. (*Bennett and Ghulam Hasan, JJ.*) PARMESHWAR DIN *v.* EMPEROR. **195 I C. 630 = 1941 O A. 689 = 1941 O L R. 609 = 1941 A.W R (C.C) 265 = 1941 A.L.W 856 = 14 R.O. 110 = 42 Cr L.J. 758 = 1941 A.Cr C. 198 = 1941 O.W.N. 981 = A.I.R. 1941 Oudh 517.**

——**S. 342**—*Omission to examine accused after charge—Illegality.*

If no prosecution witnesses are either examined or cross-examined after the framing of the charge, the omission to examine the accused again is not illegal. (*Bhide, J.*) GHAUS MAHOMED *v.* EMPEROR. **43 P.L.R. 436 = A.I.R. 1941 Lah. 322.**

——**S. 342**—*Omission to examine accused after further cross-examination of prosecution witnesses—Effect of.*

Where the accused was examined under S. 342, Cr. P. Code, after the witnesses for the prosecution had been examined but was not examined again after some of them were re-called at his request and further cross examined by him after he had been called on for his defence.

Held, that there had been no non-compliance with the provisions of S. 342, Cr. P. Code. (*Edgley, J.*) GIRILAL MONDAL *v.* EMPEROR. **45 C.W.N. 328.**

——**S. 342**—*Scope — Examination of prosecution witness after charge—Omission to examine accused thereafter—Effect on trial.*

The omission to examine the accused after the examination of prosecution witness after framing of the charge vitiates the trial and conviction of the accused. (*Lakshmana Rao, J.*) MAHOMED ABDULWAHAB *v.* EMPEROR. **1941 M.W.N. 679 (1) = 54 L.W. 249 = A.I.R. 1941 Mad. 553.**

——**S. 342**—Scope— Non-compliance — Effect —If vitiates trial—S. 537. *See* 1940 Dig., Col. 494. EMPEROR *v.* KONDIBA BALAJI. **13 R.B 153 = 42 Cr. L J. 71**

——**S. 344**—*Adjournment* sine die—*Legality of order.*

S. 344, Cr. P. Code, does not provide for an indefinite adjournment of a case. An order adjourning a case *sine die* is, therefore, illegal. (*Derbyshire, C.J. and Bartley, J.*) EMPEROR *v.* EBRAHIM. **I.L.R. (1941) 2 Cal. 281 = 45 C.W.N. 768.**

——**S. 344**—*Adjournment* sine die—*Legality of order—Request by Prosecuting Inspector for adjournment for obtaining Government orders—Duty of Magistrate.*

Per *Derbyshire, C.J.*—Under S. 344, Cr. P. Code, the Magistrate can adjourn an enquiry or trial until such time as he considers reasonable. He cannot adjourn a case *sine die* on the request of a Prosecuting Inspector for a definite period of adjournment to enable him to obtain orders from the Government regarding the prosecution of the case.

Henderson, J.—The Magistrate should prosecute the matter further to discover why it is that the police are unwilling to go on with the case. Unless they are able to produce some reasonable excuse he should insist that the trial should go on. (*Derbyshire, C.J. and Henderson, J.*) EMPEROR *v.* RAHAMATALI. **45 C.W.N. 819.**

CR. P. CODE (1898), S. 345.

——**S. 344**—*Applicability — Adjournment under S. 526 (8) on accused intimating intention to move for transfer—Power of Magistrate to order payment of costs of the day to prosecution.*

Where a party to a criminal proceeding is desirous of moving the High Court for transfer, all that he has to do is to intimate to the Court his intention to move the High Court for transfer. It is the duty of the Court to fix a day within which the applicant will have to move the High Court and also the security which the applicant will have to furnish. On the applicant's compliance, the Court has simply to grant an adjournment; but in doing so the adjournment is granted not under S. 344, Cr. P. Code, but under S 526 (8) which leaves the Court no option. The Court has no jurisdiction to order payment of costs of the day to the prosecution. (*Horwill, J.*) T. V. VENKATARAMA CHETTI, *In re.* **54 L.W. 632 = (1941) 2 M.L.J. 854.**

——**S 345**—*Complaint or police report mentioning offence under S. 448 read with S. 117, I. P. Code—Facts disclosing offence under Ss. 143 and 117, I. P. Code—Order allowing compounding of offence under S. 448, but refusing offence under S. 143 to be compounded—Legality—S. 117—If includes S. 143—Complaint—Construction.*

It cannot be laid down as a general proposition of law that an offence of abetment under S. 117, I. P. Code, necessarily involves the offence of unlawful assembly under S. 143, I. P. Code. It is not correct to say that because S. 117 applies to the abetment of an offence, an offence under S. 143 necessarily or automatically follows. Nor is the mere mention of certain sections in a police report or a complaint conclusive of the matter, as to what offences are committed. If upon the facts alleged on the first information report, a Magistrate has reason to believe that an offence under S. 143, I. P. Code, has been committed, it matters not what figures or what labels the first information or the complaint attaches to the facts; it is for the Magistrate to decide upon the facts alleged what is the offence alleged and what section of the Penal Code is the appropriate section. It is not for the first informant or the complainant, if a complaint is made to determine the offence or the jurisdiction of the Court. The police report or challan against several persons referred to S. 448 read with S. 117, I. P. Code, but the facts alleged in the first information report disclosed an offence under S. 143, I. P. Code, read with S. 117, I. P. Code, there being allegations of an unlawful assembly having been formed to take unlawful possession of Government property, and jathas being arranged to be sent to make unlawful and unauthorized entry. The Magistrate allowed the offence under S. 448 read with S. 117 to be compounded, but refused to allow the offence under S. 143 read with S. 117 to be compounded, as he was of opinion that the facts disclosed also an offence under S. 143, read with S. 117. He also held that S. 117 necessarily included S. 143.

Held, in revision, (1) that the Magistrate was correct in refusing the offence under S. 143 read with S. 117, I. P. Code, to be compounded, as the offence under S. 143 was not compoundable. The offence under S. 143, being an offence which directly affected the public peace and not merely those immediately involved, and the conclusion of a criminal trial concerning such an offence was something more than an agreement between individuals; (2) that the magistrate was not correct in holding that S. 117 necessarily included S. 143, I. P. Code. (*Davis, C.J and Weston, J.*) AGHA NAZARALI SULTAN *v.* EMPEROR. **I.L.R. (1941) Kar 352 = 196 I.C. 751 = A.I.R. 1941 Sind 186.**

CR. P. CODE (1898), S. 345.

——**S. 345**—*Non-compoundable case—Application to consign based on misconception—Power of Magistrate to revive.*

Where owing to a misconception an application is made to consign to the record, a non-compoundable case the Magistrate is entitled to revive it on application by the party misled. (*Ghulam Hasan, J.*) RAMCHARAN *v.* EMPEROR. **195 I.C. 488 = 1941 A.L.W. 769 = 1941 O.W.N. 869 = 1941 O.L.R. 591 = 14 R.O. 98 = 1941 A.W.R. (C.C.) 243 = 42 Cr.L.J. 746 = 1941 A Cr.C. 182 = 1941 O.A. 565 = A.I.R. 1941 Oudh 510.**

——**S. 345 (5)**—*Applicability—Offence under S.* 345 (1)—*Refusal of application to compound on ground of offence falling under S.* 345 (2)—*Conviction—Appeal—Appellate Court finding offence falling under S.* 345 (1) *while writing judgment—Power to allow compounding—Procedure.*

S. 345 (5), Cr. P. Code, applies not only to an offence under Cl. (1) but also to an offence under Cl. (2) of S. 345; the sub-section applies to all offences which may be compounded under the section. Where an application to compound an offence is rejected on the ground that the offence fell under S. 345 (2), and in appeal from conviction the appellate Court, while writing its judgment, finds that the offence is one falling under S. 345 (1), it can consider an application for compounding and then pass an order allowing the offence to be compounded and the consequential order of acquittal. (*Davis, C.J. and Weston, J.*) AKAN SABZALI *v.* EMPEROR. **I.L.R. (1941) Kar. 429 = A.I.R. 1941 Sind 216.**

——**S. 345 (6)**—*Applicability—Panchayat—If bound to accept compromise—Bihar and Orissa Village Administration Act, S.* 76—*Scope—One party resiling from compromise—Procedure.*

S. 345 (6) of the Cr. P. Code does not apply to a Panchayat under the Bihar and Orissa Village Administration Act. There is no provision in the latter Act similar to S. 345 (6). S. 76 of the Act merely enables a panchayat to accept a compromise and decide the case accordingly. But a panchayat is not bound to do so. In a case where one of the parties resiles from the compromise, the panchayat would be exercising a wise discretion in not acting on the compromise. (*Agarwala, J.*) GONI MAHTON *v.* EMPEROR. **193 I C 491 = 7 B R 606 = 13 R P 614 = 42 Cr.L.J. 434 = 1940 P W.N. 973 = A.I.R. 1941 Pat 169.**

——**S. 345 (6), Penal Code, Ss. 323, 392 and 452**—*Consignment to record of complaint under Ss.* 392 *and* 452, *I. P. Code—Revival—Conviction under S.* 323, *I. P. Code—Legality.*

Where owing to a misconception an application is made to consign to the record a complaint under Ss. 392 and 452, I. P. Code and it was so consigned but later on revived on the application of the party misled it is open to the Court to convict the accused under S. 323, I. P. Code, if the necessary facts are established. (*Ghulam Hasan, J.*) RAM CHARAN *v.* EMPEROR. **195 I.C. 488 = 1941 A L.W. 769 = 1941 O.W.N. 869 = 1941 O.L.R. 591 = 14 R.O. 98 = 1941 A.W R (C.C) 243 = 42 Cr L.J. 746 = 1941 A Cr.C. 182 = 1941 O.A 565 = A I.R. 1941 Oudh 510.**

——**Ss. 347 and 288**—Commitment to Sessions in warrant case—Magistrate, if required to start proceedings *de novo*—Statements recorded prior to commitment—If can be used as substantive evidence. *See* 1940 Dig., Col. 495 FAZAL *v.* EMPEROR. **42 Cr.L.J. 29.**

——**Ss. 348 and 349**—*Applicability—Trial of old offender by Sub-Magistrate—Finding of guilty—Magistrate holding that accused deserves heavier punishment than he was competent to award—Proper procedure.*

CR. P. CODE (1898), S. 350.

A Sub-Magistrate who tried a case under S. 457, 380 or 411, I.P. Code, and being of opinion that the accused who was guilty under S. 411, I. P. Code, ought to receive a more severe punishment than he was competent to inflict as he was an old offender, submitted the case to the Sub-Divisional Magistrate under S. 349, I. P. Code. The latter acquitted the accused after a perusal of the record.

Held, on a reference by the Sessions Judge, that the Sub Magistrate should have committed the accused to the Court of Session under S. 348, I. P. Code, and the irregularity could have been cured by the Sub-Divisional Magistrate by a reference to the District Magistrate under R. 97 of the Criminal Rules of Practice. (*Lakshmana Rao, J.*) SHEIKH MASTAN SAHIB *v.* EMPEROR. **1941 M.W N. 524 = A.I.R. 1941 Mad. 748.**

——**S. 349 (1-A)**—*Scope—Mandatory—Duty of Magistrate to send all the accused to superior Magistrate—One of two accused a juvenile to be dealt with under Madras Children Act—Magistrate sending latter alone to superior Magistrate and passing sentence on other—Legality.*

Where on a trial of two persons on charges under Ss. 454 and 380, I.P. Code, a Sub-Magistrate finds both the accused guilty, but he is not empowered to deal with one of them as he is juvenile who has to be dealt with under S. 5 (1) of the Madras Children Act (IV of 1920), it is his duty to send both the accused to the Sub-Divisional Magistrate under S. 349 (1-A), Cr. P. Code. He has no jurisdiction to send the juvenile offender alone and pass sentence on the other. (*Lakshmana Rao, J.*) EMPEROR *v.* MOTTAYYAN. **1941 M.W.N. 768.**

——**S. 350**—Object and scope of—Trial *de novo* by successor—Cross-examination on commission of witness examined on commission in previous proceedings—Propriety. *See* 1940 Dig., Col. 496. SUKHRAMDAS *v.* EMPEROR. **191 I.C. 127 = 13 R.S. 128 = 42 Cr.L J. 80.**

——**S. 350 (1)**—*Case re-transferred to original Magistrate*—De novo *trial—If can be demanded.*

If a case is re transferred to the Magistrate who originally heard the case before the second Magistrate recorded any evidence, it is not necessary to grant a *de novo* trial if demanded by the accused person. (*Bhide, J.*) GHAUS MAHOMED *v.* EMPEROR. **43 P.L R 436 = A I R. 1941 Lah. 322.**

——**S. 350 (1), proviso and (3)**—*Applicability—Appeal from conviction—Order for re-trial from particular point—Case sent to another magistrate for re-trial—Right of accused to claim* "de novo" *trial.*

Where a case is sent from one Magistrate to another for re trial after reversal of a conviction on appeal, even if it be only from a particular point in the trial, S. 350 (3), Cr. P. Code, would apply and it would be open to the accused to ask for a "*de novo*" trial, and to ask for all witnesses to be re-summoned and re-heard under S. 350 (1), Cr. P. Code. (*Davies, C.J. and Lobo, J.*) VIROOMAL *v.* EMPEROR. **I.L.R (1941) Kar. 167 = 196 I C 275 = 14 R.S. 62 = 42 Cr.L J. 837 = A I.R 1941 Sind 144.**

——**S. 350 (1), Proviso a)**—Claim for *de novo* trial—Order resummoning witnesses—Witnesses not examined in chief—Legality of trial—Acquiescence of accused—Effect. *See* 1938 Dig., Col. 548. PURUSHOTTAMRAO *v.* EMPEROR **I.L.R. (1941) Nag. 496.**

——**S. 350 (1) and proviso (a)**—*Construction and relative scope—Re-commencement of trial by magistrate*

CR. P. CODE (1898), S. 350.

and commencement under proviso re-summoning witnesses—Distinction—Effect on charge already framed.

The effect of an accused person demanding the re-summoning and re-hearing of witnesses under proviso (*a*) to S. 350 (1), Cr. P. Code, is not the same as where a Magistrate himself re-commences a trial under S. 350 (1). The difference in the wording of sub-S. (1) and the proviso to it leads to the conclusion that when a Magistrate 're-commences' a trial under S. 350 (1), he leaves every thing in the previous trial behind, and the charge framed, if any, in the prior proceedings is annulled. Where, however, he commences proceedings under the proviso (*a*) to S. 350 (1) and the accused demands all or any of the witnesses to be re-summoned or re-heard, he does not "re-commence" the trial, but continues the trial begun by his predecessor. The charge already framed subsists and is not annulled. (*Davies, C.J. and Lobo, J.*) PIR MOOSAJAN *v.* BACHAYO SILU. **I.L.R. (1941) Kar. 171 = 196 I.C. 844 = A.I.R. 1941 Sind 160.**

——**S. 350 (1), proviso (a)**—*Right of accused—Accused recalling witnesses but not desiring to examine all—Discretion of Magistrate to examine all.*

There is nothing in S. 350, Cr. P. Code, which prohibits a Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused who has recalled them has exercised his right under proviso (*a*) to S. 350. Though the accused who has recalled the witnesses has a right to say that no more witnesses should be examined, that right is subject to a limitation, namely, the privilege of the Magistrate under S. 350 (1) to examine all the witnesses. (*Horwill, J.*) PALAYAN, *In re.* **54 L W. 307 = 1941 M.W.N. 1077 = A.I.R. 1941 Mad. 825 = (1941) 2 M.L.J. 401.**

——**Ss. 357 to 360**—Recording of questions disallowed—Duty of Magistrate *See* 1940 Dig., Col. 497 DEWAN SINGH MAFTOM *v.* EMPEROR. **192 I.C. 347 = 13 R.L. 380 = 42 Cr.L.J. 284.**

——**Ss. 367 and 424**—*Contents of appellate judgment.*

It is the duty of an appellate Magistrate to state in his judgment the points for determination, to give his determination regarding those points and his reasons therefor. No useful purpose is served by his merely saying that the prosecution case has been proved. (*Sen, J.*) RAJANI KUMAR *v.* EMPEROR. **45 C.W.N. 794.**

——**S. 367 (5)**—Award of lesser penalty—Duty of Court to give proper reasons. *See* 1940 Dig., Col. 499. MIANJI KHAN *v.* EMPEROR. **192 I.C. 179 = 13 R.Pesh. 35 = 42 Cr L.J. 254.**

——**S. 369**—*Bench Court—Power to review or rectify errors in judgment—Illegal disposal of case by Bench of Magistrates—Subsequent review and re hearing—Legality.*

A Bench Court has no power to correct errors in its judgments or to review its own illegal orders. Such power vests only in the High Court. Three Bench Magistrates sat to consider a case. At a later hearing of the case a fourth Magistrate also joined. At the final hearing there were only three Magistrates present, of whom two had sat throughout. As the complainant was absent, the case was dismissed under S 247 Cr. P. Code. Later the Magistrates realised that they had passed an illegal order, as the Magistrate who did not sit at the first hearing had no power to participate in the disposal of the case, and they proceeded to rectify it by hearing the case once again.

Held, that the re-hearing and trial were illegal and the proceedings must be quashed. (*Horwill, J.*) NARAYANASWAMI *v.* NARAYYA. **(1941) 2 M.L.J. 1049.**

CR. P. CODE (1898), S. 403.

——**S. 380**—Scope—Proceedings submitted to Sub-divisional Magistrate—Duty of latter—Reference to District Magistrate or High Court—Competency. *See* 1940 Dig., Col. 499. MAILA GOWDA *v.* EMPEROR. **191 I.C. 149 = 13 R M. 485 = 42 Cr L.J. 89.**

——**Ss. 386 (1) (b) and (c)**—Scope—If controls S. 70, I. P. Code—Warrant under S. 386 (1) (*b*)—Limitation against immovable property—Limitation. *See* PENAL CODE, S 70. **43 Bom L.R. 122.**

——**S. 397**—*Imprisonment in default of fine—Order for concurrent running with substantive sentence of imprisonment—Legality.*

Under S. 397, Cr. P. Code, a Magistrate can direct substantive sentences of imprisonment passed in two different cases to run concurrently. But there is no provision of law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. (*Bhide, J.*) EMPEROR *v.* HAJI. **195 I C. 3 = 14 R L. 26 = 42 Cr.L.J. 642 = 43 P.L.R. 163 = A.I.R. 1941 Lah. 209.**

——**Ss. 397 and 35**—Sentences of imprisonment in default of fines—If can be concurrent—Separate trials—Penal Code, S. 64. *See* 1940 Dig., Col. 500. EMPEROR *v.* CHANAN SINGH. **42 Cr. L.J. 33.**

——**S. 397 and provisos 1 and 2**—Applicability—Accused undergoing imprisonment for theft—Order for imprisonment under S 120 for failure to give security under S. 118—Separate sentence under Criminal Tribes Act—How to run. *See* CR. P. CODE, SS. 118, 120 AND 123. **I.L.R. (1941) Kar. 63.**

——**S. 397, proviso (2)**—*Applicability—Imprisonment under Ss. 21 and 24, Sind Frontier Regulations Act.*

Ss. 20 to 26, Sind Frontier Regulations, should be read with S. 397, Cr. P. Code. S. 397, proviso (2), therefore applies to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations. (*Davis, C J. and Lobo, J.*) EMPEROR *v.* MAHOMED HASSAN ALLAHDAD. **I L.R. (1941) Kar 161 = 192 I.C. 865 = 42 Cr L.J 342 = 13 R.S 221 = A.I.R. 1941 Sind 29.**

——**S. 397, Second Proviso**—*Scope—Order directing substantive sentence of imprisonment to take effect after sentence under S. 123—Legality.*

An order directing a substantive sentence of imprisonment to take effect on the expiry of the period of imprisonment imposed under S. 123, Cr. P. Code, is illegal. The substantive sentence must take effect from the date on which it is pronounced. (*Burn, J.*) KORA VATHAN, *In re.* **1941 M.W.N. 1031 = (1941) 2 M.L.J. 694.**

——**S. 403**—*Applicability—Prosecution on three specific acts of misappropriation—Acquittal—Subsequent prosecution in respect of other specific and distinct acts of misappropriation—If barred.*

Where in a case of criminal misappropriation, the prosecution without having recourse to S. 222 (2), Cr. P Code, decides to prosecute the accused in respect of three separate and specific acts of misappropriation the acquittal of the accused in such a case does not in any way bar his prosecution again in respect of other specific and distinct acts of misappropriation. There is clearly no hardship in such a case so as to justify the High Court in exercising its powers to stop the trial on that ground. (*Shearer, J.*) MAYADHAR SWAIN *v.* NETRANANDA. **7 Cut.L.T. 64 = 1941 P.W.N. 425 = A I R. 1941 Pat. 606.**

——**S 403**—*Scope—Charge of cheating under S. 420, I. P. Code—Acquittal—If bar to prosecution under S. 120-B on charge of conspiracy to commit series of acts of cheating.*

CR. P. CODE (1898), S. 403.

S. 403, Cr. P. Code, protects a person who has once been tried and acquitted of an offence from liability to be tried again for the same offence or on the same facts but sub-S. (2) of S. 403, provides that a person acquitted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235 (1). An acquittal of an offence under S. 420, I. P. Code, for a particular overt act of cheating *A*, cannot be a bar to the prosecution of the acquitted person on a charge of conspiracy, under S. 120-B, I. P. Code, to commit a series of acts of cheating or on a charge that he in pursuance of such a conspiracy had successfully cheated *B*, or had unsuccessfully attemped to cheat *C*. Though overt acts may properly be looked at as evidence of the existence of a concerted intention, and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out, yet the criminality of the conspiracy is independent of the criminality of the overt act. (*Rowland and Manohar Lal, JJ.*) EMPEROR *v.* GOURISHANKAR BOHIDAR.

196 I.C. 604 = 20 Pat L.T. 825 = 8 B.R. 54

——**S. 403 (1)**—*Scope—Charge under S.* 465, *I. P. Code—Withdrawal and acquittal—Subsequent prosecution on same facts under S.* 196, *I. P. Code—Sustainability.*

Where a person is charged under S. 465, I. P. Code, in respect of certain account books produced in income-tax and acquitted owing to the withdrawal of the charge by the Public Prosecutor, he cannot be charged or prosecuted under S. 196, I. P Code, on the same facts and for the same offence, so long as the order of acquittal stands. S. 403 (1), Cr. P. Code, bars the subsequent prosecution under S. 196, I. P. Code. The fact that the Court in the previous case did not proceed to investigate the facts before acquitting the accused makes no difference. (*Manohar Lall, J.*) HALKHORI *v.* EMPEROR.

195 I.C. 698 = 14 R.P. 164 = 1941 I.T.R 209 = 42 Cr.L.J. 774 = 7 B.R. 965 = 22 Pat L.T. 255 = 1941 P.W.N. 170 = A.I.R 1941 Pat. 442.

——**S. 407 (1) and (2)**—*Applicability—Appeal under S.* 486 (1) *against sentence under S.* 480—*Transfer by District Magistrate to first class Magistrate—Jurisdiction of later to hear appeal.*

An appeal lies against a sentence imposed under S. 480 Cr.P. Code, only under S. 486 (1) and not under S. 407, Cr. P. Code, as S. 407 applies only to persons convicted on a *trial* held by a Magistrate. Where such an appeal under S. 486 (1) has been filed before the District Magistrate, it cannot as in the case of appeals under S. 407 (1) be directed to be heard by any Magistrate of the first class subordinate to him. S. 407 (2) cannot properly be applied to an appeal under S. 486 (1), Cr. P. Code. (*Horwill, J.*) D. K. REDDY, *In re.*

1941 M.W.N. 1073 (1) = 54 L.W. 633 = (1941) 2 M.L.J. 852.

——**S. 409**—*Order of compensation out of fine—Misappropriation of Bank's money—Order for payment of fine if recovered to creditor of Bank at whose instance prosecution started—Propriety.*

Where the secretary of a bank (in liquidation) was charged and convicted of offences, committed before it went into liquidation, of misappropriation of moneys belonging to the Bank by falsely alleging that they were advanced as loans to fictitious persons and he was ordered to pay a fine.

Held, that the fine if received should have been ordered to be paid to the liquidator for the benefit of all the creditors and not to one fixed deposit holder whose deposit had matured at the time the misappropriation took place and at whose instance the case was launched. (*Lakshmana Rao, J.*) MARUDAMUTHU PILLAI, *In re.* **1941 Comp. C 339 = A.I.R. 1941 Mad. 853.**

CR. P. CODE (1898), S. 423.

——**S. 413**—Sentence of fine not exceeding Rs. 50—Sentence passed by Magistrate invested with first class powers only after conclusion of evidence but before sentence—Appeal, if lies. *See* 1940 Dig., Col. 501. BEJOY KUMAR KUNDU *v.* SITA NATH KUNDU.

191 I.C. 154 = 42 Cr.L.J. 87 = 13 R.C. 221.

——**S. 417**—*Acquittal under S.* 345—*Appeal against—Maintainability.*

The presentation of an appeal under S. 417, Cr. P. Code, against an order of acquittal passed under S. 345, Cr. P. Code, after permitting compounding is a procedure without precedent; and such an appeal cannot be entertained in the absence of proof of illegality on the part of the Magistrate in accepting the compromise which was within his sole discretion to allow or refuse or in the absence of proof of the grossest misuse of his discretion by the Magistrate. (*Rowland and Manohar Lal, JJ.*) EMPEROR *v.* GOURISHANKAR BOHIDAR.

196 I.C. 604 = 22 Pat L.T. 825 = 8 B.R. 54.

——**S. 418**—Appeal against conviction under Ss. 366 and 302, I. P. Code—Trial by jury for S. 366 and with assessors for S. 302—Jury's verdict unanimous—Accused if can attack, in the absence of misdirection, facts about kidnapping in appeal against the charge of murder—Murder trial—Ambiguity in procedure—Benefit to accused. *See* 1940 Dig., Col. 502. MOUJILAL *v.* EMPEROR. **I.L.R. (1941) Nag. 157 = 191 I.C. 371 = 13 R.N. 200 = 42 Cr.L.J. 154 = A.I.R. 1941 Nag. 94.**

——**Ss. 419, 420, 421 and 561 A**—Summary dismissal of jail appeal under S. 421—Subsequent re-presented appeal under S. 419—Maintainability—High Court if can review its own judgment. *See* 1940 Dig., Col. 502. JODHA *v.* EMPEROR. **15 Luck. 662.**

——**Ss. 421 and 369**—Jail appeal—Summary dismissal—Effect—Subsequent appeal through counsel—Maintainability. *See* 1940 Dig., Col. 502. RAJ KUMARI *v.* EMPEROR. **15 Luck. 703.**

——**Ss. 422 and 423**—*Scope—Appeal from conviction—Complainant's advocate—Right of to appear and to argue—Discretion of Court.*

There is no provision in the Code of Criminal Procedure for appearance or argument by the complainant's advocate in an appeal from a conviction even in a non-cognizable case, *e.g.*, defamation case, in addition to, or in substitution for, appearance or argument by the Public Prosecutor. S. 423, Cr. P. Code, makes no provision for hearing the advocate for the complainant; nor does S. 422 make any provision for notice of an appeal to be given to the advocate for the complainant. It may be said that Ss. 422 and 423 are not exhaustive, and therefore in private prosecutions the Court may, if it thinks fit to do so, may allow the complainant to appear by an advocate and hear his advocate. (*Davis, C.J.*) PESTONJI C. TARAPORE *v.* EMPEROR.

I.L.R. (1941) Kar. 451.

——**S. 423**—*Alteration of conviction—Conviction under S.* 323, *I. P. Code—Alteration into one under S.* 323/114—*Legality.*

The appellate Court cannot change a conviction under S. 323, I. P. Code, into one under S. 323 read with S. 114, I. P. Code, when there was no charge under this section framed against the accused. (*Varma, J.*) JANAK SINGH *v.* EMPEROR. **195 I.C. 843 = 7 B.R. 979 = 14 R.P. 178 = 42 Cr.L.J. 790 = 22 P.L.T. 943 = A.I.R. 1941 Pat. 623.**

——**S. 423**—*Appeal—Disposal without hearing any party—Legality.*

CR. P. CODE (1898), S. 423.

Against a conviction in a case of rioting, some accused preferred an appeal, which, after notice, was posted for hearing on 1st November, 1939. On that date the other accused also preferred an appeal which was admitted and clubbed along with the other appeal. The Magistrate refused the request of the advocate for adjournment and closed the appeal and later on pronounced orders acquitting the accused.

Held, in revision, that the appeals having been closed without any hearing the orders disposing of the appeals could not be sustained. (*Lakshmana Rao, J.*) NILAKANTA IYER *v.* PICHAIKARAN. **1941 M.W.N. 670 = A.I.R. 1941 Mad. 802.**

——**S. 423**—*Powers of appellate Court—Power to order re-trial on ground of defect in charge—Exercise of—Considerations—Finding as to failure of justice—Necessity.*

An appellate Court has undoubtedly power to order a re-trial under Ss. 423 and 232, Cr. P Code, on the ground of there being a defect in the charge; but before ordering a re trial, the appellate Court must come to a clear finding as to whether the error or defect in charge had misled the accused in his defence or occasioned a failure of justice, in view of the wording of Ss. 531 and 232. (*Fazl Ali, J.*) BHOLA NATH MITRA *v.* JITENDRA NATH MUKHERJI. **1941 P.W.N. 657.**

——**S. 423**—*Trial by jury—Appeal from conviction—High Court holding that there has not been legal trial—Power to order that there should not be fresh trial.*

Where on an appeal from a conviction at a trial by jury, the High Court holds that there has been misjoinder of charges and as such there has not been a legal trial, it is not entitled to order that there shall not be a fresh trial unless it is prepared to quash the commitment under S. 215, Cr. P. Code. (*Lodge and Akram, JJ.*) HUGH FRANCIS BELLGARD *v.* EMPEROR.

I.L.R. (1941) 2 Cal. 319 = 45 C.W.N. 839 = A.I.R. 1941 Cal. 707

——**S. 423 (1) (b)**—*Power of appellate Court—Re-trial from particular stage of trial—Order for—Legality.*

A Sessions Judge hearing an appeal from a conviction and ordering a re-trial on the ground that the magistrate failed to question the accused on the evidence of the prosecution witnesses, can order a re-trial from the stage at which the illegality crept in, *i.e*, from the stage at which the examination of the accused is taken. The words in S. 423 (1) (*b*), Cr. P. Code, authorizing an appellate Court to order a re-trial are sufficiently wide to authorize a re-trial from the point at which the error or illegality in the trial has been committed, provided the accused was not otherwise prejudiced. (*Davis, C.J. and Lobo, J.*) VIROOMAL *v.* EMPEROR.

I.L.R. (1941) Kar. 167 = 196 I C. 275 = 14 R.S. 62 = 42 Cr.L J. 837 = A.I.R. 1941 Sind 144.

——**S. 423 (1) (b)**—*Power of Appellate Court to commit accused to Sessions Court without repeating inquiry or writing committal order.*

An appellate Court under S. 423 (1) (*b*) has power to commit the accused for trial to the Court of Session, without repeating the inquiry or writing a long committal order when the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very fully upon the record. (*Davis, C.J.*) MANSHA RAM GIAN CHAND *v.* EMPEROR.

193 I.C. 454 = 13 R.S. 231 = 42 Cr.L.J. 460 = A.I.R. 1941 Sind 36.

——**Ss. 423 (1) (b) and 439**—*Power of High Court—Charge under S. 302 but conviction under S. 304, Part 1, Penal Code—Appeal by convict—Power of High Court to alter conviction to one under S. 302, I. P. Code and enhance sentence.*

The word 'alter' in S. 423 (1) (*b*) (2) means to change one finding to another finding and therefore the words "alter the finding" in S. 423 (1) (*b*) (2) mean that the finding can be altered to any other finding that the Court considers proper on the findings of fact at which it arrives in appeal. In the case contemplated in S. 423 (1) (*b*) there is no question of a complete acquittal, for the appeal is against a conviction and, therefore, there is no necessity to annul or set aside any finding that the man is innocent or not guilty of anything at all. All that is necessary is to find the proper offence of which he could be held to be guilty on the findings of the appellate Court. All that is taken away from the appellate Court is the power of enhancing the sentence, but no restriction is placed on the power of appellate Court to change the finding to any that it considers suitable to the purpose. As regards the High Court, the matter stands on a different footing. In its appellate jurisdiction the High Court can alter the finding to any that it considers suitable. As soon as it has done so, it can under the provisions of S. 439, Cl. (1), in its revisional jurisdiction enhance the sentence to any sentence it considers suitable Consequently it is open to the High Court, in an appeal from a conviction by a convict who had been charged, say for example. under S. 302, Penal Code, but convicted under S. 304, Part 1, Penal Code, to alter the conviction from one under S. 304, Part 1, to one under S. 302, Penal Code, and then in the exercise of the powers conferred by S. 439 (1) to enhance the sentence to one of death. (*Dalip Singh, Ram Lall and Sale, JJ.*) BAWA SINGH *v.* EMPEROR.

A.I.R. 1941 Lah. 465 (F.B.)

——**Ss. 423 (2) and 537 (d)**—*Misdirection—Interference—When not justified.*

If a Court after considering the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably have come to any other decision, it should not interfere. (*Pollock, J.*) HARAKCHAND *v.* EMPEROR. **1941 N.L.J. 441 = A.I.R. 1941 Nag. 324.**

——**S. 428**—*Additional evidence—Power of appellate Court—Re-trial—If to be ordered on ground of additional evidence being necessary.*

An appellate Court under S. 428, Cr. P. Code, has power to take, or direct the taking of, additional evidence, such as the evidence of a handwriting expert, if it thinks that such additional evidence is necessary. It is not necessary for the Court to direct a retrial on that ground. (*Fazl Ali, J.*) BHOLA NATH MITRA *v.* JITWORA NATH MUKHEKJEA.

1941 P.W.N. 657.

——**Ss. 435 and 439**—*Court subordinate to High Court—Bihar and Orissa Municipal Act, S. 198—Magistrate acting under—If acts judicially—Orders—If open to revision.*

The function that a Magistrate discharges under S. 198, Bihar and Orissa Municipal Act, is discharged in the course of his judicial duty, and is not a function that can be assigned to any one but a Magistrate. He functions as a Criminal Court and is therefore an inferior Criminal Court and his order is therefore subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. (*Dhavle, J.*) CHAIRMAN, BIHAR MUNICIPALITY *v.* RAMNANDI KUER. **197 I.C. 74 = 1941 P.W.N. 459 = 22 Pat.L T. 510 = A.I.R. 1941 Pat. 548.**

——**S. 435**—Duty of applicant to be ready with case and documents—Adjournment to enable documents to be sent for—Practice. *See* 1940 Dig., Col. 504. MUKUND MARTU *v.* EMPEROR, **42 Cr.L.J. 52.**

CR. P. CODE (1898), S. 435.

——Ss. 435 and 439—*Enhancement — Principles governing.*

The fact that the sentence passed is a very lenient one is not a sufficient ground on which the court will exercise its powers to enhance the sentence. Generally speaking, a sentence will not be enhanced in revision unless it is such a manifestly inadequate punishment for the offence committed as to amount to a miscarriage of justice. (*Roberts, C.J. and Dunkley, J.*) HLA SAN *v.* THE KING. **1941 Rang. L.R. 595.**

——S. 435—"*Inferior Criminal Court*"—*Panchayat under Bihar and Orissa Village Administration Act—Order passed by—Revision—High Court's power.*

A panchayat constituted under the Bihar and Orissa Village Administration Act, is a Court, and in the exercise of its criminal jurisdiction, it is an inferior Criminal Court for purposes of S. 435, Cr. P. Code, and its orders are therefore revisable by the High Court under S. 435 Cr. P. Code. Ss 53 (2) (*b*) and 57 (2) of the Bihar and Orissa Village Administration Act are a clear indication that a panchayat is a Court. (*Agarwala, J.*) GONI MAHTON *v.* EMPEROR.

193 I.C. 491 = 7 B.R. 606 = 13 R.P. 614 = 42 Cr.L.J. 434 = 1940 P.W.N. 973 = A.I.R. 1941 Pat. 169.

——Ss. 435 and 439—Interference—Contravention of S. 530 (*p*), Cr. P Code—When justifies interference. *See* CR. P. CODE, S. 530 (*p*). **1941 M.W.N. 811 = (1941) 2 M.L.J. 420.**

——S. 435—Jurisdiction of District Magistrate—Order under S. 145 by Subordinate Magistrate—Power of District Magistrate to set aside—Procedure. *See* 1940 Dig., Col. 504. LUTI SINGH *v.* RAM KIRIT SINGH, **192 I.C. 784 = 7 B.R. 492 = 42 Cr.L.J. 340 = 13 R.P. 569 = A.I.R. 1941 Pat. 105.**

——S. 435—*Powers of District Magistrate—Calling for pending proceedings—Order for, signed by some body 'for' District Magistrate—Legality.*

Under S. 435 the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person 'for' the District Magistrate, calling for a proceeding, is an order without authority. Hence an order issued by the headquarters assistant and signed by him for District Magistrate is void. (*Dunkley, J.*) KING *v.* MAUNG PO THAING. **1941 Rang. L.R. 82 = 194 I.C. 370 = 13 R.R. 306 = 42 Cr.L.J. 573 = A.I.R. 1941 Rang. 114.**

——(as amended in 1923), S. 435—*Powers of High Court—Revision against order under S. 145—Power to bring on record legal representatives of deceased party—Inherent powers—S. 561-A.*

The High Court in dealing with revision applications against orders under S. 145, Cr. P. Code (as amended in 1923) have the wide powers of an appellate Court instead of the restricted powers conferred under S. 15 of the Charter Act, under which revision petitions had to be filed prior to 1923, as S. 435, Cr. P. Code, did not apply to proceedings under Chapter XII of the Act prior to 1923 when the Code was amended. S. 561-A enacted in 1923, also gives very wide additional powers to the High Court. As the law now stands, the High Court has ample powers in revision against orders under S. 145, Cr. P. Code, to bring legal representatives on record if the ends of justice require it. (*Horwill, J.*) SURYANARAYANA RAJU *v.* VISWANADHARAJU. **(1941) 2 M.L.J. 1047.**

CR. P. CODE (1898), S. 437.

——Ss. 435 and 439—*Practice—Revision against original orders of Magistrates.*

It is a rule of the Nagpur High Court not to interfere with an original order of a Magistrate unless there has been an application to the District Magistrate or the Sessions Judge to refer the case to this Court. (*Pollock, J.*) YESHWANT RAO *v.* EMPEROR, **1941 N.L.J 619.**

—— Ss. 435 and 439—*Questions of fact—Power to go into evidence.*

When a revisional Court holds that in deciding on the guilt of an accused, the lower Courts have taken into consideration inadmissible evidence, it is plainly incumbent on the revisional Court to satisfy itself that the remaining evidence, which the lower Court could properly take into consideration, is sufficient to establish as against the accused, proof of his guilt beyond reasonable doubt. (*Roberts, C. J. and Dunkley, J.*) A. H. GHANDHI *v.* THE KING. **1941 Rang.L.R. 566 = A.I.R 1941 Rang. 324.**

——S. 435 (4)—*Sub-Divisional Magistrate—Power to stay proceedings of Panchayat Court under Bihar and Orissa Village Administration Act—Bihar and Orissa Village Administration Act, Ss. 53 (2) (b) and 77.*

Under S. 435 of the Cr. P. Code, a Sub Divisional Magistrate has power to call for the record of an inferior Criminal Court, *e.g.*, a panchayat under the Bihar and Orissa Village Administration Act within his jurisdiction; but his power is limited under S. 435 (4), Cr. P. Code, to forwarding the record to the District Magistrate. There is no power in the Sub-Divisional Magistrate either under S. 435, Cr. P. Code, or under the Village Administration Act to order stay of proceedings before a panchayat and if he makes a stay order it is without jurisdiction. Even under S. 53 (2) of the Village Administration Act, his only power of interference is to transfer the case; while under S. 77, the power to cancel an order of conviction or compensation comes into operation only after a conviction is recorded. (*Agarwala, J.*) GONI MAHTON *v.* EMPEROR.

193 I.C. 491 = 7 B.R. 606 = 13 R.P. 614 = 42 Cr.L.J. 434 = 1940 P.W.N. 973 = A.I.R. 1941 Pat. 169.

——S. 436—*Additional District Magistrate—Jurisdiction to quash charge framed by Stationary Sub-Magistrate.*

An additional District Magistrate has no jurisdiction to quash a charge framed by a Stationary Sub-Magistrate under S. 436 Cr. P. Code. (*Lakshmana Rao, J.*) PANNALAL MARWARI *v.* KRISHNASWAMI PILLAI. **1941 M.W.N. 677 = 54 L.W. 391 (2) = A.I.R. 1941 Mad. 804.**

——S. 436—Power of Sessions Judge—Petition of protest to Magistrate before receipt of police report—If "complaint"—Order "file" on such petition—Competence of Sessions Judge to direct further inquiry. *See* 1940 Dig., Col. 505. SAIDU KHAN *v.* GAYA PRASAD. **193 I.C. 255 = 7 B.R. 519 = 42 Cr.L.J. 358 = 13 R.P. 574 = A.I.R. 1941 Pat. 144.**

——S. 436—Scope—Order for further inquiry by Sessions Judge—Direction to Magistrate to frame charge under specified section and to dispose of the case—Legality of. *See* 1940 Dig., Col. 505 SIDDA REDDI *v.* VENKATAGIRIANNA. **42 Cr.L.J. 102 = 13 R.M. 523 (2) = A.I.R. 1941 Mad. 65.**

——S. 437—*Scope and applicability — Trial for offence under Ss. 377/511 and 323, I. P. Code, pending—Sessions Judge, if can direct commitment on charges under Ss. 367 and 307, I. P. Code.*

S. 437, Cr P. Code, contemplates a case in which there has already been a completed inquiry under the provi-

CR. P. CODE (1898), S. 438.

sions of Ch. XVIII followed by an order of discharge in a case triable exclusively by the Court of Sessions. Where the accused is charged with offences uncer Ss. 377/511 and 323, I.P. Code and during its pendency an application is made for their commitment on charges under Ss. 367 and 307, I. P. Code, it is not open to the Sessions acting under S. 437, Cr. P. Code to direct such commitment. Such an order may possibly be justified when a Magistrate has tried out a case and has allowed the accused all the privileges which are common to a full trial in a warrant case and to a full inquiry under Ch. XVIII, but it is certainly not justifiable when the trial in respect of the other charges had been adjourned for further cross-examination of the prosecution witnesses. (*Yorke, J.*) NASIMULLAH *v.* EMPEROR.

194 I.C. 214 = 1941 A Cr C. 117 = 13 R.O. 572 = 1941 O L.R. 432 = 42 Cr L J. 536 = 1941 A.W.R. (C.C.) 159 = 1941 O W.N. 634 = 1941 O.A. 405 = 1941 A.L.W. 503 = A.I.R. 1941 Oudh 409.

——**S. 438**—*Criminal circulars—Cir. No. 38, R. 7—Reference—Explanation from inferior Court—Necessity to call for.*

It is necessary that the Court before making a reference under S. 438, Cr. P. Code, should call for an explanation from the inferior Court with regard to the points on which it proposes to make the reference, as required by R. 7 in Circular No. 38 of the Criminal Circulars of the Judicial Commissioner. (*Niyogi, J.*) HARBHAJAN SINGH *v.* EMPEROR. **1941 N.L.J. 573.**

——**Ss. 438 and 439**—Enhancement of sentence—Charge and conviction under S. 193, I. P. Code, in the alternative for making contradictory statements under S. 164, Cr. P. Code, in the Sessions trial—Absence of proof as to which statement was false—Enhancement of sentence—Propriety of, *See* 1940 Dig., Col. 505. EMPEROR *v.* SULTANSHA SIDISHA. **13 R.B. 187 = 191 I.C. 336 = 42 Cr.L.J. 155.**

——**S. 438**—*Reference for enhancement of sentence by District Magistrate—Competency.*

The High Court can accept a reference from the District Magistrate direct, for the enhancement of sentence. It is clearly permissible under the Cr. P. Code. (*Pollock, J.*) EMPEROR *v.* AZIZ. **1941 N.L.J. 551.**

——**S. 438**—*Reference pending appeal—If competent.*

The Deputy Commissioner cannot make a reference to the High Court while the appeal filed by the accused remains undisposed of before him. (*Manohar Lall and Meredith, JJ.*) EMPEROR *v.* KUMHRA MUNDA. **196 I.C. 402 = 14 R.P. 197 = 8 B R 23 = 42 Cr.L J. 862.**

——**Ss. 438 and 439**—*Scope—Magistrate accepting final report of case that no case is made out—Subsequent receipt of report—Police and Government order from Court Inspector—Order calling for charge-sheet—If justified—Order transferring case for trial to subordinate Magistrate—Proceedings—If to be quashed—Judicial or administrative act.*

A Magistrate is under the law competent to reconsider a matter, notwithstanding a previous order by him or his predecessor accepting a final report by the Police investigating officer that no case was made out. But he can only do so on proper grounds and proper materials which would justify action to be taken. It is his duty as a judicial officer to form his own views on proper materials instead of merely carrying out the views of government or executive officers in his judicial work as a Magistrate. He must in other words, apply his judicial mind before putting a person on his trial. Where, after a magistrate

CR. P. CODE (1898), S. 439

has passed orders accepting the final report of the Police Officer, he receives a report from Inspector of Police through the Court Sub-Inspector, and a government order, on which such report is made, to the effect that the case should be tried and decided by the Court, the Magistrate should not merely on the basis of the government order and the Inspector's Report call for a charge-sheet in the case, without reference to any other matters. He must apply his mind not merely to carrying out the views of the government as he takes them to be, but must consider whether there are any proper materials for putting the accused on trial. If the order calling for a charge-sheet is dictated by nothing more or better than what has been taken to be the government order, his order must be set aside in revision. Interference in revision cannot be refused on the ground that the government order on the subject is an executive and not a judicial order. It is the order of the Magistrate calling for a charge sheet that has to be revised and not the government order. The Magistrate in calling for a charge sheet takes judicial action, and, if he, without proper materials, calls for a charge sheet, and after receipt of the charge-sheet, transfers the case for trial to a subordinate Magistrate, he has undoubtedly taken judicial action, and the order being open to scrutiny by Courts of Revision under Ss 435 and 439, Cr. P. Code, must be quashed.

Quaere: Whether the order of a Magistrate (empowered to take cognizance of police reports) calling for a charge-sheet is a judicial or an administrative order? (*Dhavle, J.*) N. L. CARRICK *v.* EMPEROR. **194 I C 94 = 13 R.P. 662 = 42 Cr L J. 504 = 7 B.R. 681 = 1941 P.W.N 328 = 22 P.L.T. 348 = A.I.R. 1941 Pat. 395.**

——**S. 439**—Acquittal — Interference in revision. *See* 1940 Dig., Col. 506. CHANDRIKA PRASAD *v.* MAHOMED JAFAR. **A.I.R. 1941 Oudh 7.**

——**S. 439**—Acquittal — Interference —Principles *See* 1940 Dig., Col. 506. RAM LAL *v.* RAM PIARE. **191 I.C. 538 = 12 R.O 285 = 1941 A.W.R. (C.C) 9 = 42 Cr.L J. 190 = A.I.R. 1941 Oudh 182.**

——**S 439**—*Acquittal—Revision against by private party—Interference by High Court—Rule—Exception—Defamation cases.*

As a general rule it is not expedient for the High Court to interfere in revision at the instance of a private person with an order of acquittal and the High Court will decline to interfere unless interference is urgently demanded in the interest of public justice. Defamation cases perhaps form an exception to this general rule, but in such cases which from their very nature affect private parties and not the public Government would usually be unwilling to interfere. (*Broomfield and Divatia, JJ.*) VINAYAK ATMARAM *v.* SHANTARAM JANARDAN. **43 Bom.L.R. 737 = A.I.R. 1941 Bom. 410.**

——**S. 439**—*Acquittal—Revision against—Interference—Application by private prosecutor to vindicate position—Propriety.*

The High Court as a rule is reluctant to interfere with an order of acquittal save in certain well-defined exceptions. The power of revision in the case of acquittals should be most sparingly exercised and only in cases where it is urgently demanded in the interest of public justice. The High Court will not interfere in a case where the revision application is made to vindicate the position of a private prosecutor, even though there may be an error of law, where there is at the highest only a mere technical offence committed. (*Manohar Lall and Meredith, JJ.*) CANTONMENT BOARD OF

CR. P. CODE (1898), S. 439.

DINAPUR *v.* DWARKA PROSAD. **22 Pat.L.T. 803 = 1941 P.W.N. 596.**

——**S. 439**—*Acquittal—Revision against—Interference—Grounds.*

The High Court always acts with great reluctance in allowing a petition for revision against an order of acquittal, and only when it is shown that such interference is essential to avoid or remedy a clear failure of justice. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I.C. 107 = 7 B.R. 875 = 14 R.P. 84 = 1941 P.W.N. 255 = 22 Pat L.T. 327 = A.I.R. 1941 Pat. 362**

——**S. 439**—*Acquittal—Revision against—No appeal by Government—Interference by High Court.*

The fact that there is no Government appeal against an order of acquittal does not debar the High Court from using its revisional powers under S. 439, Cr. P. Code. As a Court of revision, the High Court has every power to set aside the order of acquittal and order a retrial. (*Young, C.J. and Blacker, J.*) WARYAM SINGH *v.* CROWN. **I.L.R. (1941) Lah. 423 = 195 I.C. 58 = 14 R.L. 28 = 42 Cr.L.J. 660 = 43 P.L.R. 159 = A.I.R. 1941 Lah. 214.**

——**S. 439**—Alteration of conviction—Power of High Court. *See* 1940 Dig., Col. 507. JOYRAM RAKSHIT *v.* ANNADA PROSAD KUNDU. **193 I.C. 288 = 42 Cr.L.J. 383 = 13 R.C. 394 = A.I.R. 1941 Cal, 90.**

——**S. 439**—*Acquittal—Revision against—Power of High Court.*

It is not open to the High Court in revision to convert a finding of acquittal into one of conviction. In the event of a complete acquittal the only remedy is an appeal against the acquittal by the Crown. (*Sale, J.*) GHULAM JILANI *v.* EMPEROR. **43 P.L.R 707 = A.I.R. 1941 Lah. 425.**

——**S. 439**—Applicability—Order under S. 476 by Civil Court—Revision—If governed by S. 115, C. P. Code—Nature of proceedings. *See* C. P. CODE, S. 115. **I.L.R. (1941) Kar. 422.**

——**S. 439**—"Court subordinate to High Court"—Commissioner of Police—Order of externment under S. 27, City of Bombay Police Act — Revision — Jurisdiction of High Court. *See* BOMBAY CITY POLICE ACT (1902 AS AMENDED IN 1938), S. 27. **43 Bom.L.R. 702.**

——**S. 439**—*Delay in application for revision—If ground for non-interference.*

Where improper order of the lower Court allows the accused to escape trial, it will not be allowed to stand on the mere ground of delay in application for revision when the delay was for good and sufficient cause. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* SHEROO. **195 I.C. 14 = 14 R.S. 4 = 42 Cr.L.J. 645 = A.I.R. 1941 Sind 97.**

——**S. 439**—Discretion—Proceedings under S. 147—Order dropping proceedings with taking evidence on untenable ground—Interference in revision. *See* CR. P. CODE, SS. 144, 145 AND 147. **1941 P.W.N. 188.**

——**S. 439**—*Duty of High Court—Propriety of conviction and sentence—Accused not contesting.*

It is the duty of the High Court to see, in any case which may be brought to its notice, that the conviction is in accordance with law, and the sentence not excessive, even though the accused does not contest its propriety. (*Skemp, J.*) MIAN IFTIKAR-UD-DIN *v.* EMPEROR. **196 I.C. 485 = 14 R.L.157 = 42 Cr.L.J. 890 = 43 P.L.R. 378 = A.I.R. 1941 Lah. 324.**

——**S. 439**—Enhancement of sentence—Practice.. *See* 1940 Dig., Col. 508. MIANJI KHAN *v.* EMPEROR. **192 I.C. 179 = 13 R. Pesh. 35 = 42 Cr.L.J. 254.**

CR. P. CODE (1898), S. 439.

——**S. 439**—*Enhancement—Propriety—Application by private party.*

The Court should generally be loath to enhance sentences on the application of a private complainant although there might be cases in which a complainant or some other person might bring some matter to the notice of the Court and the Court would come to the conclusion that the interests of justice generally would be served by an enhancement. (*Allsop and Bajpai, JJ.*) NASIR KHAN *v.* EMPEROR. **I.L.R. (1941) A. 465 = 195 I.C. 720 = 14 R.A. 116 = 1941 A Cr C. 148 = 1941 O.W.N. 839 = 42 Cr.L.J. 779 = 1941 O.A. (Supp.) 510 = 1941 A.L.W. 683 = 1941 A.W.R. (H.C.) 215 = 1941 A.L.J. 342 = A.I.R. 1941 A. 309.**

——**S. 439**—*Enhancement—Sentence wholly served—Powers of High Court.*

It is true that High Court can enhance a sentence which has been wholly served but High Court should always be reluctant to enhance the sentences of persons who do not themselves institute the proceedings which bring their cases to notice of High Court and especially reluctant to enhance the sentences of such persons when they have almost completed the term for which they have been committed. (*Sharpe and Blagden, JJ.*) MA TIN TIN *v* MAUNG AYE. **1941 Rang.L.R. 65 = 195 I.C. 190 = 14 R.R. 24 = 42 Cr.L.J. 690 = A.I.R. 1941 Rang. 135.**

——**S. 439**—*Error of law——Interference.*

Where there has been a clear error in law resulting in a sentence of imprisonment, the High Court should interfere in revision. (*Davis, C.J. and Tyabji, J.*) BHAIRO MUZID *v.* EMPEROR. **I.L.R. (1941) Kar. 324 = 194 I C. 759 = 14 R.S. 1 = 42 Cr.L.J. 623 = A.I.R. 1941 Sind 82.**

——**S. 439**—Interference—Grounds— Dismissal of complaint under S. 203—Adoption of irregular procedure—If ground for setting aside dismissal. *See* CR. P. CODE, SS. 202 AND 203. **7 B.R. 420.**

——**S. 439**—*Irregularity—Manner of constituting jury—Irregularity in—If ground for interference—Jury summoned and empanelled according to law—Effect.*

Where the procedure in summoning and empanelling a jury has been in accordance with the statute, the manner in which the jury are constituted will not obviously be a ground for interference in revision on the ground of any irregularity. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I.C. 107 = 14 R.P. 84 = 7 B.R. 875 = 1941 P.W.N. 255 = 22 P.L.T. 327 = A.I.R. 1941 Pat. 362.**

——**S. 439**—*Jurisdiction—Revision preferred direct to High Court and not through lower Court—If incompetent—Objection as to departure from practice after admission of application—Sustainability.*

The High Court has jurisdiction to deal with a revision application presented to it and admitted by it, notwithstanding that it was presented directly to the High Court instead of through the lower Courts in the form of a reference by the lower Courts, contrary to rules of procedure. That is not a fatal objection. Once the application has been admitted and the records called for the objection on that score should not be entertained. (*Dhavle, J.*) PRASAD GAREBI *v.* MST. KESARI. **192 I.C. 893 = 13 R P. 567 = 7 B.R. 501 = 22 Pat.L.T. 273 = 42 Cr L.J. 347 = 1941 P.W.N. 94 = A.I.R. 1941 Pat. 444.**

——**S. 439**—Order under S. 494—Revision application by witness—Maintainability. *See* 1940 Dig., Col.

CR. P. CODE (1898), S. 439.

509. FAKIR CHAND RAM KRISHIN *v.* MURAD UMAR.
I.L.R. (1941) Kar. 32 =
13 R.S. 163 = 191 I.C. 440 = 42 Cr.L J. 182.

——**S. 439**—*Order without jurisdiction—Power to set aside.*

A Sessions Judge passed an order under S. 13 (2), Sind Frontier Regulation, staying proceeding so that the case may be referred to Council of Elders. It was subsequently found that the offence committed not being one under S. 8 of the Regulation, the case could not be so referred.

Held that the order could be set aside in revision under S. 439, Cr. P. Code. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* SHEROO. 195 I.C. 14 = 14 R.S. 4 = 42 Cr.L.J. 645 = A.I.R. 1941 Sind 97.

——**Ss. 439 and 435**—*Pending case—Interference in revision—Powers.*

There is no doubt that the High Court has power to interfere in revision with a pending case. S. 439, Cr. P. Code, gives wide powers of control over the proceedings of the inferior Courts, but that is an extraordinary power, which by its very nature, imposes grave responsibility on the High Court of exercising it with due circumspection, to avert miscarriage or promote the ends of justice. That is a residuary power which being of a discretionary character is incapable precise and rigid definition. But the revisional authority extensive as it is, rarely travels beyond the region of law or procedure to correct errors in decision on the facts. When its exercise is called for in a pending case, S. 439, Cr. P. Code, must be read in conjunction with S. 435, Cr. P. Code. In a pending case no question as to the correctness or propriety of a finding can arise; consequently the superior Court can examine the proceedings of the inferior Court only to satisfy itself as to their regularity. They would not be regular if the facts sought to be proved do not constitute an offence. Continuation of such proceedings would therefore manifestly be but an abuse of the process of Court and harassment of the accused on trial. In such circumstances considerations of justice themselves dictate the termination of proceedings. Where however the facts alleged and sought to be proved do constitute an offence and the decision turns on the credibility of witnesses and inferences to be drawn after a close and critical examination of documentary evidence, interference by the High Court would amount to an improper and illegitimate use of its revisional authority. (*Niyogi, J.*) HARBHAJAN SINGH *v.* EMPEROR. 1941 N.L.J. 573.

——**S. 439**—Powers of High Court—Acquittal—No appeal or revision—Application by witness to expunge marks against him from judgment of trial Court—Jurisdiction of High Court. *See* GOVERNMENT OF INDIA ACT, S. 224. 7 B.R. 736 = 194 I.C. 248.

——**S. 439**—*Powers of High Court—Alteration of finding and sentence.*

A Court of Revision has the power of the Court of Appeal to "alter the finding maintaining the sentences, or with or without altering the finding, reduce the sentence," and therefore to pass sentences under Ss. 143 and 144, I. P. Code, while setting aside the convictions under Ss. 295 and 379, I.P. Code, provided the sentences do not exceed those passed by the lower Appellate Court. (*Dhavle, J.*) BECHAN JHA *v.* EMPEROR.
7 B.R. 785 = 194 I.C. 476 = 14 R.P. 1 =
1941 P.W.N. 462 = 42 Cr.L.J. 579 =
A.I.R. 1941 Pat. 492.

——**S. 439**—*Power to stay proceedings in subordinate Criminal Courts—Who can exercise.*

There is no provision of the Cr. P. Code authorizing the District Magistrate to stay proceedings in a criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by S. 439 of the Code and S. 85 (1), Government of Burma Act. When a case is once made over for disposal to a subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. 32, Cr. P. Code, *i.e.*, Ss. 435, 436 and 437. (*Dunkley, J.*) KING *v.* MAUNG PO THAING.
1941 Rang.L.R. 82 = 194 I.C. 370 =
13 R.R. 306 = 42 Cr.L.J 573 =
A.I.R. 1941 Rang. 114.

——**S. 439**—*Quashing proceedings — Principles governing.*

The High Court will interfere to quash proceedings only in exceptional cases such as where a person is being harassed by an illegal prosecution; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress where the evidence on record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of Court. Where a question of territorial jurisdiction arises during the pendency of a case it must be decided by the High Court. (*Mosely, J.*) H. G. SHERAZEE *v.* THE KING.
1941 Rang.L.R. 599

——**S. 439**—Quashing proceedings—Summons case wrongly tried as warrant case—Dilatory trial—No suitable evidence by prosecution—Error discovered towards end of trial—Retrial ordered—Quashing. *See* 1940 Dig. Col. 510. D. MODY *v.* EMPEROR. 192 I.C. 268 =
13 R.C. 311 = 42 Cr.L J. 264.

——**S. 439**—*Revision—Forum—Practice of Chief Court—Application to Sessions Judge prior to coming up to the Chief Court—Necessity.*

It is the uniform practice of the Chief Court of Oudh to refuse to entertain an application in revision against the appellate order of a District Magistrate, where the applicant has not gone in revision to the Court of Session in the first instance. (*Thomas, C.J.*) DEBI SINGH *v.* EMPEROR. 193 I.C. 47 = 13 R.O. 438 =
1941 A.W.R. (C C.) 78 = 1941 O.L.R. 250 =
42 Cr.L.J. 349 = 1941 O.A. 150 =
1941 A.Cr.C. 81 (2) = 1941 O.W.N. 193 (2) =
A.I.R. 1941 Oudh 268.

——**S. 439 and High Court Rules, Ch. IV, R. 15 (C.P.)**—*Revision—Forum—Revision of order of Criminal Court of appeal—High Court, if can be moved directly.*

According to R. 15 of Ch. IV of the High Court Rules an application for revision of an order passed by a Criminal Court of appeal may be made direct to the High Court and the applicant need not first apply to the Sessions Court. (*Pollock and Gruer, JJ.*) NATHURAM GOTIRAM *v.* EMPEROR. I.L.R. (1941) Nag. 606 =
196 I.C. 546 = 1941 N.L.J. 438 =
A.I.R. 1941 Nag. 316.

——**S. 439**—*Scope—Revision against order under S. 476—Powers of High Court—If limited by S. 476-B—Order for proper inquiry—If can be made.*

S. 476-B, Cr. P. Code, is not exhaustive and the High Court's powers in revision are not limited by the powers of appeal conferred by S. 476-B. Under S. 439, Cr. P. Code, read with S. 423 (1) (*c*) and (*d*), the High Court has power to set aside the order of the lower Court and, as an incidental order, direct proper inquiry to be made. (*Davis, C.J. and Weston, J.*) VALIRAM LILARAM *v.* GOBINDRAM. I.L.R. (1941) Kar. 422 =
A.I.R. 1941 Sind 217.

CR. P. CODE (1898), S. 439.

——**S. 439 (2)**—*Acquittal—Revision against—All the accused persons not parties to revision—Power to set aside acquittal as against accused not parties.*

Under S. 439 (2), Cr. P. Code, no order can be passed to the prejudice of an accused unless he has had an opportunity of being heard either personally or by a pleader in his own defence. In an application for revision against an order of acquittal, if the High Court decides to set aside the order of acquittal, it can so set aside the order only in respect of the accused persons who are actually parties to the revision application. So far as the accused persons who are not parties to the revision are concerned, the High Court cannot set aside the order of acquittal, and the acquittal of such persons cannot be touched. (*Dhavle J.*) RAMLAKHAN DHOBI *v.* RACHHEY KALWAR. **194 I C. 660 = 14 R.P. 16 = 7 B R. 814 = 42 Cr L J. 622 = 22 Pat.L.T. 237 = 1941 P.W N. 253 = A.I R. 1941 Pat. 287**

——**S. 439 (5)**—*Revision petition by accused who has not appealed—If barred.*

Under S. 439 (5), Cr. P. Code, no proceedings by way of revision can be entertained at the instance of an accused who had a right of appeal but has not appealed. (*Bartley and Lodge, JJ.*) ALI HOSSAIN *v.* EMPEROR. **I.L.R. (1941) 1 Cal. 417.**

——**S. 439 (6)**—Enhancement of sentence—Accused showing cause against conviction—Duty of High Court to examine evidence. *See* 1940 Dig., Col. 511. JOYRAM RAKSHIT *v.* ANNADA PROSAD KUNDU. **193 I.C. 288 = 13 R.C, 394 = 42 Cr.L J. 383 = A.I.R. 1941 Cal. 90.**

——**Ss. 469 and 470**—*Lunatic accused—Procedure—Examination by medical officer—When required.*

S. 469, Cr.P. Code, read with S. 470, provides that the Magistrate shall acquit the accused where he is satisfied from the evidence given before him that the accused was at the time of the commission of the crime, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that it was wrong or contrary to law. It is only in proceedings where an enquiry is made as to whether the accused is of unsound mind at the time of the trial and, therefore, incapable of making his defence, that the law makes it requisite for the accused to be examined by a medical officer. (*Mosely, J.*) THE KING *v.* KALA NYO. **1941 Rang.L.R. 544 = A.I.R. 1941 Rang. 352**

——**Ss. 471 and 423**—*Order of detention after acquittal by appellate Court—Nature of.*

S. 471, Cr.P. Code, in terms gives power to the Court trying the accused to pass an order of detention of a lunatic after his acquittal. But such orders by an appellate Court are consequential orders within the meaning of S. 423 (*d*). (*Mosely, J.*) THE K.NG *v.* KALA NYO. **1941 Rang.L.R. 544 = A.I.R. 1941 Rang. 352.**

——**S. 476**—Applicability—Departmental inquiry by Judge of Court—Order for complaint against witnesses for giving false evidence—Legality. *See* 1940 Dig., Col. 512. ANJANAPPA *v.* EMPEROR. **191 I C 761 = 13 R.M. 520 = 42 Cr.L.J. 224.**

——**S. 476**—Applicability—Summons case. *See* 1940 Dig., Col. 512. EMPEROR *v.* RAM LAL ANAND. **I.L.R. (1941) Lah. 145.**

——**S. 476**—Application not made immediately—If may be entertained. *See* 1940 Dig., Col. 512. JAWALA PARSHAD *v.* RAM PARSHAD. **192 I C. 863 = 13 R.L. 423 = 42 Cr L.J 324**

——**S. 476**—Application under—Duty of Court—Dismissal for non appearance of applicant—Propriety. *See* 1940 Dig., Col. 513. JAWALA PARSHAD *v.* RAM PARSHAD. **192 I.C. 863 = 13 R.L. 423 = 42 Cr. L.J. 324.**

CR. P. CODE (1898), S. 476.

——**S. 476**—'Civil Court'—Special Judge acting under U. P. Encumbered Estates Act, if included. *See* 1940 Dig, Col. 513. MAHOMED MEHDI *v.* RAMJI LAL. **16 Luck. 237 = 191 I.C 146 = 13 R.O. 218 = 1941 A.W.R. (C.C.) 8 = 42 Cr.L.J. 85 = A.I.R. 1941 Oudh 48**

——**Ss. 476 and 482**—Contempt of Court—Power of Court to proceed under S. 476. *See* 1940 Dig., Col. 514. EMPEROR *v.* RAM LAL ANAND. **I.L.R. (1941) Lah. 145.**

——**S. 476**—*Duty of Court—Inquiry under—Considerations for Court—Duty to proceed against all who are found involved in offence made out besides persons complained against in application.*

A complaint to be made in the interests of justice on an inquiry under S. 476, Cr. P. Code, does not rest only upon private individuals, and the fact that a private party chooses to proceed only against some of the offenders, is no ground for the Court abstaining from action against others found to be concerned in the offence. The Court has its duty; in an inquiry under the section the Court should consider primarily the interests of justice, and can of its own motion inquire and should not rest content with placing responsibility on a private person. The Court should probe into the matter to the bottom and should make a complaint not only against those who are made parties to the application before it but also against those against whom the Court considers a *prima facie* case has been made out. It is for the Court to take action against all, whom it has reason to believe were involved in the offence. (*Davis, C. J. and Weston, J.*) VALIRAM LILARAM *v.* GOBINDRAM. **I.L.R. (1941) Kar. 422 = A.I R. 1941 Sind 217.**

——**S. 476**—*Duty of Court—Order for prosecution for perjury on basis of contradictory statements made by witness—Duty to specify assignments of perjury.*

It is usual, as it is very desirable in case of perjury by contradictory statements, for the prosecuting Court not to leave the matter at large, but to specify the assignments of perjury, so that the Magistrate who deals with the case will know precisely what it is for which the accused is proceeded against. (*Dhavle, J.*) SUBA SINGH *v.* EMPEROR. **193 I.C. 569 = 13 R P. 612 = 7 B.R. 563 = 22 P.L T. 775 = 42 Cr.L.J. 446 = 1940 P.W.N. 1012 = A I R. 1941 Pat. 165.**

——**S. 476**— Expediency of prosecution — Complainant failing to prove case—Effect—Order for prosecution under S. 211, I. P. Code—If justified. *See* PENAL CODE, S. 211. **7 B.R. 420.**

——**S. 476**—*Expediency of prosecution—Contradictory statements by witness in committal proceedings and in sessions trial—Order for prosecution under S. 193, I. P. Code—When justified— Considerations—Duty of Court.*

The fact that a witness appears to have made contradictory statements at two different stages of a case, *e.g.*, in the commitment proceedings and in the sessions trial, is not by itself always sufficient to justify his prosecution for perjury under S. 193, I. P. Code. Such contradictions may arise from carelessness or from exaggeration due to the inability of ignorant witnesses to keep apart what they really saw from what they have since been hearing from others about the occurrence or from other causes. The fact that the evidence in question is given in cases of a grave nature is not of itself sole ground for launching a prosecution. On the other hand that fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh

CR. P. CODE (1898), S. 476.

all the circumstances before embarking on a prosecution for perjury on the basis of contradictions. It is in the interest of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of session irrespective of whatever evidence they may have given in the Court of the committing magistrate. What the Court should consider is the character of the contradictions. If the contradictions are far from material and are not irreconcilable, a Court would be better advised in refraining from prosecuting the witness on the basis of the contradictions. Where, however, the contradiction is not a case of correcting a misstatement previously made through inadvertence and reverting to the truth, but is a case of conscious improvement on what the witness had really seen, and doing so without any excuse, a prosecution would be justified. (*Dhavle, J.*) SUBA SINGH *v.* EMPEROR. **193 I.C. 569 = 13 R.P. 612 = 7 B.R. 563 = 22 Pat.L.T. 775 = 42 Cr.L.J. 446 = 1940 P.W.N. 1012 = A.I.R. 1941 Pat. 165.**

——**S. 476**—*Expediency of prosecution — Contradictory statements by witness under S.* 164, *Cr. P. Code, and later in committing Magistrate's Court—Alternative charge of perjury—Sanction for prosecution—Duty of Court.*

Before the Court orders a prosecution under S.476, Cr. P. Code, it has to be satisfied that it is expedient in the interests of justice that there should be a prosecution. Where sanction is sought to prosecute a witness for perjury for making a statement under S. 164, Cr. P. Code, and a contradictory statement afterwards in the committing Magistrate's Court, the Court must first make up its mind whether it was the statement under S. 164, Cr. P. Code, or the statement subsequently made in Court which is false. If the statement made in Court is false, it is in the interests of justice that there should be a prosecution. But there can be no prosecution where the Court is satisfied that it is the earlier statement under S. 164, Cr. P. Code, which is false or where the Court is unable to determine which of the two statements is false. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* NINGAPA RAMAPPA. **43 Bom.L.R. 864 = A.I.R 1941 Bom. 408.**

——**S. 476**—*Expediency of prosecution—Duty of Court—Scope of inquiry—Civil matter—Notice—If to go to Public Prosecutor or Government pleader.*

In sanctioning a prosecution for offences committed against public justice, the Court should consider not only whether there is a *prima facie* case, but also whether it is in the public interests to allow criminal proceedings to be instituted. Though it may be a civil matter, owing to the nature of the proceedings, it is desirable that in appeals in such matters, notice should go to the Public Prosecutor rather than to the Government pleader. (*Mockett, J.*) KUPPUSWAMY CHETTIAR *v.* SUBBARAYA CHETTIAR. **196 I.C. 128 = 14 R.M. 276 = 1941 M.W.N. 376 = 53 L.W. 677 = 42 Cr.L.J. 817 = A.I.R. 1941 Mad. 574 = (1941) 1 M.L.J. 611.**

——**S. 476**—First application dismissed for non-appearance of applicant—Second application—If can be made. *See* 1940 Dig., Col. 515. JAWALA PARSHAD *v.* RAM PARSHAD. **192 I.C. 863 = 13 R.L. 423 = 42 Cr.L.J. 324.**

——**S. 476**—*"In relation to"—Warrant entrusted to constable for execution—Constable reporting at thana that arrested person was rescued—Police not submitting charge-sheet against rescuers—Case by one of them against constable under S.* 211, *I. P. Code—Complaint, if necessary.*

A constable who was entrusted with the execution of a warrant issued by a trying magistrate gave information at the thana that certain persons had rescued

CR. P. CODE (1898), S. 476-A.

the arrested person and committed an offence under S. 225-B, I. P. Code. No charge-sheet was submitted against them by the police as after investigation they came to the conclusion that the case was a doubtful one. One of those accused persons instituted a case under S. 211, I. P. Code against the constable.

Held, that as the offence was committed in a transaction which arose out of the execution of the warrant, it was impossible to say that the offence was not committed in relation to those proceedings, and that, therefore, the Magistrate had no jurisdiction to take cognisance of the case without a complaint under S. 476, Cr. P. Code. (*Henderson and Sen, JJ.*) GANGA PRASAD SINGH *v.* EMPEROR. **194 I.C. 829 = 14 R.C. 53 = 42 Cr.L.J. 626 = 45 C.W.N. 195 = A.I.R. 1941 Cal. 263.**

——**Ss. 476, 476-A and 476-B**—*Nature of proceedings under—Civil Court acting under—If becomes a Criminal Court—Appeal, revision, law governing.*

There is nothing in the words of Ss. 195, 476, 476-A or 476-B, Cr. P. Code, or in the combined effect of the operation of these sections to warrant the view that a Civil or Revenue Court acting under S. 476 or S. 476-A or 476-B is thereby altered into a Criminal Court for purposes connected with such proceeding. Where a Civil or a Revenue Court decides to institute or withhold a prosecution the appeal is to the Civil or the Revenue Court, as the case may be, and the revision, if any, therefrom to the High Court is also on the Civil Side under S. 115, C. P. Code and not under S. 439, Cr. P. Code. (*Mya Bu and Ba U, JJ.*) DAW SAW KHIN *v.* KO SHWE HPAR. **1941 Rang.L.R. 90 = 195 I.C. 444 = 14 R.R. 49 = 42 Cr.L.J. 735 = A.I.R. 1941 Rang. 163.**

——**S. 476**—*Preliminary enquiry—Absence of—Legality of proceedings.*

Under S. 476, Cr. P. Code, the Court need not order a preliminary enquiry if it does not think it necessary to do so. Proceedings under that section without such enquiry are not, therefore, illegal. (*Young, C.J. and Sale, J.*) MAHOMED TAHIR *v.* EMPEROR. **I.L.R. (1940) Lah. 669 = 193 I.C. 170 = 13 R.L. 443 = 42 Cr.L.J. 351 = 1941 Comp. C. 201 = A.I.R. 1941 Lah. 52.**

——**Ss. 476 and 476-B**—Refusal to prosecute—Interference by High Court if and when justified. *See* C. P. CODE, S. 115 AND CR. P. CODE, SS. 476 AND 476-B. **1941 N.L.J. 91.**

——**S. 476**—*Scope—Proceedings before Civil Court—Offence under S.* 193, *I. P. Code, disclosed—Procedure—Complaint of offence under other sections—If ground for cancellation of complaint.*

Where one of the offences alleged is an offence under S. 193, I. P. Code, in connection with a proceeding before a District Munsif, such an offence falls under S. 195 (1) (*b*), Cr. P. Code, for which a complaint by the Court is necessary. The fact that the District Munsif has also complained that the facts established offences under other sections of the Penal Code to which S. 476, Cr. P. Code, has no application, is no ground for cancelling the complaint which is valid and necessary as far as the offence under S. 193, I. P. Code, is concerned. (*Wadsworth, J.*) VEERA REDDI, *In re.* **196 I.C. 27 = 14 R.M. 252 = 1941 A.Cr.C. 121 = 1941 O.A. (Supp.) 604 = 42 Cr.L.J. 800 = 53 L.W. 320 = 1941 M.W.N. 220 (1) = A.I.R. 1941 Mad. 576 = (1941) 1 M.L.J. 363.**

——**S. 476-A**—*Additional District Judge—Complaint in respect of proceedings in Court of Subordinate Judge—Competency.*

CR. P. CODE (1898), S. 476-A.

An Additional District Judge is not a Court to which appeals ordinarily lie from the Court of the Subordinate Judge and the Subordinate Judge is therefore not subordinate to the Additional District Judge but only to the District Judge. An Additional District Judge is not therefore competent to file a complaint under S. 476-A, Cr. P. Code, in respect of proceedings in the Court of a Subordinate Judge. (*Varma, J.*) HARIHAR GIR *v.* BAWAN SINGH. **195 I.C. 497=14 R.P. 141=7 B.R. 943=42 Cr.L.J. 748=1941 P.W.N. 482=A.I.R. 1941 Pat. 592.**

——**S. 476-A**—*Applicability—Complaint by superior Court—When can be made.*

S. 476-A, Cr. P. Code, comes into operation where the Court below has neither made a complaint nor rejected an application for the making of such complaint, that is to say, the lower Court has not passed any order in connection with the offence. (*Varma, J.*) HARIHAR GIR *v.* BAWAN SINGH. **195 I.C 497=14 R.P. 141=7 B R. 943=42 Cr.L.J. 748=1941 P.W.N. 482=A.I.R. 1941 Pat. 592.**

——**S. 476-B**—*Appeal—Competency—No complaint by original Court and no application made therefor—Appeal—If lies.*

Where there is no application made by any party for the making of a complaint to the original Court under S. 476, Cr. P. Code, and the Court does not think fit to file any complaint. no appeal lies under S. 476-B, Cr. P. Code. (*Varma, J.*) HARIHAR GIR *v.* BAWAN SINGH. **195 I.C. 497=14 R.P. 141=7 B.R. 943=42 Cr.L.J. 748=1941 P.W N. 482=A I.R. 1941 Pat. 592.**

——**S. 476-B**—Order dismissing application in default—Appealability. *See* 1940 Dig., Col. 517. JAWALA PARSHAD *v.* RAM PARSHAD. **192 I.C. 863=13 R.L. 423=42 Cr.L.J. 324.**

——**Ss. 476-B and 195 (1) (a) and (3)**—*Refusal to make complaint in respect of offence under S. 182, I. P. Code—Appeal—Forum.*

Where a Magistrate refuses to make a complaint in respect of an offence under S. 182, I. P. Code, an appeal from that order lies to the District Magistrate and not to the Sessions Judge. (*Agarwal, J.*) CHANDRAKUMAR DIKSHIT *v.* RAMESH CHANDRA. **196 I C. 664=1941 A.W.R (C.C.) 313=1941 A Cr.C. 241=1941 O.L.R. 734=1941 O W.N. 1130=1941 O.A. 822.**

——**S. 476-B**—*Right of appeal—Court issuing notice to witness* suo motu*—Order subsequently declining to take action—If appealable.*

If a Magistrate in calling on a witness to show cause why he should not be prosecuted for perjury, acts *suo motu* and not on an application made by a party, the latter has no right of appeal against the order of the Magistrate subsequently declining to take action against the witness under S. 476, Cr. P. Code. (*Shearer, J.*) SITA RAM *v.* BRIJ BEHARI. **195 I.C. 580=7 B.R. 944=14 R.P. 149=1941 P.W.N. 623=42 Cr.L.J. 757=A I.R. 1941 Pat. 591.**

——**S. 476-B**—Scope—If exhaustive— Revision against order under S. 476—Powers of High Court. *See* CR. P. CODE, S. 439. **I L.R. (1941) Kar. 422.**

——**S. 488**—*Amount of maintenance—Maintenance to child—If to cover cost of education—Bare maintenance—If sufficient.*

Maintenance under S. 488, Cr. P. Code, does not mean a bare maintenance, but also includes the cost of education of a child. The amount paid by a father to his child under the section should cover at least the cost of education sufficient for the child, so soon as he is old enough to earn his living and to maintain himself.

CR. P. CODE (1898), S. 488.

(*Davis, C. J. and Weston, J.*) TEKCHAND *v.* KALAVANTIBAI. **I.L R (1941) Kar. 417=A.I.R. 1941 Sind 214.**

——**S. 488**—*Application by wife for maintenance—Dismissal on ground of husband's indebtedness—Legality.*

The indebtedness of a husband is not a ground for dismissing a petition by his wife for maintenance under S. 488, Cr. P. Code. (*Lakshmana Rao, J.*) VALLIAMMAI AMMAL *v.* DHARMALINGA MUTHIRIAN. **1941 M.W.N. 668=54 L.W. 386=A.I.R. 1941 Mad. 762 (2).**

——**S. 488**—*Burden of proof—Claim by mother of illegitimate child against putative father — Onus of proof of parentage — Statement of mother—Value of without corroboration.*

In a claim by a woman for maintenance of an illegitimate child against its putative father, it is not for the opposite party to prove that he was not the father of the illegitimate child. It is for the applicant to show that the child was the child of the opposite party against whom the claim is made, before the latter can be called upon to disprove it. It is *prima facie* improper to accept without corroboration the mere statement on oath of the mother who asserts that the respondent to whom she is not married is the father of her child. (*Dhavle, J.*) PRASAD GAREBI *v.* MST. KESARI. **192 I.C 893=7 B.R. 501=42 Cr.L.J. 347=13 R.P. 567=1941 P.W.N. 94=22 P.L.T. 273=A.I.R. 1941 Pat. 444.**

——**S. 488**—Claim by wife—Opposite party behaving badly—Date from which maintenance to be awarded. *See* 1940 Dig., Col. 517. HEMIBAI *v.* KUNDIBAI. **I.L.R. (1941) Kar. 58=192 I.C. 340=13 R.S. 188=42 Cr.L.J. 278.**

——**S. 488**—Compromise as to maintenance—Limits to the power of Court to pass or enforce order. *See* 1940 Dig., Col. 517. MA KHIN YI *v.* EDWARD KHIN MAUNG. **192 I.C 640=13 R.R. 194=42 Cr.L.J. 312=A.I.R. 1941 Rang. 46.**

——**S. 488**—*Compromise petition—Proper form of order.*

Per *Derbyshire, C.J.*—If the parties to a proceeding under S. 488, Cr. P. Code, present a petition of compromise by which they agree to the payment of a certain sum of money for maintenance and pray for an order in terms thereof, the proper procedure for the Magistrate to adopt is to make an order in these words. "Petition of compromise filed. Order in terms of compromise." Then the provisions of S. 488 (3), Cr. P. Code can be invoked in order to secure the carrying out of what the parties had agreed to. (*Derbyshire, C.J. and Bartley, J.*) DEBJANI BISWAS *v.* RASIK LAL, **196 I C. 527=42 Cr.L.J. 894=45 C.W.N. 765=A.I.R. 1941 Cal. 558.**

——**Ss. 488 and 386**—*Enforcement of order—Order attaching immovable property—Legality.*

Under S. 488 a Magistrate has no jurisdiction to attach immovable property. The amount due in cases under S. 488 should be realized in the same manner as fines. For the purpose of attaching immovable property procedure under S. 386 should be followed. (*Bhide, J.*) LABH SINGH *v.* MT. PUNJAB KAUR. **196 I.C. 691=A.I R. 1941 Lah. 360.**

——**S. 488**—*Jurisdiction—Claim for maintenance of children from father—Burden of proof—Finding of neglect or refusal to maintain—Necessity.*

Under S. 488, Cr. P. Code, a Magistrate has no jurisdiction to pass an order against a father for maintenance of his children unless neglect or refusal to maintain his children is brought home to him, and

CR. P. CODE (1898), S. 488.

unless the Magistrate finds such neglect or refusal on the evidence. (*Dhavle, J.*) PRASAD GARERI *v.* MST. KESARI. **192 I.C. 893=22 Pat L.T 273=7 B R. 501= 42 Cr.L J. 347=13 R.P. 567=1941 P.W.N. 94= A.I.R. 1941 Pat. 444.**

——**S. 488**—*Jurisdiction— General rule—Casual visit, if can confer jurisdiction on the Court of the place.*

The general rule as to jurisdiction in regard to applications under S. 488, Cr. P. Code, is, that such an application can only be entertained at the place where husband and wife last resided together and this rule has been modified to the extent that it has been held possible for a husband to have more than one residence for the purposes of S. 488. But a casual visit by the husband to a place cannot confer jurisdiction on the Court of that place to entertain such an application. (*Grille, J.*) EMPEROR *v.* SHAMBAI. **I.L.R. (1941) Nag. 262= 192 I.C 5=42 Cr.L.J. 647=14 R.N. 33= 1941 N.L.J. 199=A.I.R. 1941 Nag. 175.**

——**S. 488**—*Jurisdiction of Magistrate—Husband and wife living apart—Children living with wife—Father declining to maintain them when living with wife and offering to maintain them, if they live with him or under his care—Power to make order.*

Where a husband and wife are living apart and the children are in fact living with the wife, the magistrate has power under S. 488, Cr. P. Code, to make an order for the maintenance of the children, although the father only refuses to maintain them whilst they are with the wife and offers to maintain them if they live with him or with somebody of whom he approves. The object of S. 488, Cr. P. Code, is to avoid vagrancy by providing that a magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. The magistrate must, however, take the facts as he finds them. If in fact the children are living with the wife and if in fact the father is refusing or neglecting to maintain them where they are living, the magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, he must take proper proceedings in the Civil Court to get the children removed from the custody of the wife or mother. The fact that such proceedings may involve expense which a father is unable or unwilling to bear cannot deprive the magistrate of the right to exercise his powers under S. 488. As long as the children are in fact living with the wife and as long as the husband is in fact declining to maintain them, the Magistrate can make an order for their maintenance under S. 488. (*Beaumont, C.J. and Sen, J.*) EBRAHIM MAHOMED *v.* KHURSHEDBAI EBRAHIM.

195 I.C. 232=42 Cr L J. 639=14 R B. 30= 43 Bom.L.R. 515=A.I.R. 1941 Bom. 267.

——**S. 488**—"Just cause"—Wife suffering from unpleasant disease not uncommon, incurable or serious—If just cause for husband's refusal to live with wife. *See* 1940 Dig., Col. 518. HEMIBAI *v.* KUNDIBAI. **I.L.R. (1941) Kar. 58=192 I.C. 340= 13 R.S. 188=42 Cr.L.J. 278.**

——**S. 488**—Maintenance claim by wife—Husband member of joint Hindu family—Order—Form of—If can be against family. *See* 1940 Dig., Col. 518. HEMIBAI *v.* KUNDIBAI. **I.L.R (1941) Kar. 58= 192 I.C. 340=13 R.S. 188=42 Cr.L J. 278.**

——**S. 488**—Maintenance to children—Offspring aged 20—"Inability to maintain himself"—Burden of proof. *See* 1940 Dig., Col. 518. MAHOMED YAR *v.* ALI MAHOMED. **193 I.C. 548=13 R.L. 463= 42 Cr.L J. 439=A.I.R. 1941 Lah. 92.**

CR. P. CODE (1898), S. 488.

——**S. 488**—*Major child—Right to maintenance when unable to maintain himself or herself.*

If a child is unable to maintain himself or herself, though not a minor, there is a right of maintenance under S. 488, Cr. P. Code. The age of the child is immaterial. The section does not limit the right of maintenance to minors. (*Lakshmana Rao, J.*) KANNIAH NAIDU *v.* RAJAMMAL. **196 I.C. 16= 1941 M.W.N. 479 (1)=42 Cr.L.J. 838= A.I.R. 1941 Mad. 685.**

——**S. 488**—*Marumakkathayee wife—Application against husband for maintenance of herself and child—Marriage before Marumakkathayam Act not dissolved—If legal—Right to maintenance.*

When there is a legal marriage between marumakkathayees which was not dissolved before the Marumakkathayam Act came into force, that must be deemed to be a legal marriage. If in such a case it is found that the income of the tavazhi properties of the wife is very little, her infant son as well as herself are entitled to maintenance from the father. (*Lakshmana Rao, J.*) LAKSHMI AMMA *v.* KRISHNA KURUP. **1941 M.W.N. 674=54 L.W. 387 (1)= A.I.R. 1941 Mad. 940 (2)=(1941) 2 M.L.J. 254.**

——**S. 488**—*Offer to maintain wife—Order for maintenance—If proper.*

Where a wife expressed her willingness to live with her husband in her application for maintenance and the husband offers to keep her with him, but the wife at that stage refuses to live with him, an order for maintenance is not justified. (*Grille, J.*) EMPEROR *v.* SHAMBAI. **I.L.R. (1941) Nag. 262=195 I.C. 5= 42 Cr.L.J. 647=14 R.N. 33=1941 N.L.J. 199= A.I.R. 1941 Nag. 175.**

——**S. 488**—Parties — Claim by wife— Husband member of joint Hindu family—Husband falsely alleged to have committed suicide or been murdered—Husband's father—If can be made party—Procedure. *See* 1940 Dig., Col. 519. HEMIBAI *v.* KUNDIBAI. **I.L.R. (1941) Kar. 58=192 I.C. 340= 13 R.S. 188=42 Cr.L.J. 278.**

——**S. 488**—Procedure—Jurisdiction of Magistrate—Order directing attachment of movables of husband's joint Hindu family and holding joint property liable for maintenance—Legality. *See* 1940 Dig., Col. 519. HEMIBAI *v.* KUNDIBAI. **I.L.R. (1941) Kar. 58= 192 I.C. 340=13 R.S. 188=42 Cr.L.J. 278.**

——**Ss. 488 and 489**—*Property set apart by arrangement, for maintenance—Jurisdiction of Court to pass orders under Ss.* 488 *and* 489 *in such cases.*

Where a person by private arrangement makes over certain property for the maintenance of his wife and daughter, there is no refusal to maintain and so no order could be passed under S. 488, Cr.P. Code. In such case an order under S. 489 increasing the allowance cannot be passed because the original allowance was not granted by Court under S. 488 but by private arrangement and S. 489 can have no application. (*Pollock, J.*) KESHEORAO *v.* KUMARI MALTIBAI.

1941 N.L.J. 622.

——**S. 488 (3)**—*Compromise—Order based on—Enforcement.*

Per *Bartley, J.*—An order lawfully made by a Magistrate under S. 488, Cr. P. Code, whether on compromise or otherwise, must be deemed to be enforceable in the manner provided by sub-S. (3) of that section. (*Derbyshire, C. J. and Bartley, J.*) DEBJANI BISWAS *v.* RASIK LAL. **196 I.C. 527=42 Cr.L.J. 894= 45 C.W.N. 765=A.I.R. 1941 Cal. 558.**

CR. P. CODE (1898), S. 488.

——**S. 488 (3)**—*Construction—Single application in respect of several months' arrears—Imprisonment, for what period can be awarded.*

When a wife applies to enforce a maintenance order and in a single application includes arrears which cover several months, the Magistrate has power to sentence the defaulter to more than one month's imprisonment. He may sentence the defaulter to one month's imprisonment for each full month's arrears of maintenance and to a further month for any broken period over and above that completed number of month's arrears which falls short of another complete month. (*Sharpe and Blagden, JJ.*) MA TIN TIN *v.* MAUNG AYE.

1941 Rang. L.R. 65=195 I.C. 190=14 R.R. 24=42 Cr.L.J. 690=A.I.R. 1941 Rang. 135.

——**Ss. 488 (3) and 490**—*Enforcement of order—Proper procedure—Proper term of imprisonment—Costs recovery—Procedure.*

Where after an order for the payment of maintenance has been made if it is not complied with or if there is a refusal to pay it, the Magistrate cannot straightaway order the defaulter to be committed to jail. The first thing that must be done is to issue a distress warrant and it is only for the whole or part of each months allowance that remains unpaid after the execution of the warrant that imprisonment may be awarded. A man cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears. The only method provided for the recovery of costs awarded is by distress warrant. An application for enforcement or execution may be made to *any* Magistrate in a place where the person against whom the order is made. It is not necessary that the Magistrate should be of the categories mentioned in S. 488 or have the powers prescribed therein. (*Mosely, J.*) MAUNG TUN ZAN *v.* MA MYAING. **196 I.C. 563=14 R.R. 93=1941 Rang.L.R. 403=A.I.R. 1941 Rang. 247.**

——**S. 488 (3)**—"Sufficient cause"—Adjudication as insolvent. *See* 1940 Dig., Col. 520 RADHARANI DASSI *v.* MATI LAL SEN. **I.L.R (1940) 2 Cal. 525=192 I.C. 185=13 R.C. 305=42 Cr.L.J. 250.**

——**S. 488 (3)**—Sufficient cause—Adjudication in insolvency—Effect of. *See* 1940 Dig., Col. 520. EMPEROR *v.* MAHOMED HUSSAIN. **191 I.C. 198=13 R.B. 156=42 Cr.L.J. 101.**

——**S. 488 (4)**—*Applicability—Helpless wife ill-treated by husband—Submission to amount agreed upon by Panchayat—If living separately by mutual consent—Right to order.*

It cannot be said that where a woman, who is helpless and has been ill-treated by her husband, has to submit, or thinks she has to submit, to a sum agreed upon by her Panchayat, she is living separately by mutual consent within the meaning of S. 488 (4), Cr. P. Code. (*Davis, C.J. and Weston, J.*) TEKCHAND *v.* KALAVANTIBAI. **I.L.R. (1941) Kar. 417=A.I.R. 1941 Sind 214.**

——**S. 488 (6)**—*Scope—Non-compliance—Effect on order for maintenance.*

The direction in Cl. (6) of S. 488, Cr. P. Code, is peremptory; and if the evidence on which an order under S. 488, Cr. P. Code, against the husband or the father is made, has not been taken in the presence of the husband or the father, as the case may be, and if his personal attendance has not been dispensed with, the order is illegal as it contravenes S. 488 (6) and must be set aside. (*Davis, C. J. and Weston, J.*) RUPCHAND ISSARDAS *v.* EMPEROR. **I.L.R. (1941) Kar. 415.**

——**Ss. 488 (7), 439**—*Costs of revision.*

The High Court has under S. 488 (7) power to make such order as to costs as it considers just in applications for revision of orders under S. 488. (*Sharpe and Blagden, JJ.*) MA TIN TIN *v.* MAUNG AYE.

1941 Rang. L.R. 65=195 I.C. 190=14 R.R. 24=42 Cr.L.J. 690=A.I.R. 1941 Rang. 135.

CR. P. CODE (1898), S. 497.

——**S. 488 (8)**—"Where he last resided with his wife" — Interpretation. *See* 1940 Dig., Col. 520. CHARAN DAS *v.* SURASTI BAI. **I.L.R. (1940) Lah. 755=191 I.C. 203=13 R.L. 287=42 Cr.L.J. 105.**

——**Ss. 489 (2) and 488**—Civil suit subsequent to order under S. 488—Decree—Subsequent procedure. *See* 1940 Dig., Col. 521. U ARZEINA *v.* MA KYIN SHWE. **192 I.C. 439=13 R.R. 180.**

——**S. 494**—Duty of Magistrate to exercise independent judgment. *See* 1940 Dig., Col. 521. FAKIR CHAND RAM KRISHIN *v.* MURAD UMAR. **I.L.R. (1941) Kar. 32=13 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.**

——**S. 494**—Extraneous reasons—If proper. *See* 1940 Dig., Col. 521. FAKIR CHAND RAM KRISHIN *v.* MURAD UMAR **I.L.R (1941) Kar. 32=13 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.**

——**S. 494**—Reasons for permitting withdrawal—Duty of Court to record. *See* 1940 Dig. Col. 521. FAKIR CHAND RAM KRISHIN *v.* MURAD UMAR. **I.L.R. (1941) Kar. 32. 13 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.**

——**S. 495**—Duty of Magistrate — Application for permission—Proper authority to deal with—Engagement of Advocate privately engaged by complainant—Propriety. *See* 1940 Dig., Col. 522. AHMED MAHOMED ISMAIL *v.* EMPEROR. **191 I.C. 378=13 R.S. 156=42 Cr.L.J. 158.**

——**S 495 (1) and (4)**—Applicability—Case under S. 110—Police Officer inquiring into case—Application for permission to conduct case before Magistrate on behalf of prosecution—Propriety of. *See* 1940 Dig., Col. 522. EMPEROR *v.* ANANDYA SAMBHYA. **13 R.B. 194=191 I.C. 334=42 Cr.L.J. 150.**

——**Ss. 496 and 497**—Applicability—Offences under Defence of India Act and Rules—Right of accused to be released on bail. *See* DEFENCE OF INDIA ACT, R. 130 A (*b*). **(1941) 2 M.L.J. 1014.**

——**S. 497**—*Bailbond—Cancellation—Accused setting up alibi—If sufficient ground.*

The fact that the accused who has been enlarged on bail has filed a petition setting up an alibi in defence, is not such a conduct on his part as would make it necessary to cancel his bail bond. (*Varma, J.*) KUNJA BIHARI CHANDRA *v.* EMPEROR. **196 I.C. 476=14 R.P. 210=42 Cr.L.J. 882=8 B.R. 29.**

——**S. 497**—*Discretion—District Magistrate forwarding application to subordinate Magistrate—Endorsement of his inclination or disinclination—Propriety.*

The discretion to be exercised under S. 497 by Magistrates is a judicial discretion according to law. Consequently, a District Magistrate while forwarding an application for bail to his subordinate Magistrate having jurisdiction should not express by endorsing on the application his inclination or disinclination to grant bail as such an endorsement may amount to a hint to his subordinate and may interfere with the discretion to be exercised by him and may improperly influence him in the discharge of his judicial duties. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* ABUBAKAR. **I.L.R. (1941) Kar. 281=195 I.C. 178=14 R.S. 16=42 Cr.L.J. 703=A.I.R. 1941 Sind 83.**

——**S. 497**—*Duty of Magistrate—Accused challaned for conspiracy to murder man with whose wife he had been intriguing—Accused as Magistrate recording dying declaration of deceased and granting bail—If justified.*

CR. P. CODE (1898), S. 497.

An accused in a case of criminal conspiracy for the murder of a man with whose wife he was alleged to have been carrying on an intrigue, also recorded as a Magistrate a dying declaration of the deceased, the husband of the woman. The Magistrate granted bail to the accused on the ground that there was a discrepancy in the evidence of the approvers but there was nothing to suggest that the discrepancy was incapable of explanation and would be fatal to the prosecution case.

Held, that the grant of bail in the unusual circumstances of the case was not justified. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* ABUBAKAR.

I L.R. (1941) Kar. 281 = 195 I.C. 178 = 14 R.S. 16 = 42 Cr.L.J. 703 = A.I.R. 1941 Sind 83.

——**S. 497**—*Magistrate discovering bail granted by him to be without jurisdiction—Procedure.*

Where a Magistrate finds that an order granting bail passed by him was without jurisdiction he must commit the accused forthwith to custody and should not allow him to remain on bail pending the passing of a final order cancelling the bail bond and remanding him to custody inasmuch as there is no room for an interim order in such a matter. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* ABUBAKAR. **I L.R. (1941) Kar. 281 = 195 I.C. 178 = 14 R.S. 16 = 42 Cr L J. 703 = A.I.R. 1941 Sind 83.**

——**S. 497**—*Scope—Grant of bail in anticipation to persons not arrested or detained—If justified.*

The Cr. P. Code does not permit everything to be done that it does not forbid. It requires that in matters relating to the administration of law such as the arrest of the accused, the granting of bail to the accused, or in any other matters for which the law provides, the provisions of the law should be closely followed. S. 497 does not authorize and was not intended to authorize the grant of bail by anticipation to persons who are not arrested or detained. (*Davis, C J. and Tyabji, J.*) EMPEROR *v.* ABUBAKAR. **I L.R. (1941) Kar. 281 = 195 I.C. 178 = 14 R.S. 16 = 42 Cr L.J. 703 = A.I.R. 1941 Sind 83.**

——**Ss. 499 and 514**—*Liability of surety—Extent of—Surety undertaking to produce accused on fixed date and thereafter as directed by Court—Surety producing accused on fixed date—Accused with Court's permission leaving Court house for prayers and absconding—Surety's liability—If ceases.*

The liability of a surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in the custody of the Court only when his bail bond is cancelled. In his bond the accused bound himself to appear in the Court on a fixed date and thereafter as directed by the Court and the surety bound himself that the accused would so attend and in default of his so attending, he bound himself to forfeit Rs. 1,000. The surety produced the accused on the fixed date. During the course of the proceedings the accused with the Court's permission left the Court-house to say his prayers and absconded. The bail bond was not cancelled at that time nor was the surety discharged.

Held, that the surety's liability did not cease merely on the production of the accused in Court but continued thereafter and the forfeiture of his bond was justified.

Held, further, that there were mitigating circumstances in the case whereby the penalty for forfeiture could be reduced to something nominal inasmuch as the surety was taken off his guard. (*Davis, C.J. and Lobo, J.*) MURADALI *v.* EMPEROR.

I.L.R. (1941) Kar. 164 = 13 R.S. 223 =

CR. P. CODE (1898), S. 514.

193 I.C. 471 = 42 Cr.L.J. 427 = A.I.R. 1941 Sind 31.

——**S. 507 (2)**—Trial *de novo* by successor—Examination and cross-examination of witness on commission in previous proceedings—Admissibility. *See* 1940 Dig., Col. 523. SUKHRAMDAS *v.* EMPEROR.

191 I.C. 127 = 13 R.S. 128 = 42 Cr.L.J. 80.

——**S. 509 (1)**—Scope of—If applies to evidence tendered by one who happens to be a doctor—Dying declaration recorded by a doctor—Proof—Necessity. *See* 1940 Dig., Col. 523. WARIS KHAN *v.* EMPEROR.

193 I.C. 770 = 13 R.O. 513 = 42 Cr.L.J. 483 = 1941 O.L.R. 333.

——**S. 512**—*Record of statement—Sufficiency of evidence as to absconding—If can be questioned by accused.*

The condition precedent to the recording of a statement under S. 512 is that the Magistrate who records such a statement should be satisfied on some evidence led before him that the accused person is absconding. When the Magistrate is so satisfied on evidence recorded by him the sufficiency of the evidence satisfying him cannot be agitated or questioned when the accused person is later brought to trial. Far less can it be questioned at a later stage when the accused person after trial is convicted and an appeal preferred from the order of conviction. (*Bhide and Ram Lall, JJ.*) KARAM SINGH JAWAHAR SINGH *v.* EMPEROR. **197 I.C. 108 = 43 P.L.R. 641 = A.I.R. 1941 Lah. 361.**

——**S. 514**—*Bond under S. 109—Forfeiture for breach—Time for starting proceedings.*

A Magistrate who convicts a person of an offence involving the forfeiture of the security bond executed by that person under S. 109, Cr. P. Code, can subsequently take action against that person by forfeiting the security bond. (*Almond, J.C. and Mir Ahmad, J.*) UMAR BAKSH MUSA KHAN *v.* EMPEROR.

197 I.C. 66 = A.I.R. 1941 Pesh. 78.

——**Ss. 514 and 537**—*Failure to record grounds of proof—If and when curable.*

Where a Magistrate though he satisfied himself by sending for the relevant records and perusing them, did not record the grounds of proof that a security bond had been forfeited, and the person who gave the security is not thereby prejudiced, the defect in the procedure is merely an irregularity of the kind referred to in S. 537, Cr. P. Code. The Magistrate cannot be said to have acted without jurisdiction, merely because he failed to record the reasons for holding that there was a forfeiture. (*Bennett, J.*) PADAM SINGH *v.* EMPEROR.

16 Luck. 646 = 193 I.C. 627 = 13 R.O. 492 = 1941 A.L.W. 271 = 1941 A.Cr.C. 87 = 1941 O.L.R. 303 = 42 Cr.L.J. 457 = 1941 O.W.N. 357 = 1941 O.A. 277 = 1941 A.W.R. (Rev.) 219 = A.I.R. 1941 Oudh 321.

——**S. 514**—*Forfeiture of bail bond—Reduction of amount—Circumstances.*

Where owing to non-appearance of the accused on the day fixed, the bail bond of the sureties was forfeited but subsequent thereto, the sureties arrested the accused and produced them before the Magistrate concerned and the sureties were poor servants, it was *held* that the amount to be forfeited could be reduced under those circumstances. (*Ghulam Hasan, J.*) IMAM BEG *v.* EMPEROR.

1941 O A. 941 = 1941 A.W.R. (C.C.) 362 = 1941 O.W.N. 1225.

——**S. 514**—*Forfeiture of bond—Proceedings, when to be started.*

The mere fact that no immediate action under S. 514, Cr. P. Code, is taken against a person under recognizances to keep the peace or against his surety, on

the conviction of the former of an offence involving a breach of the peace, is no bar to such action being taken at a future date. Nor is it necessary that such proceedings should have been started before the expiry of the period for which the bond is given. (*Bennett, J.*) PADAM SINGH *v.* EMPEROR.
16 Luck. 646 = 193 I.C. 627 = 13 R.O. 492 = 1941 A.L.W. 271 = 1941 A.Cr.C. 87 = 1941 O.L.R. 303 = 42 Cr.L.J. 457 = 1941 O.W.N. 357 = 1941 O.A. 277 = 1941 A.W.R. (Rev.) 219 = A.I.R. 1941 Oudh 321.

——**Ss. 514 and 496**—Forfeiture of surety bond—Legality—No recognizance taken from accused. *See* 1940 Dig., Col. 524. INDAR *v.* EMPEROR.
I.L.R. (1941) Lah. 519.

——**S. 514 and U. P. Encumbered Estates Act, S. 4**—*Forfeiture—Surety being applicant under Encumbered Estates Act—If saves forfeiture.*

The fact of a surety having applied under the United Provinces Encumbered Estates Act does not protect him against a forfeiture of his bond on that ground. (*Bennett, J.*) PADAM SINGH *v.* EMPEROR.
16 Luck. 646 = 193 I.C. 627 = 13 R.O. 492 = 1941 A.L.W. 271 = 1941 A. Cr.C. 87 = 1941 O.L.R. 303 = 42 Cr.L.J. 457 = 1941 O.W.N. 357 = 1941 O.A. 277 = 1941 A.W.R. (Rev.) 219 = A.I.R. 1941 Oudh 321.

——**S. 515**—*Revision—Power of District Magistrate to raise amount of security ordered to be forfeited.*

The plain meaning of S. 515 is that the District Magistrate can pass on revision any order which the original Magistrate himself might have passed. Consequently, the District Magistrate can revise the order of the original Court so as to raise the amount of security to be forfeited. (*Almond, J.C.*) SHER MAHOMED *v.* EMPEROR.
195 I.C. 588 = 14 R. Pesh. 19 = 42 Cr.L.J. 754 = A.I.R. 1941 Pesh. 63.

——**S. 516-A**—*Applicability — Jurisdiction of Magistrate—Complaint of criminal breach of trust sent to police for investigation—Property in hands of accused*—Ex parte *order for handing over possession to complainant—Legality.*

Before an order under S. 516-A, Cr. P. Code, can be made, three conditions must be fulfilled: (1) the Magistrate must have reason to suppose that an offence has been committed; (2) that the property in question must be produced before the Court; and (3) that there must be an inquiry or trial pending at the time. Where on a complaint being made of a criminal breach of trust in respect of certain property in the hands of the accused, the Magistrate sends the complaint to the police for investigation under S. 202, Cr. P. Code, it cannot be said that an offence appears to him at that stage to have been committed, so as to justify an *ex parte* order directing possession of the property to be handed over to the complainant under S. 516-A. Such an order is also illegal on the ground that the property is not produced before the Court, as the power of a Criminal Court to make orders under S. 516-A, is limited to property which is produced before it. An investigation by the police under S. 202, Cr. P. Code, is not an inquiry within the meaning of the Code, and since at that stage there is no inquiry or trial pending, the order is also illegal on that ground. Such an *ex parte* order at that stage is therefore unwarranted and illegal. (*Broomfield and Wassoodev, JJ.*) RAMCHETSING ARJUNSINGH *v.* DEOJI KALYANJ.
43 Bom L.R. 967.

——**Ss. 517 and 520**—*Order under S. 517 by first class Magistrate—Appealability—Forum.*

Where an order under S. 517, Cr. P. Code, is passed by a first class Magistrate who acquitted the accused in

the case, an appeal lies against such order, to the Sessions Judge. (*Hamilton, J.*) RAM DIHAL *v.* BADRI.
I.L.R. (1941) All. 168 = 193 I.C. 817 = 13 R.A. 462 = 1941 O.W.N. 137 = 42 Cr.L.J. 469 = 1941 A.Cr.C. 85 = 194 O.A. (Supp.) 281 = 1941 A.L.W. 169 = 1941 A.W.R. (H.C.) 7 = 1941 A.L.J. 53 = A.I.R. 1941 All. 143.

——**S. 517**—Scope—If subject to or superseded by R. 90-B (6)—Defence of India Rules—Jurisdiction of Court to make order as to disposal of money seized under R. 90-B (4) of the Defence of India Rules. *See* DEFENCE OF INDIA RULES, R. 90-B (4) AND (6).
43 Bom.L.R. 872.

——**S. 520**—"*Court of appeal or revision*"—*Meaning of.*

The Court of appeal or revision referred to in S. 520, Cr. P. Code, is the Court which ordinarily is the Court of appeal or revision, as the case may be, to which the Court passing the order as to the disposal of the property is, as such, ordinarily subordinate, when the order which is challenged is the order as to the property alone. If the principal order is challenged, the Court of appeal or revision would be the Court before which the appeal or revision application against the principal order has been made. (*Davis, C. J. and Weston, J.*) FATIMA *v.* SAIN BAKHSH. **I.L.R. (1941) Kar. 442.**

——**S. 521**—Complaint under S. 501, I. P. Code, in respect of defamatory passages in book—Order for destruction of entire book—Propriety—Proper order. *See* 1940 Dig., Col. 526. VEERABADRA RAO SUMITRAMMA *v.* KRISHNAMURTHI SASTRI.
13 R.M. 529 (1) = 42 Cr.L.J. 119.

——**S. 522**—'Force'—Meaning of. *See* 1940 Dig., Col. 526. NARAIN SINGH *v.* PANNA LAL.
I.L.R. (1941) Lah. 512 = 191 I.C. 373 = 13 R.L. 322 = 42 Cr.L.J. 160.

——**S. 522**—'Force'—Meaning of. *See* 1940 Dig. Col. 526. KALAR DIN *v.* EMPEROR.
192 I.C. 282 = 13 R.Pesh. 41 = 42 Cr.L.J. 272 (1).

——**S. 522 (3)**—Scope—Order under S. 522—Right of appeal—If conferred. *See* 1940 Dig., Col. 527. MAHOMED SHARIF *v.* DIWAN SINGH.
I.L.R. (1941) Lah. 377 = 43 P.L.R. 534.

——**S. 523**—*Discretion under—Offence investigated as one under S. 461, I. P. Code—Subsequent filing of referred charge sheet as offence turned out to be one under S. 403, I. P. Code—Order as to disposal of property—Discretion of Magistrate.*

S. 523, Cr. P. Code, empowers a Magistrate to pass orders with regard to the disposal of property which is alleged or suspected to have been stolen or is found under circumstances which create suspicion of the commission of any offence. The police started investigation into a case in respect of certain cattle as an offence falling under S. 411, I. P. Code. Upon receipt of some information they came to the conclusion that the offence did not fall under S. 411 but under S. 403, I. P. Code. Since the offence was not cognizable the police sent a referred charge sheet to that effect. The Magistrate agreed and ordered the cattle the subject-matter of the complaint to be returned to the complainant.

Held, on a reference that the Magistrate had a discretion to make the order under S. 523, Cr. P. Code, and it could not be said that the discretion was not exercised judicially. (*Horwill, J.*) TIMMA REDDI *v.* RAMI REDDI.
195 I.C. 228 = 14 R.M. 162 = 1941 A.Cr.C. 107 = 1941 O.A. (Supp.) 603 = 42 Cr.L.J. 635 = 1941 M.W.N. 224 = 53 L.W. 394 = A.I.R. 1941 Mad. 416 = (1941) 1 M.L.J. 421.

CR. P. CODE (1898), S. 523.

——**S. 523**—*Property seized during investigation of a crime—To whom to be restored—Seizure from pawnee—No offence against pawner proved—Order for return to complainant against pawner—If justified.*

The property seized during the investigation of a crime should except in exceptional cases be restored to the person from whose possession it was taken. Where certain ornaments are seized from the pawnee during the investigation into a complaint by a third person against pawner in respect of those ornaments, when no offence against the pawner is proved, the ornaments should be returned to the pawnee and not to the complainant against the pawner. (*Agarwal, J.*) BABU RAM *v.* EMPEROR. **1941 O.W.N. 1304 = 1941 A.W.R. (C.C.) 395 = 1941 O A. 1000.**

——**S. 523**—*Scope—Property seized under S. 51—Disposal of—Duty of Magistrate.*

The disposal of property seized by the Police under S. 51 of the Cr. P. Code cannot be indefinitely postponed; and when the person from whom it has been seized applies for the restoration thereof, the Magistrate must deal with the application under S. 523, Cr. P. Code. (*Lakshmana Rao, J.*) SHROFF BODANNA *v.* EMPEROR. **1941 M.W.N. 1039**

——**S. 526**—*Application by complainant—Crown opposing application—Case, if can be transferred.*

The Court can in a proper case exercise its power of transfer at the instance of a private complainant, although the Crown opposes the complainant's application for transfer. (*Skemp, J.*) GHULAM RASUL *v.* EMPEROR. **196 I.C 467 = 14 R.L. 160 = 42 Cr.L.J. 880 = 43 P.L.R 354 = A.I R. 1941 Lah. 299.**

——**S. 526**—*Application by complainant—Duty of Court.*

An application for transfer by a complainant should be scanned more narrowly than that of an accused person. An accused person apprehends conviction and a complainant that his enemy will go free. (*Skemp, J.*) GHULAM RASUL *v.* EMPEROR. **196 I C 467 = 14 R.L. 160 = 42 Cr.L.J. 880 = 43 P.L.R. 354 = A.I.R. 941 Lah. 299**

——**S. 526**—Costs—Adjournment of case to enable accused to move for transfer—Power to order payment of costs of day to prosecution. *See* CR. P. CODE, S. 344. **(1941) 2 M.L.J. 854**

——**S. 526**—*Ground for transfer—Apprehension of conviction.*

An accused is only entitled to transfer if he has a reasonable apprehension of an unfair trial. An apprehension of being convicted is no reason for a transfer. A.I.R. 1939 Lah. 27, held incorrectly decided. (*Skemp, J.*) CHUNI LAL *v.* EMPEROR. **196 I C. 816 = 43 P.L.R. 639 = A.I.R. 1941 Lah. 367.**

——**S. 526**—Ground for transfer—Failure to note questions disallowed. *See* 1940 Dig., Col. 528. DEWAN SINGH MAFTOON *v.* EMPEROR. **192 I.C. 347 = 13 R.L. 380 = 42 Cr.L.J. 284.**

——**S. 526**—*Ground for transfer—Hostility—Magistrate and complainant taking opposite sides in election.*

The fact that the Honorary Magistrate trying a case owns land in the village of which the complainant is a lambardar and they took opposite sides in a recent election is a good ground for transfer of the case. (*Skemp, J.*) GHULAM RASUL *v.* EMPEROR. **196 I.C 467 = 14 R.L 160 = 42 Cr.L.J. 880 = 43 P.L R 354 = A I.R 1941 Lah. 299**

——**S. 526**—Ground for transfer—Police Officers of District being witnesses. *See* 1940 Dig., Col. 528.

CR. P. CODE (1898), S. 526.

DEWAN SINGH MAFTOON *v.* EMPEROR.
192 I.C. 347 = 13 R.L. 380 = 42 Cr.L J. 284.

——**S. 526**—*Reasonal apprehension of prejudice—Magistrate threatening defence witness with prosecution for negligence and issuing warrant of arrest to defence witness after application for stay for purpose of applying for transfer—If ground for transfer.*

Where a magistrate issues a warrant of arrest for a defence witness without complying with the requirements of S. 70, Cr. P. Code, at a time when the accused intends to apply to the High Court for a transfer of the case from the file of that magistrate, and threatens to prosecute a witness for the defence for negligence—which he has no power to do—his acts are not only very ill-advised, but also well-calculated to cause an apprehension in the mind of the accused that the magistrate was prejudiced against him. Such acts in fact go far to suggest that the magistrate is in that condition. That would be good ground for a transfer of the case. (*Dhavle, J.*) CHANDER KUER *v.* EMPEROR. **191 I.C. 193 = 3 R.P. 314 = 42 Cr L J 103 = 7 B.R. 166 = A.I.R 194 Pat. 206.**

——**S. 526**—*Scope—Application for transfer—Considerations for High Court—Cumulative effect of incidents or observations to be considered.*

In an application for transfer of a case under S 526, Cr. P. Code, the High Court has to see whether or not particular observations made by the Magistrate or acts done by him during the trial will raise a reasonable apprehension in the mind of the accused that he would not get a fair trial in that Court. Though some of the incidents alleged may not deserve notice, if a serious incident is alleged and is not denied by the Magistrate, the High Court will consider what the cumulative effect of all that has happened is likely to be in the mind of the accused. (*Varma, J.*) MUNAR PANDEY *v.* EMPEROR. **196 I.C. 582 = 8 B.R. 47.**

——**S. 526**—*Transfer—Grounds—Cross-complaints on same facts—Dismissal of one—Application for transfer of other—If to be allowed.*

Where one of two cross-complaints is dismissed under S. 203, Cr. P. Code, it cannot be said that the complainant's apprehension that he will not get a fair and impartial trial in the cross-complaint against him arising on the same facts is unreasonable. It is therefore desirable that the case against him should be transferred to another Magistrate. (*Lakshmana Rao, J.*) SADASIVA GOUNDAN *v.* EMPEROR. **1941 M.W.N. 844 (2).**

——**S. 526**—*Transfer—Grounds for —Prominent person figuring in case—If ground for transfer.*

Magistrates will not be deterred from doing their duty merely because a person concerned is a zamindar, an M. L.A., or a prominent person. All men are equal before the law, and a zamindar, an M.L.A., or a prominent person has no special privilege under the Criminal Procedure Code, and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way as against any other person. Consequently the fact that such a person is figuring in a case is no ground for transferring it. (*Davis, C J.*) IMAMDINO *v.* EMPEROR. **193 I.C. 557 = 13 R S. 226 = 42 Cr.L.J. 437 = A.I R. 1941 Sind 39.**

——**S. 526**—*Transfer—Grounds—Magistrate examining accused before close of prosecution case and admitting inadmissible evidence—If entitles accused to claim transfer.*

Neither the fact that a Magistrate has examined the accused exhaustively under S. 342, Cr. P. Code, before the prosecution case was closed nor the fact that he has

CR. P. CODE (1898), S. 526.

allowed certain pieces of inadmissible evidence to be brought on the record, would by itself show that there was any bias or prejudice in the mind of the Magistrate so as to entitle the accused to claim a transfer under S. 524, Cr. P. Code. (*Varma, J.*) MUNAR PANDEY *v.* EMPEROR. **196 I.C. 582=8 B.R. 47.**

——S. 526—*Transfer — Grounds — Magistrate subordinate to District Magistrate who sanctioned prosecution—If ground for transfer of case to Sessions Court.*

It cannot be accepted as a general principle that no Magistrate subordinate to the District Magistrate can deal with a case in which the District Magistrate has sanctioned the prosecution. It will not therefore be right for the High Court to transfer a case from a Magistrate to the Sessions Court on the ground merely that the Magistrate in question is subordinate to the District Magistrate who sanctioned the prosecution. But if there are reasons for thinking that in fact a particular Magistrate was likely to be influenced by the opinion of the District Magistrate, the High Court will not hesitate to transfer the case to the Sessions Court. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* SORABJI RUSTOMJI. **43 Bom L.R. 518=A.I.R 1941 Bom. 336.**

——S. 526—*Transfer — Grounds — Remarks by Magistrate during examination of prosecution witnesses adverse to accused—Magistrate insisting on stamped petition for each objection on behalf of accused to statements of witnesses—Effect—Reasonable apprehension.*

A Magistrate has to be very cautious in making remarks or observations during the course of a trial, lest a particular observation should raise a reasonable apprehension in the mind of the accused that he would not get a fair trial in his Court. If a Magistrate during the examination of the prosecution witness makes a remark that the witnesses who did not support the prosecution case have been won over by the accused and that their evidence would not affect the merits of the case is calculated to and must necessarily raise in the mind of the accused a reasonable apprehension that he would not get a fair trial. Further, where the Magistrate does not allow the pleader for the accused to raise objections orally to certain statements by witness and insists on a stamped petition being filed for every objection raised on behalf of the accused, the cumulative effect is to create in the mind of the accused an apprehension that he would not get a fair and impartial trial, and in such a case there are sufficient grounds for ordering a transfer of the case. (*Varma, J.*) MUNAR PANDEY *v.* EMPEROR. **196 I.C. 582=8 B.R. 47.**

——Ss. 526 and 528—*Transfer—Notice—Necessity—Magistrate party to prior decision on similar point—If a disqualification bear a similar point again.*

It is improper to transfer a case without giving notice to the accused. The mere fact that a Court had decided a particular point in one way on a previous occasion is no reason for holding him to be unfit to decide it on a subsequent occasion. Questions of fact have always to be decided on the facts of each case. (*Pollock, J.*) YESHWANT RAO *v.* EMPEROR. **1941 N.L.J. 619.**

——S. 528—*Failure to give notice—If affects transfer.*

Mere failure or omission to give notice to the opposite party will not make an order of transfer illegal and would be no ground to set it aside. It is a mere irregularity. There is nothing in the section itself which makes it obligatory on the District Magistrate to give notice to the opposite party. (*Bennett, J.*) KHEMANA *v.* DULARY. **193 I.C. 681=13 R.O. 510=1941 A.Cr.C. 109=1941 O.L.R. 364=42 Cr.L.J. 478=1941 O.W.N. 590=1941 A.W.R. (C.C.) 148=1941 A.L.W. 435=1941 O.A. 379=A.I.R. 1941 Oudh 388.**

CR. P. CODE (1898), S. 537.

——Ss. 528 and 17—*District Magistrate, powers of—Setting aside transfer by sub-divisional Magistrate.*

Under S. 17, Cr. P. Code all magistrates appointed under Ss. 12, 13 and 14 are made subordinate to the District Magistrate. Hence a District Magistrate has the power to set aside an order of a sub-divisional Magistrate transferring a case and transfer that case to some other Court. (*Bennett, J.*) KHEMANA *v.* DULARY. **193 I.C. 681=13 R.O. 510=1941 A.Cr.C. 109=1941 O.L.R. 364=42 Cr.L.J. 478=1941 O.W.N. 590=1941 A.W.R. (C.C.) 148=1941 A.L.W. 435=1941 O.A. 379=A.I.R. 1941 Oudh 388.**

——Ss. 529 and 197—Applicability—Wrong sanction under S. 197—Special appointment of Magistrate otherwise competent to try case. *See* 1940 Dig., Col. 528. PEAREY LAL *v.* EMPEROR. **13 R. Pesh. 28=42 Cr L J. 68.**

——Ss. 530, 531 and 537—*Scope—Trial of offence under S. 220, Penal Code, by Magistrate—Illegality—If cured.*

A Magistrate has no jurisdiction to try an offence under S. 220, Penal Code. Consequently, the trial of such an offence by him is not a mere irregularity within the meaning of S. 531 or even S. 537 but an illegality comparable to those irregularities under S. 530 which render proceedings void. (*Davis, C.J.*) MANSHARAM GIANCHAND *v.* EMPEROR. **193 I C. 454=13 R.S. 231=42 Cr.L.J. 460=A.I.R. 1941 Sind 36.**

——S. 530 (p)—*Scope of—Trial of offence less serious than one committed—Effect—Interference by High Court.*

The effect of S. 530 (*p*), Cr. P. Code, is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. If the Magistrate entirely overlooks some fact which would carry the offence beyond his jurisdiction and tries the accused for a lesser offence, he cannot be held to have acted without jurisdiction. The question whether he has or has not deliberately overlooked the circumstances is one of fact. If, on the other hand, he does not overlook the circumstance, but after his attention has been drawn to it, he deliberately ignores it, his proceedings would be improper and the High Court will interfere in revision. If the Magistrate really believes that the whole body of facts revealed to him constituted an offence triable by him, and he has in fact jurisdiction to try that offence, his proceedings are not improper and the High Court will not interfere. (*Horwill, J.*) PERIANNA MUDALI *v.* EMPEROR. **54 L.W. 738=1941 M W.N. 811=(1941) 2 M.L.J. 420.**

——S. 533—Confessional statement not properly recorded—Certificate that confession was voluntary—Magistrate's evidence—Admissibility. *See* 1939 Dig., Col. 464. BALIRAMSINGH *v.* EMPEROR. **I.L.R. (1941) Nag 506.**

——S. 537—Applicability—Failure to record grounds of proof of forfeiture under S. 514. *See* CR. P. CODE, SS. 514 AND 537. **1941 O.W.N. 357=1941 A.W.R. (Rev.) 219.**

——S. 537—*Complaint under S. 195—Absence of—Defect, if curable.*

S. 537, Cr. P Code, does not cure cases of want of or irregularity in any complaint required by S. 195, Cr. P. Code. Where in a proceeding instituted on a police report the accused was convicted under S. 353, I. P. Code, the Appellate Court cannot alter the conviction to one under S. 186, I. P. Code, in the absence of a previous

CR. P. CODE (1898), S. 537.

complaint in writing of the public servant concerned or some other public servant to whom he was subordinate, and the defect cannot be cured by S. 537, Cr. P. Code. (*Bartley and Edgley, JJ.*) MONMATHA KOLEY *v.* EMPEROR. **45 C.W.N. 580.**

——**S. 537**—Curability under—Expunging of remarks from judgment by Sessions Judge. *See* CR. P. CODE, SS. 561-A AND 537. **1941 Rang.L.R. 566.**

——**S. 537**—Curability under—Scope of. *See* CR. P. CODE, SS. 234, 239 (*d*) AND 537.

1941 Rang.L.R. 559.

——**S. 537**—*Irregularities—Interference in revision—Grounds.*

Ths provisions of S. 537 of Cr. P. Code are mandatory and the High Court could not interfere without finding that there had been a substantial error of justice due to the irregularities in the course of the trial. It was never the intention of the legislature that persons who committed offences should escape punishment merely on technical grounds which did not affect the substantial justice of a case. (*Allsop, J.*) GHANSHIAM DAS *v.* EMPEROR. **1941 A.W.R. (H.C.) 134 = 1941 A.Cr.C. 105 = 1941 O.A. (Supp.) 244 = 1941 A.L.J. 229 = 1941 O.W.N. 546 (1) = 1941 A.L.W. 397 (1).**

——**S. 537**—Sanction under S. 197 for prosecution wrongly given—Magistrate otherwise competent to try case specially appointed—Proceedings, if vitiated. *See* 1940 Dig., Col. 530. PEAREY LAL *v.* EMPEROR.

13 R. Pesh. 28 = 42 Cr.L.J. 68.

——**S. 537**—Scope—Offence under S. 220, I. P. Code, by Magistrate—Illegality—If curable. *See* CR. P. CODE, SS. 530, 531 AND 537.

A.I.R. 1941 Sind 36.

——**S. 539-A**—*Applicability—Accused person.*

S. 539-A, Cr. P. Code, applies to an accused. It applies to any person who chooses to make allegations against a public servant and in support of those allegations swears an affidavit. If an accused person chooses to come within the scope of this section and swears an affidavit on false facts he would be liable to punishment which can be inflicted upon ordinary persons who swears such false affidavits. (*Baipai, J.*) MAHTAB SINGH *v.* EMPEROR. **196 I.C. 480 = 42 Cr.L.J. 883 = 1941 A.Cr.C. 192 = 1941 A.L.W. 802 = 1941 A.W.R. (H.C.) 247 = 1941 O.A. (Supp.) 600 = 1941 A.L.J. 374 = A.I.R. 1941 All. 337.**

——**S. 540**—*Discretion and powers of Court under.*

The wording of S. 540, Cr P. Code, is extremely wide, and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential for the just decision of the case, he is bound to do so. S. 540 is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. (*Horwill, J.*) NARAYANAN NAMBIAR, *In re.* **1941 M.W.N. 1032 = 54 L.W. 556 = (1941) 2 M.L.J. 787.**

——**S. 540**—Discretion of Court—Right of prosecution to summon fresh witnesses in Sessions Court for first time—Witnesses sought being accomplices—Duty of Court. *See* 1940 Dig., Col. 531. NARAYANA REDDI, *In re.* **193 I.C. 342 = 13 R.M. 673 = 42 Cr.L.J. 404 = A.I.R. 1941 Mad. 324.**

——**Ss. 540 and 342 (1)**—Examination of Court witness at the end of the case—Accused, if should be once again examined under S. 342 (1). *See* 1940 Dig., Col. 531. BENI MADHO *v.* EMPEROR.

16 Luck. 353 = A.I.R. 1941 Oudh 20.

CR. P. CODE (1898), S. 548.

——**S. 540**—*Powers of Court under.*

The powers of Court is neither circumscribed nor fettered in any way to arrive at the truth in a criminal trial. S. 540, Cr. P. Code, gives ample powers to the Court to examine any person as a witness, whose evidence appears to it essential to the just decision of the case. A witness though he had turned hostile in the committing Court, must be made to be present in the Sessions Court, so that he can be examined under S. 540, if the prosecution fail to examine him. There is no reason why such a witness should not be tendered for cross-examination. (*Thomas, C.J. and Ghulam Hasan, J.*) SARFARAZ ALI *v.* EMPEROR. **196 I.C. 319 = 14 R.O. 157 = 1941 A.Cr.C. 214 = 42 Cr.L.J. 845 = 1941 O.L.R. 670 = 1941 A.W.R. (C.C.) 303 = 1941 O.A. 782 = 1941 O.W.N. 1034 = A.I.R. 1941 Oudh 599.**

——**S. 540**—Scope and applicability. *See* 1940 Dig., Col. 531. HANSRAJ *v.* EMPEROR.

191 I.C. 636 = 13 R.N. 212 = 42 Cr.L.J. 208.

——**S. 544**—*Power of Court under—Payment of expenses of persons summoned to produce documents.*

Courts are empowered to order that the reasonable expenses incurred by persons summoned to produce documents, should be reimbursed to them. (*Davies.*) RAJA KALYAN SINGH *v.* ALI MAHOMED.

1941 A.M.L.J. 16.

——**Ss 548 and 554**—*Discretion of Court to allow inspection of record—Proper exercise of—Right of parties to inspect record to decide whether certified copy is necessary—Bombay High Court Criminal Circular No. 160 A.*

There is a common law right of inspection of public documents by a person interested in the document so far as may be necessary for the protection of such interest. There is no doubt that except as controlled by any rule made by the High Court under S. 554, Cr. P. Code, a Magistrate or a Judge of a subordinate Criminal Court has a discretion to allow inspection of the record of his Court, but such discretion has to be exercised judicially. In exercising his discretion a Magistrate or Judge would be bound to have regard to the terms of S. 548, Cr. P. Code, which gives a right to a party to have copies of certain specified parts of the record and it would be difficult, and generally improper for him to refuse inspection of any document of which a party is entitled to a certified copy under that section. The right to a certified copy pre-supposes a right of inspection. To require a party to take certified copies of all documents on the record in order to determine of which documents he really requires copies would involve unnecessary expense and trouble. Therefore, *prima facie*, under S. 548, a party would have an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the section. Bombay High Court Circular No. 160-A (1934), is not exclusive and does not deprive the Court of the right which it previously enjoyed, and exercised in practice of granting inspection of the whole record to a party properly entitled thereto. Where a Magistrate discharges the accused, the complainant is clearly entitled under S. 548, Cr.P. Code, as a person affected by the order of discharge, to require certified copies of the orders, depositions and other parts of the record. It is altogether unreasonable to insist that he must take certified copies in order to determine whether he really wants such copies. The more rational and proper course is to allow him to inspect the documents in order to make up his mind whether he wants to have certified copies or not. (*Beaumont, C.J. and Sen, J.*) PARASURAM DETARAM *v.* HUGH GOLDING COCKE. **43 Bom.L.R. 961.**

CR. P. CODE (1898), S. 552.

——**S. 552**—*Jurisdiction—Order for production of girl not below 16 years of age—If can be passed.*

An order for production of a female child under S. 552, Cr. P. Code, can only be passed if the girl is under 16 years of age. (*Horwill, J.*) PARAMBATH KANARAN *v.* VASUDEVAN. **195 I C. 177 = 14 R.M. 146 = 42 Cr.L J 688 = (1941) M.W.N. 448 = A.I.R 1941 Mad. 625 = (1941) 1 M.L.J. 828.**

——**S. 552**—*Order under—Grounds for—Allegation of marriage in complaint—Sufficiency.*

Where a complainant alleges that a girl was legally married to him and that she was taken away by her parents to their house against the girl's wishes with the intention of getting her married to some one else, the magistrate should not make an order for production of the girl against the parents unless he has something more substantial before him about the alleged marriage than the complainant's statement. (*Horwill, J.*) PARAMBATH KANARAN *v* VASUDEVAN.

195 I.C. 177 = 14 R.M. 146 = 42 Cr L.J. 688 = (1941) M.W.N. 448 = A.I.R. 1941 Mad. 625 = (1941) 1 M.L.J. 828.

——**S. 554**—Scope—Inspection of record—Right of parties—Discretion of Court—Principles guiding exercise of. *See* CR. P. CODE, SS. 548 AND 554.

43 Bom.L.R. 961.

——**S. 561-A**—Inherent powers — Expunging of remarks against witness from judgment of trial Court—Powers of High Court on application by witness when judgment not under appeal or revision. *See* GOVERNMENT OF INDIA ACT, S. 224.

7 B.R 736 = 194 I.C. 248.

——**S. 561-A (as amended in 1923)**—Inherent powers—Revision against order under S. 145—High Court's powers to bring on record legal representatives. *See* CR. P. CODE, S. 435. **(1941) 2 M.L J. 1047.**

——**Ss. 561 A and 537**—*Power to expunge remarks from judgments—Scope and exercise of—Exercise by one not authorised—Curability.*

The High Courts have no doubt the power under S. 561-A, Cr. P. Code, to order expunction of remarks from judgments of lower Courts, but only when the passage objected to amounts to 'an abuse of the process of Court' and never when it is relevant to the points at issue before the Court. The jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. A Sessions Judge has never possessed any such authority. If he does exercise it, it is not curable under S. 537. It is clearly an assumption of authority which is not conferred on the Sessions Judge by Cr. P. Code and therefore is an illegality, and the irrebuttable presumption arises that the accused must have been prejudiced thereby. (*Roberts, C.J. and Dunkley, J.*) A. H. GHANDHI *v.* THE KING.

1941 Rang.L.R. 566 = A.I.R. 1941 Rang. 324.

——**S. 561-A**—*Scope and applicability—Matter under Press (Emergency Powers) Act—Inherent powers, if can be invoked.*

S. 561-A, Cr. P. Code, confers no fresh or new or additional powers on the High Court. It merely states that the existing powers are not circumscribed by anything in Cr. P. Code except in so far as the sections expressly dealing with them do so. Inherent powers cannot be invoked where the legislature expressly deals with the matter. In the case of matters coming under the Press (Emergency Powers) Act the legislature has expressly dealt with certain matters and no section conferring inherent powers can be invoked in the face of that. (*Bose, J.*) DESHPANDE *v.* EMPEROR.

191 I.C. 206 = 13 R.N. 193 = 42 Cr L.J. 108 = 1941 N.L.J. 44 = A.I.R. 1941 Nag. 97.

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——**S. 562**—*Applicability and scope—Offence committed deliberately by experienced police officers—Proper sentence—Release under S. 562—Propriety of.*

S. 562, Cr P. Code, is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals who may lead them further along the path of crime and to help even men of more mature years who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others or who, being ignorant and misguided, having been led away from the path of rectitude by some superior whom they dare not disobey, and who, but for such lapses, might be expected to make good citizens. The section is not intended to be applied to experienced men of the world such as police officers, who deliberately flout the law and commit offences which they know are strongly condemned by their superior officers but which they persist in doing in order that it may not be said of them that they have not been able to detect a petty crime. Such persons are not to be released under S. 562, Cr. P. Code. (*Horwill, J.*) TITUS *v.* EMPEROR. **197 I.C. 81 = 54 L.W. 81 = 1941 M W N. 505 = A.I.R. 1941 Mad. 720.**

——**S. 562**—*Cattle-lifting by youth acting in manner of practised thief—Applicability and use of order under section—If justified.*

S. 562 must be applied with discretion, for otherwise, rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity. Where the accused convicted of cattle-lifting had acted in the manner of a practised thief the fact that he was prepared to give sureties combined with his small age and the fact that he had no previous conviction are not sufficient to justify the application of S. 562. (*Davis, C. J. and Tyabji, J.*) EMPEROR *v.* AHMED HAJI SIDIK. **194 I.C. 833 = 14 R.S. 13 = 42 Cr L.J. 630 = A.I.R. 1941 Sind 109.**

——**S. 562 (1-A)**—Power to release after admonition—If exercisable by all magistrates. *See* 1940 Dig., Col. 532. KING *v.* MAUNG THEIN AUNG.

191 I.C. 712 = 13 R R. 157 = 42 Cr.L.J. 220.

——**S. 565**—Applicability—Order under, if can be passed where accused is sentenced to whipping. *See* 1940 Dig., Col. 532. KING *v.* BA KYAW.

191 I.C. 117 = 42 Cr.L.J. 81.

CRIMINAL TRIAL—*Absconding of accused subsequent to occurrence—Absence of explanation—Effect.*

Where the accused disappear after the alleged occurrence and no plausible explanation is given for the disappearance, the failure to put forward an explanation is to be regarded as a point in favour of the prosecution. (*Bennett and Ghulam Hasan, JJ.*) PARMESHWAR DIN *v* EMPEROR. **195 I.C 630 = 1941 O.A. 689 = 1941 O.L.R. 609 = 1941 A.W.R. (C C.) 265 = 1941 A.L.W. 856 = 14 R.O. 110 = 42 Cr.L.J. 758 = 1941 A. Cr.C. 198 = 1941 O.W.N. 981 = A.I.R. 1941 Oudh 517.**

——Absence of provision on a particular matter—Procedure to be followed. *See* 1940 Dig., Col. 532. HANSRAJ *v.* EMPEROR.

191 I.C. 636 = 13 R.N. 212 = 42 Cr.L.J. 208.

——*Accomplice—Corroboration—Nature—Value.*

Corroborative evidence about particulars not already known to the Police and which are discovered in consequence of information given by the accomplice is of greater value than corroborative evidence about matters known to the police before any information is received from an accomplice, (*Zia-ul-Hasan and Bennett, JJ.*)

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SHYAM KUMAR SINGH *v.* EMPEROR.
191 I.C. 466=13 R.O. 248=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.Cr.C. 21=1941 A.W.R. (C.C.) 59=1941 A.L.W. 107=1941 O.A. 65=A.I.R. 1941 Oudh 130.

———*Accused—Silence of—Effect — Presumption, if any, arises.*

The silence of an accused may, with all the other circumstances of the case, be taken into account in a proper case; but, even then, only if it is clearly borne in mind that an accused person always has a right to remain silent if he wishes. The silence of an accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption arises *ipso facto* from the silence of an accused person. (*Braund, J.*) GHURA *v.* EMPEROR.
1941 A.W.R. (H.C.) 358=1941 A.L.W. 1070.

———*Approver—Verification proceedings—Legality—Value.*

Verification proceedings are not illegal and may afford some test of the truth of the approver's statement. They are in any case a test of the approver's memory. A verification report made by the Magistrate so far as the confessional statement of an accused is concerned, cannot be said to be inadmissible when the Magistrate himself is examined as a witness in the case. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR. **191 I.C. 466=13 R O. 248=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.Cr.C. 21=1941 A W.R. (C C.) 59=1941 A.L W. 107=1941 O.A. 65=A.I R. 1941 Oudh 130.**

———*Arguments—Magistrate fixing brief period for defence arguments—Arguments thereupon not advanced by defence—Legality of trial—Hearing of arguments in appellate Court—If rectifies error.*

Where the trial Magistrate arbitrarily fixed a brief period for the defence to complete its arguments and refused to extend that period and the defence thereupon did not advance any argument, there was no proper trial of the case in the Magistrate's Court, and consequently the conviction of the accused cannot be justified. The fact that arguments were heard in the Court of Appeal is not sufficient to rectify this error. (*Lodge and Pal, JJ.*) KALIPADA KUMAR *v.* EMPEROR.
45 C.W.N. 1045.

———Benefit of doubt—Facts casting suspicion on accused and evidence not conclusive – If justifies conviction. *See* 1940 Dig., Col. 533. RAMI REDDI, *In re.*
195 I.C. 53=14 R.M. 116=42 Cr.L J. 654=A.I.R. 1941 Mad. 238.

———*Benefit of doubt—Right of accused—Mere suspicion against evidence—Effect.*

Where there is only room for suspicion against the accused but there is not reliable evidence, the accused is entitled to the benefit of the doubt. (*Burn and Mockett, JJ.*) NAGAMMA, *In re.* **A.I.R. 1941 Mad. 870.**

———Burden of proof—Duty of prosecution to prove guilt of accused beyond reasonable doubt. *See* 1940 Dig., Col. 534. REGHUNATH GOPE *v.* EMPEROR.
191 I.C. 702=13 R.P. 388=7 B.R. 241=1941 P.W.N. 433=42 Cr.L.J. 215=A.I.R. 1941 Pat. 175.

———*Burden of proof—Guilt of accused.*

Per *Allsop, J.*—There is no justification for saying that in India the burden of proving the guilt of an accused person is upon the prosecution. The true proposition is that the burden of proving the facts which would justify the conviction of the accused in the absence of any other facts entitling the accused to the benefit of any exception or proviso is upon the prosecution and the burden of proving the existence of any facts or circumstances which would entitle the accused to claim the benefit of any such exception or proviso is upon the accused. (*Iqbal Ahmad, C.J., Collister, Allsop, Bajpai, Ismail, Braund and Mulla, JJ.*) PARBHOO *v.* EMPEROR.
1941 A.W.R. (H C.) 320=1941 A.L.W. 1037=1941 A. Cr C. 267=1941 O.A. (Supp.) 885 (1)=1941 A.L.J. 619=A I.R. 1941 All. 402 (F.B.).

———*Burden of proof—Right of private defence—Onus.*

If a person accused of murder pleads right of private defence the burden of proving any such defence rests, of course, on him. (*Davis, C. J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR. **195 I C. 833=14 R.S. 47=42 Cr.L.J. 786=A.I.R. 1941 Sind 117.**

——— *Charge—Practice—Charge under Ss. 34 and 149, I. P. Code—Omission to charge each accused with particular acts committed by him—If fatal.*

In cases of rioting and murder under S. 149 and S. 34, I. P. Code, it is usual to charge the accused individually also for the acts alleged to have been committed by them. This would draw the attention of the accused in particular to the acts which they are said to have committed. When this is not done, the accused may have cause for arguing that when the main charge of rioting and acting in concert in pursuance of a common intention has failed, they should not be convicted for the particular acts committed by them. But when the omission to do so has caused no miscarriage of justice, and the accused have known exactly what acts they are alleged to have done, the conviction cannot be set aside. (*Horwill, J.*) VENKATA REDDI *v.* EMPEROR.
196 I.C. 28=14 R.M. 242=42 Cr L.J. 798=53 L.W. 556=1941 M W N. 374=A I.R 1941 Mad. 598.

———*Charges—Consolidation—Legality—Complaints of offence committed on fifteen occasions—Evidence recorded and judgment given in one only—Consequential orders in the rest—Legality of—Consent of accused—If cures illegality.*

In the case of a series of complaints of an offence alleged to have been committed on fifteen occasions, it is not permissible for the trying Magistrate to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in the other cases. Criminal cases cannot, like civil suits, be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Cr. P. Code. It would be permissible for the Magistrate to try the charges in groups of three. The procedure of hearing the evidence in one case only is illegal, and the illegality is not cured by the fact that the accused or his pleader consents to the procedure. The conviction in all the cases in which no evidence is recorded is illegal and must be set aside. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* CHAMPAKLAL CHUNILAL. **194 I.C. 345=13 R.B. 370=42 Cr.L.J. 571=43 Bom.L.R. 110=A.I.R. 1941 Bom. 156.**

———Complaint or police report—Construction—Sections mentioned in—If conclusive—Duty of Magistrate to ascertain offence from facts. *See* CR. P. CODE, S. 345. **I.L.R. (1941) Kar. 352.**

———Confession — Admissibility—Consideration for Court—Free and voluntary nature of confession—Prosecution, if bound to prove—All parts of confession, if to be given equal weight. *See* 1940 Dig., Col. 535. EMPEROR *v.* BHAGWANDAS BISESAR.
I.L.R. (1941) Bom. 27=13 R.B. 277=192 I.C. 671=A.I.R 1941 Bom. 50.

———Confession—Retracted confession — Admissibility and use of against confessor and co-accused—

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Rule as to—Corroboration—Necessity. *See* 1940 Dig., Col. 535. EMPEROR *v.* BHAGWANDAS BISESAR.
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——Confession—Statements made under S. 164, Cr. P. Code, not being full confessions—Self-exculpatory statements—If inadmissible in evidence—Admissibility and use of as admissions against interest. *See* EVIDENCE ACT, SS. 18 TO 21. **I.L.R. (1941) Kar. 257.**

——*Confession— Value—Only one arrested out of seventeen implicated by confession—Persons mentioned in first information report, not included—Inference.*

It is a very fair inference to draw that, where a confessing accused has named 17 or 18 people of whom it was worthwhile for the police to arrest only one, there is something very wrong with the confession. It is absolutely worthless as against any one but the person who confessed. At the same time, it should be said that the absence from the confession of the names of persons who had been denounced in the first information report, is strong evidence that the confession was at any rate not secured by pressure from the police. (*Braund, J.*) GHURA *v.* EMPEROR. **1941 A.W.R. (H.C.) 358 = 1941 A L.W. 1070.**

———*Confession—Voluntary character of—Burden of proof—Presumption of voluntary nature—When arises.*

When the procedure laid down by S. 164, Cr. P. Code, has been strictly followed in the recording of a confession, and the Magistrate in accordance with S. 164 has to the best of his ability satisfied himself that the statement made to him is voluntarily made without any influence of fear or hope, that is strong evidence to support a finding that the confession is voluntary.

Quaere: Whether the burden lies on the prosecution to prove that a confession is voluntary, or on the accused to prove the contrary. (*Rowland and Shearer, JJ.*) SUKER DUSADH *v.* EMPEROR **20 Pat. 547 = 192 I C. 888 = 13 R.P. 563 = 7 B R. 495 = 42 Cr.L.J. 343 = 22 Pat.L T. 297 = 1941 P W.N. 69 = A I.R. 1941 Pat. 303.**

——*Confession —Voluntary character —Statement obtained as a result of persistent questioning by police—Value of—Propriety of persistent questioning of accused.*

It is highly improper for the police to persistently question an accused person in custody or to press him to make statements. Such procedure is to be condemned. Persistent questioning may negative the impression that a statement is voluntary, and it would be extremely dangerous to attach any importance to a statement made in those circumstances. (*Burn and Mockett, JJ.*) PUBLIC PROSECUTOR *v.* MUNIGAM.
I.L.R. (1941) Mad. 503 = 195 I C 76 = 14 R.M. 126 = 1940 M.W N. 1272 = 42 Cr L.J. 664 = 52 L.W. 942 = A.I.R. 1941 Mad. 359 = (1941) 1 M.L.J. 227.

——*Confession—Whole of it when should be accepted and when need not be.*

If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case where part of it is proved to be false by other evidence. The Court is not forced to disregard a confession altogether because it is not correct in every particular. (*Ismail and Hamilton, JJ.*) EMPEROR *v.* NANUA. **I.L.R. (1941) All 280 = 193 I.C 873 = 13 R A. 463 = 42 Cr L.J 485 = 1941 O A. (Supp.) 229 = 1941 O.W N 337 = 1941 A.Cr.C. 91 = 1941 A.L W. 241 = 1941 A L J. 86 = 1941 A W.R. (H C) 65 = A.I.R. 1941 All. 145.**

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———*Conviction—Basis of—Accused pleading not guilty—Conviction on strength of his own statement—Legality—Duty of prosecution to prove case.*

An accused who pleads not guilty ought not to be convicted on the strength of his own statement. The prosecution must prove their case. (*Beaumont, C. J. and Macklin, J.*) EMPEROR *v.* MAVJI NANJI.
196 I.C 526 = 14 R B. 131 = 42 Cr.L.J. 893 = 43 Bom L.R. 629 = A.I.R. 1941 Bom. 325.

——*Conviction—Basis of—Circumstantial evidence—One man killed and several others injured in fight—Inference of deliberate fight between parties—Permissibility.*

A conviction must be based upon evidence. If there is no evidence, it is not proper even to put an accused person on his defence. If there is no reliable oral evidence in the case, it is only possible to convict if there is circumstantial evidence pointing clearly to the guilt of any individual. The fact that a man has been found dead and that several others have been found injured, cannot give rise only to the inference that there was a deliberate fight between the parties. One side or the other might well be the aggressor; and one side or the other might well have a right of self defence. (*Young, C.J. and Skemp, J.*) GULAB *v.* EMPEROR.
196 I.C. 390 = 14 R.L. 155 = 42 Cr.L J. 861 = 43 P.L.R. 144 = A.I.R. 1941 Lah 333.

———*Conviction—Basis of—Evidence of witness expunged from record as that of incompetent witness—Conviction based on—Sustainability.*

Where the trial Court once decides, rightly or wrongly, that a particular witness was not a competent witness, and on that ground expunges from the record all that the witness had said and stops the pleader for the defence from cross-examining the witness, it is not open to the trial Court or to the appellate Court to rely on the evi lence of such witness and to base a conviction on such evidence. A conviction based on such evidence is unsustainable. (*Varma and Shearer, JJ.*) RAMPADARATH SINGH *v.* EMPEROR. **20 Pat. 339 = 196 I C. 478 = 14 R.P 201 = 1941 P.W.N. 413 = 8 B.R. 30 = 42 Cr.L J. 878 = A.I R 1941 Pat. 513,**

——*Conviction—Basis of—Isolated evidence of unreliable witness.*

In the absence of satisfactory corroboration by independent evidence, no conviction should be based on the evidence of a witness who has been found to be unscrupulous and unreliable and the major portion of whose statement has been found to be false. (*Abdul Qayoom, C.J.*) FAZLU *v.* STATE. **43 P.L.R. J. & K. 30.**

——*Conviction—Basis of—Retracted confession—Sufficiency—Corroboration—Necessity.*

A voluntary and genuine confession is legal and sufficient proof of guilt; there is no rule of law that an accused person cannot be convicted on a confession made and subsequently retracted without independent corroborative evidence. (*Rowland and Shearer, JJ.*) SUKER DUSADH *v.* EMPEROR **20 Pat. 547 = 192 I.C 888 = 13 R.P. 563 = 7 B.R. 495 = 42 Cr.L.J. 343 = 22 Pat.L.T. 297 = 1941 P.W.N. 69 = A.I.R. 1941 Pat. 303.**

——*Conviction—Basis of—Suspicion—Sufficiency—Accused proved to be in company of deceased shortly before murder—Accused offering explanation consistent with innocence—Benefit of doubt.*

Though a statement made by the accused and the evidence in the case may arouse suspicion against him, they cannot be made the basis of a conviction for murder when they do not raise an irresistible presumption of guilt. Where the accused's own statement and the evidence in the case are to the effect that the accused

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was in the company of the deceased shortly before the murder, but the accused offers an explanation which may be true and which makes it far from true that he is guilty of murder, there is necessarily an element of doubt to which the accused is always entitled and he must therefore be acquitted of murder. (*Burn and Mockett, JJ.*) PUBLIC PROSECUTOR *v.* MUNIGAM.

I.L.R. (1941) Mad. 503=195 I.C. 76= 14 R.M. 126=1940 M W N. 1272=42 Cr.L.J. 664= 52 L.W. 942=A.I.R. 1941 Mad. 359= (1941) 1 M.L.J. 227.

——Counter and connected case—Use of evidence in one, in the other—Legality—If curable under S. 537, Cr P. Code. *See* 1940 Dig., Col. 536. BENI MADHO *v.* EMPEROR. **16 Luck. 353=A.I.R. 1941 Oudh 20.**

——Cross cases—Hearing by same assessors and decision by same judgment—Legality. *See* 1940 Dig., Col. 536. KHAIR MAHOMED *v.* EMPEROR.

I.L.R. (1941) Lah 66= 191 I.C. 332=13 R.L. 316=42 Cr.L.J. 151.

——*Duty of Court—Contradictory statements in Sessions Court by prosecution witness.*

Where a prosecution witness makes a statement in the Sessions Court contradictory to the one made in the committal Court and the pleader for the accused fails in his duty by not cross-examining the witness in regard to the previous contradictory statements which he had made in the committal Court, it becomes the bounden duty of the Sessions Judge to examine such witness further in regard to his previous statements and to bring those statements on to the record of the Sessions trial. (*Roberts, C.J. and Dunkley, J.*) NGA THEIN *v.* THE KING. **195 I.C. 71=14 R.R. 20= 42 Cr.L.J. 661=A.I.R. 1941 Rang. 175.**

——*Duty of Courts—Defence of prisoners at Crown's expense—Selection of lawyers.*

Those whose duty it is to select lawyers to defend at the expense of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among young men of marked ability. It frequently happens that the persons actually appointed do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored. In such circumstances the trial Judge should remember that he has the duty not only to the prosecution but to the defence. He has the police diary in front of him and should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent. He should not do this unnecessarily but only when it is desirable in the interest of justice. A. I.R. 1938 Pat. 153, Ref. to. (*Manohar Lall and Meredith, JJ.*) DIKSON MALI *v.* EMPEROR.

196 I.C. 597=8 B R. 49.

——*Duty of Court—Liberty of individual—Duty to protect—Accused not claiming protection.*

The Courts are bound to protect the liberty of the individual, and even where the accused person does not claim their protection and shows himself ready to be sent to jail, whether from political or economical motives, it is nevertheless the duty of the Courts to sift the evidence for the prosecution and to consider the case. 55 All. 857, relied on. (*Skemp, J.*) MIAN IFTIKAR-UD-DIN *v.* EMPEROR. **196 I.C. 485= 14 R.L. 157=42 Cr.L.J. 890=43 P.L.R. 378= A.I.R. 1941 Lah. 824.**

——*Duty of Magistrate—Duty to prepare record in legible handwriting.*

It is the duty of Magistrates to prepare the record in a clear and legible handwriting. (*Abdul Qayoom, C.J.*)

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43 P.L.R. J. & K. 72.

——*Duty of prosecution—Murder charge—Plea of private defence.*

The prosecution in every case must show that a murder has been committed and when the accused sets up, at the earliest possible moment, the defence that he was acting in accordance with the right of private defence, such defence must be examined and it must be shown by the prosecution before he can be convicted that there are no reasonable grounds on which such a defence could be believed to be true. (*Roberts, C.J. and Dunkley, J.*) NGA THEIN *v.* THE KING. **195 I C. 71= 14 R.R. 20=42 Cr.L.J. 661=A.I R. 1941 Rang. 175.**

——*Duty of prosecution—Murder trial—Order in which witnesses should be examined.*

In the case of a murder trial, the Public Prosecutor should as far as possible, examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witness, such as the medical witness, ought not to be examined at an early stage of the trial, when it is impossible to realize on what points their opinion is necessary. (*Roberts, C. J. and Dunkley, J.*) SHWE PRU *v.* THE KING. **1941 Rang.L R. 346= A.I.R 1941 Rang 209.**

——*Duty of prosecution—Particulars of acts done and law infringed—Necessity.*

When a person is charged with a criminal offence he must be told with particularity not only the act he is alleged to have committed which is said to constitute it but also what is the law which he is said to have infringed. (*Roberts, C.J.*) S. K. ROY *v.* THE KING.

1941 Rang.L R. 26=192 I.C. 770=13 R.R. 235= 42 Cr.L.J. 335=A.I R. 1941 Rang. 1.

——*Duty of prosecution—Production of all available evidence—Hostile witness.*

All the witnesses essential to the unfolding of the narrative on which the prosecution is based, must be called by the prosecution, whether in the result the effect of their testimony is for or against the prosecution. The fact that a witness turned hostile in the committing Court is no reason for withholding his evidence from the Sessions Court. All the witnesses in the list submitted by the committing Magistrate should be examined in the Sessions Court. (*Thomas, C.J. and Ghulam Hasan, J.*) SARFARAZ ALI *v.* EMPEROR. **196 I.C 319= 14 R.O. 157=1941 A Cr.C. 214=1941 O.L.R. 670= 1941 A.W.R. (C C) 303=42 Cr.L.J. 845= 1941 O.A. 782=1941 O.W.N. 1034= A.I.R. 1941 Oudh 599.**

——*Duty of prosecution—Production of eye-witnesses.*

The mere possibility or even probability of the story of the eye witnesses being untrue in some respects is not sufficient justification for withholding them. The prosecution is not acting right in withholding their evidence and producing other witnesses, neither named in the first information report, nor produced before the investigating officer at the earliest opportunity. (*Bennett and Madeley, JJ.*) EMPEROR *v.* GAYA DIN.

196 I.C. 244=14 R.O. 147=42 Cr.L.J. 828= 1941 A.W.R. (C.C.) 284=1941 A.Cr.C 210= 1941 O.L.R. 657=1941 O.A. 732= 1941 O.W.N. 1017.

——*Duty of prosecution—Statement made by accused in his favour.*

Since it is the duty of the prosecution to bring out any evidence which may assist in arriving at a true decision, a statement made by the accused almost immediately after the occurrence which may to some extent tell in his favour should be brought by them on the record as a relevant fact. (*Young, C.J. and Beckett, J.*) HASIL *v.* EMPEROR. **43 P.L.R. 672.**

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———Evidence—Admissibility—Behaviour of police dog. *See* 1940 Dig., Col. 538. SAID ALI *v.* EMPEROR. **192 I.C. 246=13 R. Pesh. 42=42 Cr L.J. 259.**

———*Evidence—Appreciation of—Unsatisfactory witnesses—If can corroborate each other.*

If the evidence of one witness is unsatisfactory it cannot be said that that unsatisfactory evidence becomes believable because another unsatisfactory witness says the same thing. Two bad witnesses do not make one good witness and if the statements of both are unsatisfactory it cannot be said that one is corroborated by the other. Corroboration in a way it might be, but it is unsafe to place reliance on statements of this nature. (*Rachhpal Singh, C.J. and Janki Nath Wazir, J.*) KALA *v.* STATE. **43 P.L.R. J. & K. 37.**

———Evidence = Charge against three persons—Acquittal of two on ground of evidence being insufficient—If ground for acquittal of third also when sufficient evidence exists against him. *See* 1940 Dig., Col. 539. RAMI REDDI, *In re.* **195 I.C. 53=14 R.M. 116=42 Cr.L.J. 654=A I.R. 1941 Mad. 238**

———Evidence—Charge of murder—Evidence proving that accused inflicted fatal wounds—Injuries on accused unexplained—If ground for rejecting evidence—Sentence—Injuries found on accused—If ground of mitigation of sentence. *See* 1940 Dig., Col. 539. SUBBIGADU, *In re.* **192 I.C. 525=13 R.M. 583=42 Cr.L J. 305=A.I.R. 1941 Mad. 280=(1940) 2 M.L.J. 1018.**

———*Evidence — Chemical evidence — Value of — Aconitine poisoning—Chemical Examiner's report—Contents.*

In cases where the accused are charged with "aconitine" poisoning and the "aconitine" is found in the matter vomited by the deceased just before his death, it is necessary that the Chemical Examiner's report should be clear about the category of aconitine because there are many varieties of aconitine, some of which are poisonous and some non-poisonous and known as "pseudo aconitine," the two types varying in chemical composition but having toxicological resemblances and producing similar pharmacological results. It is also necessary to take into consideration the point of time of the appearance of the symptoms of poisoning in relation to time of the alleged poisoning because according to medical jurisprudence and toxicology in cases of aconite poisoning symptoms appear in three to five minutes. (*Burn and Mockett, JJ.*) NAGAMMA, *In re.* **A.I R. 1941 Mad. 870.**

———*Evidence—Circumstantial evidence —Proof by—Essentials.*

From proof by circumstantial evidence four things are essential: They are (1) that the circumstances from which the conclusion is drawn should be fully established, (2) that all the facts should be consistent with the hypothesis, (3) that the circumstances should be of a conclusive nature and tendency, (4) that the circumstances should, to moral certainty, actually exclude every hypothesis but the one proposed to be proved. (*Straight and Duthoit, JJ.*) QUEEN EMPRESS *v.* HOSH NAK. **1941 A.L.J. 416.**

———*Evidence—Circumstantial evidence—Sufficiency for conviction—Rule—Murder and robbery—Accused producing property stolen on the occasion but offering no explanation—Accused belonging to same village as deceased and known to deceased—Inference—Duty of Court to find out rational explanation—Intention to commit robbery and murder—Inference.*

The law in relation to circumstantial evidence is that such evidence must be consistent, and consistent only with the guilt of the accused, and that if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. No doubt one of the circumstances which has to be taken into account is the fact that the accused has offered no explanation, or has offered a particular explanation; but it must be borne in mind that an accused in this country cannot go into the box and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. The fact that an accused is not willing to admit that he took part in a robbery which is proved against him ought not to prejudice the question whether he committed murder at the same time. It cannot be laid down that it is not the duty of the Court to invent possible explanations. It is clearly the duty of counsel defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence. In many cases the accused is not able to employ counsel, and in other cases counsel are asked to defend by the Court, and such counsel may be inexperienced, and in such cases the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because not offered by the accused. Three persons were charged with murder and robbery. It was proved that the three accused produced property which had been stolen on the occasion of the robbery and murder. They did not offer any explanation of the possession of the property, but merely said that they did not produce it. The murder was committed with a crowbar which was found at the scene of the murder after the crime. It was stained with human blood. All the accused came from the same village as the deceased who knew all of them.

Held, that on the evidence the only rational explanation which fitted in with the whole evidence was that the accused committed the robbery and that pursuant to their common intention to rob the deceased and avoid detection they had the further intention of murdering the deceased and that they carried that intention out. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* BASANGOUDA YAMANAPPA. **I.L.R. (1941) Bom. 315=195 I.C. 208=14 R.B. 25=42 Cr.L J. 697=43 Bom L.R. 144=A I.R. 1941 Bom. 139.**

———*Evidence—Credibility of witness—Rules as to.*

The fact that a witness has been disbelieved on one point is no reason for discarding his evidence altogether. The fact that certain witnesses have not been believed against some of the accused is no reason for not believing them against others. (*Agarwal, J.*) QAMRUL HASAN *v.* EMPEROR. **1941 O.A. 843=1941 O.W.N. 1166=1941 A.W.R. (C.C.) 322=1941 A.Cr.C. 247.**

——— *Evidence—Credibility of witnesses—Speaking to dying declaration doubtful if made at all—Their whole evidence, if to be discarded.*

Where the story of a dying declaration has not been positively shown to be quite false and though its making may be doubtful, the fact that some of the witnesses refer to the making of it, is no ground to discard their evidence altogether. The dying declaration may be discarded and other evidence acted upon. (*Agarwal and Madeley, JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 A.W.R. (C.C.) 354=1941 O.A. 943=1941 O.W.N. 1246.**

———*Evidence—Eye-witness—Not giving information to police—Value of such evidence.*

Though it cannot be said that the evidence of a person who says he had seen a murder committed but did not

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give any information thereof is little better than that of an accomplice yet his evidence cannot be free from suspicion. (*Yorke and Bennett, JJ.*) BIRJA *v.* EMPEROR.
195 I.C. 493 = 14 R.O. 94 = 194 A.Cr.C. 187 = 1941 O.L.R. 595 = 1941 A.W.R (C C) 279 = 42 Cr.L.J. 749 = 1941 O.W.N. 953 = 1941 O.A. 668 = A.I.R. 1941 Oudh 563

——*Evidence—Inconsistent statements of witness—How to be dealt with.*

Where there are two statements of a witness mutually irreconcilable there is nothing to prevent the Court applying its mind to discover which of them is true. (*Agarwal and Madeley, JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 A.W.R. (C.C.) 354 = 1941 O.A. 943 = 1941 O.W.N. 1246.**

——*Evidence—Information which led investigating officer to take action—Admissibility.*

There is no reason why an investigating police officer should not indicate the source of information upon which he takes action, and it is sometimes of assistance to the Court to know what the source is. It is a mistake to think that such evidence is inadmissible. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR. **191 I.C 466 = 13 R.O. 248 = 1941 O.A. 65 = 1941 O.W.N. 133 = 42 Cr.L.J. 165 = 1941 A.Cr.C. 21 = 1941 A.W.R. (C.C.) 59 = 1941 A.L.W. 107 = A.I.R. 1941 Oudh 130.**

——Evidence—Necessity for full and conclusive evidence—Evidence casting suspicions on accused—Sufficiency of—Charge against woman of causing death of her new born child by drowning it in cesspool—Facts to be proved. *See* 1940 Dig., Col. 540. EMPEROR *v.* KUPPAMMAL. **195 I.C. 129 = 14 R.M. 133 = 42 Cr.L.J. 677 = A.I.R. 1941 Mad. 1.**

——*Evidence of prosecution—Consideration—Proper procedure.*

Where instead of examining the prosecution evidence on its intrinsic worth a Judge tests its trustworthiness in the light of the defence evidence, the procedure adopted is not justified. (*Thomas, C.J. and Ghulam Hasan, J.*) EMPEROR *v.* GAYA PRASAD.
195 I.C. 557 = 14 R.O. 26 = 1941 O.W.N. 852 = 1941 A.Cr.C. 153 = 1941 A.L.W. 752 = 42 Cr.L.J. 595 = 1941 A.W.R. (C.C.) 211 = 1941 O.A. 545 = A.I.R. 194 Oudh 487.

——*Evidence—Panchnama—Admissibility and use of—Putting in of panchnama by police witness without calling panch—Propriety.*

If the police rely on a panchnama in a criminal case, they must call a panch to prove it. The panchnama is merely a record of what a panch sees, and the only use to which it can properly be put is that when the panch goes into the witness-box and swears as to what he saw, the panchnama can be used as a contemporary record to refresh his memory. But a police officer is not entitled to give evidence of what the panch told him, that he saw, and that is what it comes to if a police-officer is allowed to put in a panchnama. A police witness may state that he held a panchnama and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence in chief. If the police hold a panchnama, and do not offer to call the panch, an inference may be drawn against them from the fact that the panch is not submitted for cross-examination. The putting in of a panchnama without calling the panch is not only an infringement of the rules of evidence, but it is unfair to the accused, and should not be permitted. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* MOHANLAL BABABHAI. **194 I.C. 326 = 13 R.B. 365 = 42 Cr.L.J. 556 = 43 Bom.L.R. 163 = A.I.R. 1941 Bom. 149.**

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——*Evidence—Police evidence not based on personal knowledge—Admissibility—Evidence that person was in the list of suspects—Admissibility and value of—Suspicion—Sufficiency of.*

The evidence of a police-officer who deposes not on his own personal knowledge but as a result of some enquiries which he has made in the course of his official duties is wholly inadmissible in evidence in a criminal proceeding. Evidence that an accused was on the active picketing list of the *thana* and that the said list is maintained for criminals who are suspected to be most active is also wholly inadmissible. A Court has to decide matters judicially and not upon suspicions which have led the police authorities, however correctly, to place a person upon the list of suspects. (*Manohar Lall, J.*) LAKHMAN KURMI *v.* EMPEROR. **194 I.C. 295 = 13 R.P. 700 = 7 B.R. 747 = 22 Pat.L.T. 545 = 1941 P.W.N. 443 = 42 Cr.L.J. 554 = A.I.R. 1941 Pat. 478.**

——Evidence—Rioting with common object of cutting crops and theft of crops—Charge—Conviction—Sustainability—Plea of right to land and crops—Duty of prosecution—Specific acts to be proved against individual accused. *See* PENAL CODE, SS. 147 AND 379. **22 Pat.L.T. 765.**

——*Evidence—Statements by persons not called as witness—Admissibility.*

A Court is not bound to accept statements by persons who were not called as witnesses merely because the case is a criminal one and certain facts were admitted. (*Davis, C.J.*) SANOO MANAJI *v.* EMPEROR. **I.L.R. (1941) Kar. 316 = 193 I.C. 616 = 13 R.S. 234 = 42 Cr.L.J. 454 = A.I.R. 1941 Sind 33.**

——Evidence—Statements by witness at identification parade—Mediators' reports containing record of proceedings at parade—Admissibility. *See* CR. P. CODE, S. 162. **1941 M.W.N. 521.**

——*Evidence—Two witnesses giving same evidence—One disbelieved—Believing other and basing conviction on his evidence—Legality.*

Where two witnesses for the prosecution tell practically the same story, it is absurd to disbelieve one of them and believe the other and base a conviction on his evidence. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* SADEPPA GIREPPA. **43 Bom.L.R. 946.**

——*Evidence—Value—Accessory after the fact.*

The evidence of an accessory after the fact cannot be put on a higher level than that of an approver. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR. **191 I.C. 466 = 13 R.O. 248 = 1941 O.A. 65 = 1941 O.W.N. 133 = 42 Cr.L.J. 165 = 1941 A.Cr.C. 21 = 1941 A.W.R. (C.C.) 59 = 1941 A.L.W. 107 = A.I.R. 1941 Oudh 130.**

——Evidence—Value of—Evidence of witness tainted with falsehood. *See* 1940 Dig., Col. 541. NANDIA *v.* EMPEROR. **I.L.R. (1941) Lah. 259 = 42 Cr.L.J. 53.**

——*Evidence—Value of — Extra-judicial confessions.*

Extra-judicial confessions are evidence of a very weak character and the duty of the Courts dealing with such evidence is to treat them with greatest possible caution. The legislature has enacted S. 164, Cr. P. Code, in the interest of protecting an accused person. He is to be taken before a Magistrate for the recording of his confession and to such a confession naturally more sanctity would be attached than to a confession made in the presence of a witness or witnesses. Extra-judicial confessions are not recorded on any piece of paper and there is no check on a lying witness to add to the actual words which an accused person might have used in mak-

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ing it. (*Rachhpal Singh, C.J. and Janki Nath Wazir, J.*) KALA *v.* STATE. **43 P.L.R.J. & K. 37**

———*Evidence—Value of—Witness of tender age.*

The evidence of witnesses of tender age has to be accepted with very great caution. Witnesses of this type are somewhat dangerous. It is so easy to make them repeat a story which the prosecution or the defence may desire them to put forward and there is no guarantee that they really understand the enormity of the offence which they are committing by making a statement which may not be true. (*Rachhpal Singh, C.J. and Janki Nath Wazir, J.*) KALA *v.* STATE.

43 P.L.R.J. & K. 37.

———*Evidence—Witness—Duty of prosecution—Witness treated as hostile in committal Court—Proper course for Public Prosecutor and Court.*

Although the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evidence hostile to the prosecution in the lower Court, it is the duty of the Court, when there is an important eye-witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal inquiry, to record the evidence of this witness, and the accused should not be forced to examine him as a defence witness. The proper course in such circumstances is for the Public Prosecutor to see that the witness is present in the Court, and for the Court, if the witness is really important, to examine him as a Court witness and allow both sides to cross-examine the witness. (*Wadsworth and Somayya, JJ.*) GURUSWAMI GOUNDER, *In re.* **197 I.C. 54=54 L.W. 136=1941 M.W.N. 766=A.I.R. 1941 Mad. 765. (1941) 2 M.L.J. 209.**

———*Evidence—Witness examined and evidence taken—Power to expunge same from record.*

A Magistrate has no power to expunge from the record the evidence of a witness for the prosecution on the ground that the complainant applies to have it expunged as being unfavourable to his case. The accused are entitled to prove through witness documents admissible in evidence. (*Lakshmana Rao, J.*) SOUNDARARAJA AYYANGAR *v.* EMPEROR.

196 I.C. 882=1941 M.W.N. 789.

———*Evidence—Witness—Right of accused—Accused applying at early stage for calling clerk of canal department—Clerk sent unable to prove handwriting on papers—Application by accused for another clerk to be sent—If too late.*

The accused in a case of theft applied to the Court at the proper time for calling, as a defence witness, a competent clerk of the canal department, naming him, and leaving it to the department to send any other competent person. The department sent a clerk who was, however, unable to prove the handwriting on the papers. The defence at once applied for another clerk to be summoned.

Held, the application cannot be said to have been made too late, and the accused had the right to have another clerk of the canal department put into the witness-box. (*Dhavle, J.*) CHANDRA MAHTON *v.* EMPEROR. **197 I.C. 63=22 Pat.L.T. 388=1941 P.W.N. 91=A.I.R. 1941 Pat. 546.**

———*Evidence—Witness—Same person if can be both a prosecution and defence witness.*

The same person cannot under any provision of the Code of Criminal Procedure be both a witness for the prosecution and for the defence. If he is called for the prosecution and the defence desires to elicit any facts from him, then those facts must be elicited by questions asked in cross-examination at the proper time. (*Roberts, C. J. and Dunkley, J.*) NGA THEIN *v.* THE KING. **195 I.C. 71=14 R.R. 20=42 Cr.L.J. 661=A.I.R. 1941 Rang. 175.**

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———*First information report—Persons named in—If alone to be proceeded against.*

Where proceedings are taken on the basis of a first information report, the action taken need not be confined to persons named in the first information or charged with taking a direct part in an occurrence. (*Dhavle, J.*) N. L. CARRICK *v.* EMPEROR. **194 I.C. 94=13 R.P. 662=42 Cr.L.J. 504=7 B.R. 681=1941 P.W.N. 328=22 Pat L.T. 348=A.I.R. 1941 Pat. 395.**

———*Intention—Relevancy—Murder charge—Inference of intention from acts.*

There is no reason why in a murder case as in other cases, a man's intention should not be inferred from his acts. (*Davis, C. J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR. **195 I.C. 833=14 R.S. 47=42 Cr.L.J. 786=A.I.R. 1941 Sind 117.**

———Investigation—Getting statements repeated before witnesses—Propriety. *See* 1940 Dig., Col. 542. BHAROSA RAMDAYAL *v.* EMPEROR.

193 I.C. 6=13 R.N. 318=42 Cr.L.J. 390=A.I.R. 1941 Nag. 86.

———*Joinder of charges—Murder case—Charge of misappropriation of articles of deceased—Propriety.*

In a case of murder, it is an unusual and undesirable procedure to charge the accused with misappropriation of the articles of the deceased. (*Burn and Mockett, JJ.*) YERRANNA, *In re.* **193 I.C. 465=13 R.M. 694=42 Cr.L.J. 424=52 L W. 898=1940 M W N. 1238=A.I.R. 1941 Mad. 306.**

———Jurisdiction—Appeal from conviction on prosecution sanctioned by Sub-Collector—Jurisdiction of Sub-Collector as Joint Magistrate to hear and decide appeal. *See* 1940 Dig., Col. 542. PONNUSWAMY PILLAI *v.* EMPEROR. **13 R.M. 525=42 Cr.L.J. 55.**

———Jurisdiction—Charge under S. 406, I. P. Code—Accused arrested illegally outside jurisdiction and brought up—Release on bail—Subsequent appearance of accused—Jurisdiction of Magistrate—If affected by illegality of arrest. *See* 1940 Dig., Col. 542. SUBRAMANIA CHETTI *v.* EMPEROR. **192 I.C. 684=13 R.M 586=1940 M.W.N. 1271=42 Cr.L.J. 320 (1)=A.I.R. 1941 Mad. 181=(1940) 2 M.L.J. 1016.**

———*Jurisdiction—Failure to object at early stage.*

A Court does not get a jurisdiction which it does not possess merely because objection to it is taken by the accused at a late stage only. (*Davis, C.J.*) MANSHARAM GIANCHAND *v.* EMPEROR. **193 I.C. 454=13 R.S. 231=42 Cr.L.J. 460=A.I.R. 1941 Sind 36.**

———*Jurisdiction—Offence under S. 220, Penal Code—Alteration of section into S. 347 and trial by Magistrate—Legality.*

Where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a first class Magistrate, however proper be his motives, should not himself remove that case from the Court of Session, and try it himself by merely altering the numbers of the sections, for after all, the numbers of the sections are mere labels, and what is to be looked at is the allegation of facts. A Magistrate cannot therefore usurp a jurisdiction to himself he did not possess by placing an offence, which rightly falls under S. 220, Penal Code, under S. 342 or S. 347, Penal Code, so as to give himself jurisdiction and trying it himself. It is however desirable from all points of view, that serious cases, involving offences such as under S. 220, Penal

Code, should, so far as the law permits, be committed to the Court of Session even if a first class Magistrate had power to try them. (*Davis, C.J.*) MANSHARAM GIANCHAND *v.* EMPEROR. **193 I.C. 454= 13 R.S. 231=42 Cr.L.J. 460=A.I.R. 1941 Sind 36.**

——*Jurisdiction—Trial by Magistrate of case triable exclusively by Court of Session—Charge under serious offence left out and trial held under minor charges—Acquittal—Legality.*

A case exclusively triable by a Court of Session cannot be brought within the jurisdiction of a Magistrate by leaving out the more serious charges and confining the trial to the minor charges only. If the Magistrate tries the case on the minor charges leaving out the more serious charge, and passes an order of acquittal, it is without jurisdiction and must be set aside, for if the more serious charge exclusively triable by the Court of Session were framed, it would not be open to pass any order of acquittal at all in the case. 22 persons were sent up by the police on a charge of rioting in the course of which grievous hurt was caused to two persons and death to a third. The Sub-Divisional Magistrate framed charges under Ss. 147 and 325 read with S. 149, I. P. Code, against all of them and also framed an additional charge under S. 435, I. P. Code, against one of them. He did not, however, frame charge under S. 302 or even under S. 304, read with S. 149, I. P. Code, on the ground that the accused who had struck the fatal blow and killed the deceased was absconding. He tried the accused and acquitted them holding that no clear case had been made out.

Held, that the absence of the accused who dealt the fatal blow causing death was no justification for his failure to frame a charge against the accused under S. 302, I. P. Code, or at least under S. 304 read with S. 149, and trying the case himself; and the order of acquittal was therefore without jurisdiction and liable to be set aside. (*Dhavle, J.*) RAMLAKHAN DHOBI *v.* RACHHEY KALWAR. **194 I.C. 660=7 B.R. 814= 14 R.P. 16=42 Cr.L.J. 622=22 Pat.L.T. 237= 1941 P.W.N. 253=A.I.R. 1941 Pat. 287.**

——*Murder trial—Open murder in the morning in crowded village—Failure of accused to produce evidence as to manner of death of deceased and as to their own innocence—If matters for consideration.*

Though it is quite true that it is not for the accused in a murder case to prove how the deceased was murdered yet where the accused are not able to produce any evidence as to how an open murder in the morning in a crowded village took place, and how they were quite innocent of it, these are matters which can be taken into consideration. (*Agarwal and Madeley, JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 O.A. 943= 1941 A.W.R. (C.C.) 354=1941 O.W.N. 1246.**

——*Plea of guilty under misapprehension—Conviction—Sustainability.*

Where an accused admits the offence charged under a misapprehension, his conviction must be set aside and a retrial has to be held. (*Lakshmana Rao, J.*) PATTABIRAMA IYER *v.* EMPEROR. **196 I.C. 553= 53 L.W. 714 (1)=1941 M.W.N. 447= A.I.R. 1941 Mad. 679.**

——*Powers of Court—Accused pleading guilty—Entry of plea of not guilty—Permissibility—South African practice.*

South African practice permits a Court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty, if it considers that he does not properly understand the effect of that plea or if he seems to have matter of exculpation that he wishes to allege. (*Sir Philip Macdonell.*) FAKISANDHLA NKAMBULE *v.*

THE KING. **191 I.C. 4=13 R.P.C. 106=7 B.R. 203= 42 Cr.L.J. 13=1941 P.W.N 11= 1941 M.W.N. 228 (P.C.).**

——*Procedure—Appeal—Disposal on date of presentation in spite of request for time—Legality.*

Where a criminal appeal is presented and the advocate for the appellant requests for time to obtain the necessary records, it should not be disposed of on the same day of presentation. (*Lakshmana Rao, J.*) PONNUSWAMI REDDIAR, *In re.* **194 I.C. 256= 13 R.M. 774=42 Cr.L.J. 551=53 L.W. 75 (1)= 1941 M.W.N. 64 (1)=A.I.R. 1941 Mad. 604.**

——Procedure—Case disclosing offences triable by Second Class Magistrate—Conversion into preliminary register case on ground of its being counter to preliminary register case—Legality. *See* 1940 Dig., Col. 543. OONNA MUDALI *v.* EMPEROR. **191 I.C. 156= 13 R.M. 491=42 Cr.L.J. 86=(1940) 2 M.L.J. 215.**

——*Procedure—Complaint disclosing offence under Copyright Act—Dismissal on ground of dispute being of civil nature—Legality.*

Where a complaint about infringement of a copyright discloses an offence under Ss. 7 and 8 of the Copyright Act, the complaint cannot be dismissed on the ground that the dispute is of a civil nature. (*Lakshmana Rao, J.*) SHARMA *v.* DHARMA RAO. **1941 M.W.N. 871.**

——Procedure—Eye-witness—Tendering of for cross-examination without examining-in-chief — Legality. *See* EVIDENCE ACT, S. 138. **43 Bom L.R. 946.**

——Procedure—Magistrate having no jurisdiction to try case—Procedure—Order of discharge—Legality. *See* CR. P. CODE, S. 209. **1941 M.W.N. 765 (2).**

——Procedure—Misjoinder of accused—Effect on conviction—Prejudice to accused—Presumption of. *See* CR. P. CODE, S. 239. **(1941) 2 M.L.J. 534.**

——*Procedure—Request made by Government to Magistrate—Sending instructions through his superior officers—Practice condemned.*

If the Government desire to put in a petition or request to a Magistrate, they can do so directly through the Public Prosecutor who is the proper officer to put the matter before him. The practice of sending instructions from the Government through the District Magistrate and the Sub-Divisional Officer to the Public Prosecutor and having those instructions reported to the Court of the trying Magistrate who is subordinate to the District Magistrate and the Sub-Divisional Officer is open to the gravest objection. It is not a procedure contemplated by Cr.P. Code and those who issue instructions in that way, those who forward those instructions, and those who obey them do not act according to law. (*Derbyshire, C.J. and Bartley, J.*) EMPEROR *v.* EBRAHIM. **I.L.R. (1941) 2 Cal. 281=45 C.W.N. 768.**

——Procedure—Search list—Failure to exhibit—Witness giving evidence of and Judge discussing contents in judgment—Propriety—Proper procedure to be followed. *See* MYSORE CR. P. CODE, S. 103. **46 Mys.H.C.R. 18.**

——Prosecution—If can be based on contract not enforceable in Civil Court. *See* 1940 Dig., Col. 543. EMPEROR *v.* RAGHUNATH. **16 Luck. 194= A.I.R. 1941 Oudh 3.**

——*Public Prosecutor—Duty of—Duty to put before Court all that can be said in support of charge.*

Although a Public Prosecutor is expected to be fair to an accused person and not to press for a conviction of a graver offence if he thinks a lesser offence has been committed, it is his duty to put before the Court all that can be said in support of the charge and he should not state that a lesser offence has been committed when a

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graver one is in fact committed. (*Horwill, J.*) KARUPPAYYA THEVAR *v.* EMPEROR.
1941 M.W.N. 1025 = (1941) 2 M L.J. 999.

———*Rewards—Distribution—Proper time and propriety.*

The distribution of rewards to police and other witnesses if made before the decision of the case is calculated to prejudicially affect the fair trial of the case against the accused. It may also lead to large body of otherwise good evidence being eliminated from consideration. (*Thomas, C.J. and Ghulam Hasan, J.*) EMPEROR *v.* GAYA PRASAD. 194 I.C. 557 = 1941 O.W.N. 852 = 14 R.O. 26 = 1941 A.Cr.C. 53 = 1941 A.L.W. 752 = 42 Cr.L.J. 595 = 1941 A.W.R. (C.C.) 211 = 1941 O A. 545 = A.I.R. 1941 Oudh 487.

———*Sentence—Age of accused—Relevancy.*

The age of the accused as a factor for imposing a light sentence is only relevant when he is very young or very old. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHWARLAL CHHAGANLAL. 196 I.C. 442 = 14 R.B. 129 = 42 Cr.L.J. 869 = 43 Bom.L.R. 511 = A.I.R. 1941 Bom. 310.

———Sentence—Charges under Ss. 302 and 201, I. P. Code—Conviction—Sentence of death—Separate sentence under S. 201—Propriety. *See* PENAL CODE, S. 302. 1941 M.W.N. 874.

———*Sentence—Consideration in awarding—Period during which accused was in custody—Relevancy.*

Among the factors taken into account by the Court in imposing punishment on conviction, the period of time during which the accused may have remained in custody is a matter to which the Court always pays some regard. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ISHVARLAL CHHAGANLAL. 196 I.C. 442 = 14 R.B. 129 = 42 Cr.L.J. 869 = 43 Bom L.R. 511 = A.I.R. 1941 Bom. 310.

———*Sentence—Conspiracy to murder by persons of education and position.*

Severe sentences are justified in a case where a young woman has been the victim of a conspiracy to murder her, pursued relentlessly for more than two years by persons of education and position. Their education and position do not constitute a reason for treating them leniently: rather the reverse. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR.
191 I.C. 466 = 1941 O.W.N. 133 = 42 Cr.L.J. 165 = 1941 A.Cr.C. 21 = 1941 A.W.R. (C.C.) 59 = 13 R.O. 248 = 1941 A.L.W. 107 = 1941 O.A. 65 = A.I.R. 1941 Oudh 130.

———*Sentence—Fine, in addition to a long term of substantive imprisonment—Undesirability.*

It is not proper in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. It becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. Judges should exercise a careful discretion in the matter of super-imposing fines upon long substantive terms of imprisonment. (*Braund, J.*) EMPEROR *v.* MEHDI ALI. 195 I.C. 599 = 1941 O A. (Supp.) 564 = 1941 A.L.J. 395 = 1941 A.L.W. 660 = 14 R.A. 77 = 1941 A.Cr.C. 146 = 42 Cr.L.J. 755 = 1941 A.W.R. (H.C.) 238 = A.I.R. 1941 All. 310.

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———Sentence—First offender—Short term of imprisonment—Propriety of. *See* 1940 Dig., Col. 544. EMPEROR *v.* ACHAR HAMZO. 193 I.C. 341 = 13 R.S. 222 = 42 Cr.L.J. 403 = A.I.R. 1941 Sind 48.

———*Sentence—Mitigation — Conviction of young person below 18 for murder—Proper sentence.*

Youth by itself is not a reason for mitigating the punishment in murder cases, but in the case of a young murderer below 18 years, it is very rarely that he is sentenced to death. (*Burn and Mockett, JJ.*) PUBLIC PROSECUTOR *v.* VENKATASUBRAMANYAM
I.L.R. (1941) Mad. 428 = 192 I.C. 579 = 1941 M.W.N. 58 = 13 R.M. 585 = 42 Cr.L.J. 311 = 52 L.W. 949 = A.I.R. 1941 Mad. 358 = (1941) 1 M.L.J. 34.

———*Sentence—Mitigation of—Murder—Conviction of person instigating the murder—Actual murderer getting off wholly free—If ground for mitigating sentence.*

The fact that a person who instigated another to commit a murder is in danger of being hanged while the person who did the actual murder gets off wholly free is not by itself a reason for mitigating the punishment of the instigator who is convicted. (*Burn and Mockett, JJ.*) PUBLIC PROSECUTOR *v.* VENKATASUBRAMANYAM. I.L.R. (1941) Mad. 428 = 192 I.C. 579 = 194 M.W.N. 58 = 13 R.M. 585 = 42 Cr L.J. 311 = 52 L.W. 949 = A.I.R. 1941 Mad. 358 = (1941) 1 M.L.J. 34.

———Sentence—Murder—Youth of accused—If ground for not awarding death sentence. *See* 1940 Dig., Col. 544. CHENNA REDDI, *In re.* 194 I C. 527 = 42 Cr.L J. 582 = 14 R.M. 18 = 52 L.W 981.

———*Sentence—Offence not involving moral turpitude but deliberate and intentional—Sentence of fine—Propriety.*

Where the offence involves no moral turpitude but is deliberate and intentional, a sentence of fine is a particularly suitable punishment for an offender who can pay. (*Skemp, J.*) MIAN IFTIKHAR-UD-DIN *v.* EMPEROR. 196 I.C. 485 = 14 R.L. 157 = 42 Cr.L.J. 890 = 43 P.L.R. 378 = A.I.R. 1941 Lah. 324.

———Sentences—Police Officers committing offences. *See* 1940 Dig. Col. 544. PARMANAND *v.* EMPEROR. I.L.R. (1941) Nag. 110 = 42 Cr.L J. 17.

———*Sentence—Police officer found guilty of extortion—Deterrent sentence.*

When a police officer who is a public servant whose duty it is to help the helpless people of the village and protect them from oppression, instead of doing which adopts the role of an oppressor and is found guilty of extortion under S. 383, I. P. Code, a deterrent sentence will serve as an example to others. (*Thomas, C.J.*) JAGDISH NARAIN *v.* EMPEROR.
1941 A.W.R. (C.C.) 358 = 1941 O.A. 947 = 1941 O.W.N. 1255.

———Stages in the commission of an offence—Distinction between. *See* DEFENCE OF INDIA RULES, RR. 34 (6) (K. & P.), 38 (5) AND 121. 1941 A.L.J. 687.

———*Stay of pending civil suit—Dispute as to right of fishery involved in both—If ground for stay.*

Whether criminal proceeding should be stayed when a civil suit is pending is a question which depends upon the facts of each case. Where a question of a right of fishery is involved in a criminal case as well as in a civil suit, it is pre-eminently a matter which should be dealt with by a Civil Court. In such a case the criminal proceedings should be stayed pending disposal of the civil suit. But the evidence connected with the case should not be lost, and the examination of the witnesses should be continued till the prosecution cases closed and after that

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proceedings should be stayed. The hearing of the civil suit should also be expedited. (*Varma, J.*) CHHANNO PRASAD SINGH *v.* SAKHICHAND SAHU.

196 I.C. 69=7 B.R. 995=22 Pat.L.T. 718=42 Cr.L.J. 804=14 R.P. 181=1941 P.W.N. 594.

———*Transfer—Notice—Transfer at the instance of some of the accused without notice to the others—Legality.*

The transfer of a criminal case on the application of some of the accused without notice to the other accused person is not illegal. (*Horwill, J.*) KUMARASWAMI KALINGA RAYAR *v.* EMPEROR. **1941 M.W.N. 1027.**

———*Trial by jury—Case remanded for re-trial—Jury empanelled on second occasion including foreman of jury at former trial—Proceedings, if should be held before entirely new jury.*

Where the verdict has been set aside on appeal and the case remanded for re-trial and the jury empanelled on the second occasion has included the foreman of the jury at the former trial, the case should not proceed by simply discharging this juror and substituting in his place another person. The proceedings should be held before an entirely new jury. (*Bartley and Lodge, JJ.*) SALAMATULLAH *v.* EMPEROR. **195 I.C. 117=14 R.C. 47=42 Cr.L J. 674=A.I.R. 1941 Cal. 328.**

———*Witnesses—Duty of Court in dealing with—Judge angrily rebuking witness—If ground for inferring bias on part of Judge.*

The dignity of a Court is best maintained by the presiding Judge invariably treating the witnesses with courtesy and insisting on counsel doing so. It is not desirable that the Judge should angrily rebuke a witness and tell him to give straight answers. There are cases in which some fairness on the part of the Judge is necessary; and if the Judge feels compelled to deal firmly with the witness, the actual words used, even if somewhat forcible, cannot always be taken to lead to any inference of suspicion or any bias on the part of the Judge in the case generally. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I.C. 107=7 B R. 875=14 R.P. 84=1941 P.W.N. 255=22 Pat L.T. 327=A.I.R. 1941 Pat. 362.**

CRIMINAL TRIBES ACT (VI OF 1924), S. 23 (1)—*"Special reason to the contrary"—What amounts to.*

Where the appellant, a member of a criminal tribe, had been out of jail for about 7 years after his last conviction, that may very well be considered to be a reason to the contrary under S. 23 (1) of the Criminal Tribes Act. (*Burn, J.*) NAGADU *v.* EMPEROR. **1941 M.W.N. 876 (1).**

———**S. 23 (1) (b)**—*"Special reason to the contrary"—What amounts to—Interval of several years between coming out of prison and next offence.*

Where there is an interval of about 5 years between the date when a member of a criminal tribe came out of prison after serving a sentence of 7 years' rigorous imprisonment, and the commission of the next offence for which he is being tried; that is a special reason to the contrary within the meaning of S. 23 (1) of the Criminal Tribes Act for awarding a lesser sentence than transportation for life. (*Lakshmana Rao, J.*) VENKATASUBBADU *v.* EMPEROR. **1941 M W.N. 875=54 L.W. 562.**

CROWN—*Suit by, on the ground of escheat—Onus.*

In a suit by Government for ejectment of defendant on the ground of escheat and for possession, it lies upon the Crown to prove at least *prima facie* that the deceased died without heirs. (*Ghulam Hasan and Agarwal, JJ.*) UNITED PROVINCES *v.* KANHAIYA LAL.

16 Luck. 551=1941 A.W.R. (C.C.) 37=192 I.C. 131=1941 O.L.R. 75=13 R.O. 326=

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1941 O.W.N. 33=1941 O.A. 1=A.I.R. 1941 Oudh 337.

CROWN GRANTS ACT (XV OF 1895), S. 3 and Berar Inam Rules (1859)—Inams—Nature of—Devolution—Law as to. *See* 1940 Dig., Col. 545. SHRIRAM *v.* BANYA BAI. **194 I.C. 454=13 R.N. 369.**

CUSTOM—*Chota Nagpur—Aboriginal tribe*—Kurmi ohdars—*Law applicable—Custom or Hindu Law.*

A family belonging to an aboriginal tribe in Chota Nagpur, *kurmi ohdars*, is, in the absence of other evidence and circumstances, governed by the rules and customs appertaining to the tribe. The members of the tribe must be assumed not to be governed by the Hindu Law.

Quaere.—Whether *kurmi ohdars* are Hindus. (*Harries, C.J. and Manohar Lall, J.*) HARAKHNATH OHDAR *v.* GANPAT RAI. **22 Pat L.T. 829=A.I.R. 1941 Pat. 625.**

———*Essentials of validity—Proof.*

A custom to be valid must be proved to be ancient, certain and invariable, and it must be established by clear and unambiguous evidence. (*Harries, C.J. and Manohar Lall, J.*) HARAKHNATH OHDAR *v.* GANPAT RAI. **22 Pat.L.T. 829=A.I.R. 1941 Pat. 625.**

———*Essentials of validity—Proof—Necessity for clear evidence.*

A custom to be valid must be immemorial, reasonable, continuous and certain. A custom which is set up as superseding the ordinary law must be proved by clear and unambiguous evidence. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) IMAM SAB *v.* SHAMA JOIS. **19 Mys.L.J. 363.**

———*Inheritance—Exclusion of widow and daughters—Wajib-ul-arz—Construction—Inference.*

Where one of the two wajib-ul-arz recorded that a daughter who had a real brother would be excluded from inheritance and the other that in case there was no male issue, the daughter would be entitled to a share, it was held that it was a clear record of custom that daughters were excluded by sons. Where both the documents contained a statement that inheritance was according to wives, that is to say, the sons inherited in the manner mentioned earlier, as it were *per stirpes* and not *per capita*, it was held that it was similarly an indication of a custom excluding widows in the presence of sons and permitting partial inheritance only to childless widows. (*Yorke, J.*) MAHOMED JAFAR *v.* LAL BAHADUR. **192 I.C. 420=1941 A.W.R. (Rev.) 13=1941 R.D. 11=1941 O L.R 179=13 R.O. 356=1940 O.A. 1284=1940 O W.N. 1352=A.I.R. 1941 Oudh 198.**

———*Local custom—Antiquity—Extent to be established.*

It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstance of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. To require that in every case the antiquity of a custom must be carried back to a period which is beyond the memory of man, would only create great perplexity in the

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already uncertain character of customary law. (*M. R. Jayakar.*) SUBHANI *v.* NAWAB.

I.L.R. (1941) Lah. 154 = 43 Bom.L.R. 432 = 1941 O.A. 347 = 1941 A.W.R. (Rev.) 374 = 193 I.C. 436 = 1941 O.L.R. 343 = 7 B.R. 665 = 43 P.L.R. 318 = 13 R.P.C. 154 = I.L.R. (1941) Kar. (P.C.) 22 = 1941 A.L.J. 530 = A.I.R. 1941 P.C. 21 (P.C.).

———Haqe-e-chaharum—*Interest on.*

In the absence of any custom or contract to the contrary, interest cannot be claimed in respect of *Haqe-e-chaharum.* (*Baipai and Dar, JJ.*) ABDUL HASHIM *v.* MALIK ARJUN. **1941 A.W R. (Rev.) 963 = 1941 A.L.W. 962.**

———Haq e-chaharum—*Liability of auction-purchaser.*

In a proper case, no doubt, a liability could be imposed against a decree-holder or against execution-creditor to pay the *haq-e-chaharum* to the zamindar. But where the auction-purchaser has purchased the property for a low price with a margin for the payment of *haq-e-chaharum* and with full knowledge of the liability for such a payment, there is no reason to exempt him, in the absence of a custom to the contrary, from a liability to pay the *haq-e-chaharum.* (*Bajpai and Dar, JJ.*) ABDUL HASHIM *v.* MALIK ARJUN.

1941 A L.W. 962 = 1941 A.W.R. (Rev.) 963.

———Haq-i-chaharum—*Proof of existence in case of private sales—Custom, if applies to sales in execution.*

The proof of a custom whereby the zamindar of a village is entitled to ¼ of the purchase-money, when a house in a village is sold privately, is not proof of a similar custom in respect of sales in execution of decrees. The zamindar cannot recover such sum from either the vendees or the ryots in the case of execution sales. (*Iqbal Ahmad, C.J. and Collister, J.*) BASDEO SINGH *v.* SHEO SHANKAR HALWAI.

1941 O.A. (Supp) 778 = 1941 A.L.W. 932 = 1941 A.W R. (Rev.) 904 = 1941 R.D. 928 = 1941 A.L.J. 592 = A.I.R. 1941 All. 396.

———Haq-e-chaharum—*Recovery against auction-purchaser alone—If permissible.*

A zamindar is not entitled to obtain a decree for the customary dues of *haq-e-chaharum* against an auction-purchaser alone when he had failed to implead the decree-holder, who has taken away the ¼ of the price paid by the auction purchaser, as a party to the suit. (*Sulaiman, C.J. and Bennet, J.*) VISHWA NATH UPADHYA *v.* ASHARFI SINGH. **1941 R.D. 835 = 1941 O.A. (Supp) 766 = 1941 A.L.W. 906 = 1941 A.W.R. (Rev.) 866.**

———*Parsis in mofussil—Law applicable—Powers of guardian to mortgage estate of ward—Justice, equity and good conscience—Rule of English law.*

The legal position of Parsis in the mofussil is that in the absence of any statutory provision relating to them, they are governed in the first place by usage, and secondly, by the rules of equity and good conscience, and in apylying this rule to the facts of any particular case, the Courts would be guided by the general principles of English law. It must therefore be held that a Parsi guardian has no authority to alienate the estate of his ward except with the permission of the Court. This applies to every guardian, no matter how appointed, and whether *de facto* or *de jure.* (*Broomfield and Macklin, JJ.*) KUBERDAS DEV CHAND *v.* JERKISH NAOROJI. **43 Bom.L.R. 981.**

———*Proof.*

Custom that is set up should be strictly proved and should not be extended by analogy. (*Thomas, C.J. and Ghulam Hasan, J.*) GULAB CHAND *v.* MANNI LAL.

16 Luck. 302 = 192 I.C. 643 = 1941 O.W.N. 214 = 1941 A.W.R. (C.C.) 58 = 1941 O.L.R. 194 = 13 R.O. 381 = 1941 A.L.W. 319 (1) = 1941 O A. 43 = A.I.R. 1941 Oudh 230.

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———*Proof—Custom judicially recognised—Effect of—Allegation or proof—Necessity.*

If a custom is known and has been judicially recognized, it is not necessary to allege or prove it, as it has become part of the local law of which the Court takes judicial notice. (*Beaumont, C. J., Divatia and Sen, JJ.*) DASHRATHLAL CHHAGANLAL *v.* BAI DHONDUBAI. **I.L.R. (1941) Bom. 460 = 195 I.C. 464 = 14 R.B. 34 = 43 Bom L R 581 = A.I.R. 1941 Bom. 262 (F B.).**

———*Proof—Judicial decisions—Certified copies—If necessary.*

Judicial decisions can be relied on as furnishing evidence of custom without certified copies of the judgments being placed on the record. (*Dalip Singh and Bhide, JJ.*) RAMI *v.* GIAN SINGH.

43 P.L R. 665.

———*Proof—Mode of—Family and local customs—Duty of Court.*

When a custom is pleaded by a party to a suit, the first thing which the Courts must ascertain is as to what kind of custom is pleaded. A custom set up must be definite so that its application in any given instance may be clear and certain and reasonable. Hindu customs are usually grouped under the heads of *Kulachar* (family customs) and *Desachar* (local customs). Where a family custom is set up the evidence is to be confined to the instances relating to the family of the parties but where a local custom is set up instances may be given not only relating to the members of the family but also instances relating to cases of all people residing within the locality. In the former case, unlike in the latter, instances relating to other castes living in the local area would not be admissible in evidence in proof of the custom. (*Rachhpal Singh, C.J. and Kazi Masud Hasan, J.*) THANEDAR *v.* MALUKA. **43 P.L.R.J. & K. 130.**

———*Proof of existence up to date of suit—Necessity.*

Where a claim is based on custom, before it can be entertained it must be proved that the custom still exists and not merely that it existed at some past distance of time. An entry in the *wajib-ul-arz* is evidence of the existence of custom, but it is not conclusive. Nor can it be presumed that because it existed some long time back it still continues to exist. A custom is not a statutory creation but comes into being of its own accord and in the same manner can disappear of its own accord. Hence before it can be relied upon it must be shown in every case that it still prevails at the time of the filing of the suit and is a living one. (*Harper, S. M. and Sathe, J. M.*) MOIMUDDIN *v.* JAGMOHAN.

1941 R.D. 598 = 1941 A.W.R. (Rev.) 575 (2) = 1941 O.A. (Supp.) 533 (2).

———*Proof of*—Wajib-ul-arz—*Value of entries in—Instances of judicial recognition.*

A *wajib-ul-arz* when properly used affords most valuable evidence of custom. The best evidence to prove a custom besides a *wajib-ul-arz* is of instances in which it is recognized by Courts. A record in the *wajib-ul-arz* of a custom coupled with three instances of its recognition by Courts was *held* enough to constitute proof of the existence of the custom. (*Agarwal, J.*) KULSOOM *v.* CHUTTAN.

1941 O.W.N. 1316 = 1941 A.W.R. (Rev.) 1111 = 1941 O.A. 990.

———*Reasonableness—Recognition by Courts—Rejection—If justified.*

The reasonableness of a custom is primarily a question of fact and when a custom has been recognized by Courts of law on various occasions and has been followed

in practice, it should not be rejected on the mere ground that it is unreasonable, because if questions had been put to witnesses who knew about the custom they might have been in a position to explain its reasonableness. (*Sulaiman, C.J. and Bennet, J.*) VISHWA NATH UPADHYA *v.* ASHARFI SINGH. **1941 R.D. 835 = 1941 O.A. (Supp) 766 = 1941 A.L.W. 906 = 1941 A.W.R. (Rev.) 866.**

——*Reasonableness—Right to eject from house site on payment of compensation.*

A custom by which an owner claims to have right to eject a ryot from house site on payment of compensation for the materials of the house was *held* to be not unreasonable. (*Agarwal, J.*) KULSOOM *v.* CHUTTAN. **1941 O.W.N. 1316 = 1941 A.W.R. (Rev.) 1111 = 1941 O.A. 990.**

——*Validity—Essentials.*

The legal title to recognition of a special custom depends upon its antiquity, certainty and uniformity, and the Court must be assured of these conditions by means of clear and unambiguous evidence. A custom to be valid must be consciously accepted as having the force of law. Even if a custom is established by evidence, such custom, if unreasonable, will not be enforced by Courts. For the purpose of determining whether a custom is against reason or not, we are to judge not by the reason of an unlearned man, but by artificial and legal reason warranted by authority of law. (*Mukherjea and Biswas, JJ.*) JOGESH CHANDRA GHOSH *v.* SREE DHAKESWARI MATA. **I.L.R. (1941) 2 Cal. 258 = 73 C.L.J. 544 = 45 C.W.N. 809.**

——Zar-i-chaharum—*If confined to private sales only—If can be enforced against the vendee.*

Where a custom of *Zar i-chaharum* is established, it is not limited to private sales only but extends also to cases of auction sales—there being no difference in principle between the two sales—and it can be enforced against the vendee also. (*Collister, J.*) RADHEY SHIAM *v.* NAZIR HUSAIN. **1941 A.W.R. (H.C.) 40 = 194 I.C. 705 = 1941 O.W.N. 291 = 1941 R.D. 469 = 1941 A.W.R. (Rev.) 168 (2) = 1941 O.A. (Supp.) 115 = 1941 A.L.W. 194 = 14 R.A. 6 = 1941 A.L.J. 43 = A.I.R. 1941 All. 173.**

—— **(N. W. F. P.)**—Haq-i-Chaharum—Existence of practice of exacting—When can be inferred. *See* 1940 Dig., Col. 546. RAMAI CHAUBEY *v.* RAM DATTA SONAR. **193 I.C. 824 = 13 R.A. 457.**

——**(N. W. F. P.)**—Succession — Female heirs of collaterals. *See* 1940 Dig., Col. 547. MUZAFFAR SARFRAZ *v.* RAHIM JANA. **13 R. Pesh. 25.**

——**(Oudh)**—Proof of— Quantum of evidence. *See* 1940 Dig., Col 547. NARAIN SINGH *v.* NET RAM. **I.L.R. (1940) All. 726 = 192 I.C. 570 = 13 R.A. 335.**

——**(Punjab)** — Adoption—Sister's or daughter's son—Tarkhans of Village Chanian, Jullunder District. *See* 1940 Dig., Col. 547 GURBAKHSH RAM *v.* MANAK CHAND. **191 I.C. 724 = 13 R.L. 328.**

——**(Punjab)**—*Alienation—Powers of—Sayyads of Gurdaspur District.*

The Sayyads of Gurdaspur District are governed by what is called the usual customary law in the matter of alienations and ancestral immovable property cannot be alienated by the holders without necessity. (*Dalip Singh and Sale, JJ.*) GHULAM RASUL *v.* KAFIL AHMAD SHAH. **193 I.C. 469 = 13 R.L. 460 = 43 P.L.R. 91 = A.I.R. 1941 Lah. 30.**

——**(Punjab)**—*Alienation — Powers of—Widow among Sayyads.*

Among Sayyads if a widow inherits the whole of her husband's estate, her tenure is that of a life tenant only or, in other words, she enjoys only a life-estate and not

an absolute estate and whether any reversioners are in existence or not, an inherent restriction is imposed on the estate and she has not unrestricted power of alienation. (*Bhide and Din Mohammad, JJ.*) KHADAM HUSSAIN *v.* MOHAMMAD HUSSAIN. **195 I.C. 873 = 14 R.L. 106 = A.I.R. 1941 Lah. 73.**

——**(Punjab)**—*Alienation—Reversioner — Suit by remote reversioner—Discretion of Court to allow.*

While there is a limit to the right to bring a suit by a remoter reversioners in the presence of nearer reversioners, it is a matter of judicial discretion, having regard to the circumstances of each case, as to whether a remoter reversioner should be allowed to sue in the presence of a nearer reversioner. (*Tek Chand and Dalip Singh, JJ.*) JAN MOHAMMAD *v* MOHAMMAD KHAN. **196 I.C. 130 = 14 R.L. 132 = A.I.R. 1941 Lah. 169.**

——**(Punjab)**—*Alienation—Right to challenge—Remote reversioner.*

In the case of an alienation by a widow any reversioner, however remote, can challenge it. (*Bhide and Din Mohammad, JJ.*) KHADAM HUSSAIN *v* MOHAMMAD HUSSAIN. **195 I.C. 873 = 14 R.L. 106 = A.I.R. 1941 Lah. 73.**

——**(Punjab)**—*Alienation—Rule of reversion—Extinction of vendee's line—If reverts to vendor's descendants.*

The rule of reversion on the extinction of the line of the alienee applies only to gifts of ancestral land among persons governed by customary law. But neither under custom nor under any other system of law does land, which has been sold outright, revert to the descendants or collaterals of the vendor on the line of the vendee becoming extinct. (*Tek Chand and Din Mahomed, JJ.*) JAWALA SINGH *v.* JAGDISH SINGH. **195 I.C. 244 = 14 R.L. 49 = 43 P.L.R. 41 = A.I.R. 1941 Lah. 144.**

——**(Punjab)**—*Alienation—Widow—Assent of next reversioner—Effect—Remote reversioner's right to contest.*

A remote reversioner has no right to contest an alienation of non-ancestral property by way of gift made by a widow with the assent of the next reversioner, (*Beckett J.*) SUNDAR *v.* MT. TABO. **194 I.C. 310 = 13 R.L. 530 = 42 P.L.R. 819 = A.I.R. 1941 Lah. 43.**

——**(Punjab)** — *Alienation— Widow — Notice of necessity to husband's agnates—If obligatory—Riwajiam of Mianwali District.*

The provision in the "Answer" to "Question" 11 of the Riwajiam of the Mianwali District requiring the widow to give notice of her necessity to the agnates of her deceased husband before an alienation, is not obligatory in the sense that its non-observance renders the transaction void against the agnates, regardless of whether necessity did or did not in fact exist. The failure of the widow to give the notice referred to therein does not, therefore, *ipso facto* render the alienation invalid. (*Tekchand, J.*) MAHOMED IKHTIYAR *v.* KHANA. **196 I.C. 400 = 14 R.L. 153 = 43 P.L.R. 429 = A.I.R. 1941 Lah. 310.**

——**(Punjab)**—Alienation—Widow—Powers of. *See* 1940 Dig., Col. 548. TARA SINGH *v.* SURAJ KAUR. **I.L.R. (1941) Lah. 546 = 191 I.C. 422 = 13 R.L. 294.**

——**(Punjab)**—Alienation—Widow—Suit by some reversioners challenging alienation—Other reversioners impleaded as defendants—Compromise decree—Alienee surrendering immediate possession to plaintiffs on cash payment—Right of defendant reversioners to share in benefit of decree. *See* 1940 Dig., Col. 549. JALAL DIN

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v. NAWAB. **193 I.C. 186 = 13 R.L. 437 = A.I.R. 1941 Lah. 55.**

——(Punjab)—*Ancestral land—Inference from name in pedigree—Propriety.*

It is settled law in Punjab that mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. (*M R. Jayakar.*) SUBHANI *v.* NAWAB. **I.L.R. (1941) Lah. 154 = 43 Bom.L R. 432 = 1941 O.A. 347 = 1941 A W R. (Rev.) 314 = 193 I.C 436 = 1941 O.L.R. 343 = 7 B.R. 665 = 43 P.L.R. 318 = 13 R.P.C. 154 = I.L.R. (1941) Kar. (P.C.) 22 = 1941 A.L.J. 530 = A.I.R. 1941 P.C. 21 (P.C.).**

——(Punjab)—Ancestral property—Presumption—Foundation of village by common ancestor. *See* 1940 Dig., Col. 549. GHULAM GHAUS *v.* MALANG KHAN. **191 I.C. 892 = 13 R.L. 356.**

——(Punjab)—Ancestral property—Test. *See* 1940 Dig., Col. 549. GHULAM GHAUS *v.* MALANG KHAN. **191 I.C. 892 = 13 R.L. 356.**

——(Punjab)—Applicability—Mahomedan qureshi family residing in Gujrat Town. *See* 1940 Dig., Col. 550. SHARIFA BEGAM *v.* COURT OF WARDS. **191 I.C. 676 = 13 R.L. 343.**

——(Punjab)—Applicability — Proof — Instances showing exclusion of female heirs—Value of. *See* 1940 Dig., Col. 550. SHARIFA BEGAM *v.* COURT OF WARDS. **191 I.C 676 = 13 R.L. 343.**

——(Punjab)—*Applicability—Sarsut Brahmins of mauza Jandola, tahsil Thanesar, District Karnal.*

Sarsut Brahmins of mauza Jandola, tahsil Thanesar, District Karnal are presumed to follow Hindu law in matters of adoption and hence adoption of wife's sister's son is valid. The fact that the family of these Brahmins own one-half of the village is not sufficient to prove that they do not follow Hindu law in matters relating to adoption and adopted custom of agricultural tribes. (*Tek Chand and Beckett, JJ.*) HIR BHAN *v.* JAGANNATH. **I.L.R. (1941) Lah. 628 = 193 I.C. 522 = 13 R.L. 462 = A.I.R. 1941 Lah. 25**

——(Punjab)—*Daughters and grand-daughters* versus *collaterals—Kharal tribe of Montgomery District.*

Under the customary law governing the kharal tribe of the Montgomery District, daughters and grand-daughters are preferred to collaterals in the matter of succession to non-ancestral property. (*Tek Chand and Din Mahomed, JJ.*) SANATA *v.* SAHIB BIBI. **I.L R. (1941) Lah. 692 = 193 I.C. 404 = 13 R.L. 458 = 43 P.L.R 7 = A.I.R. 1941 Lah. 94.**

——(Punjab)—*Landlord and tenant—Chil trees on occupancy tenancy—Right of tenant to extract resin—Hoshiarpur District.*

In the Hoshiarpur District, an occupancy tenant has no right to cut the chil trees standing on his tenancy or to extract resin therefrom. As resin is contained in the wood of the tree it is reasonable that the right to the resin in the timber should accrue to the persons entitled to the timber itself, that is to say, to the proprietors of the land rather than to the occupancy tenants. (*Mitchell, F.C.*) HARSARAN *v.* DEVI SARAN. **20 L L.T. 61**

——(Punjab)—*Non-ancestral property—Exclusion of daughters—Onus.*

Where the property is non-ancestral, the initial onus lay on the collateral plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom enabling the collaterals to exclude the daughters. On the evidence it was held

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that the collaterals had not succeeded in discharging that onus. (*M. R. Jayakar.*) SUBHANI *v.* NAWAB. **I.L.R. (1941) Lah. 154 = 43 Bom.L.R. 432 = 1941 O.A. 347 = 1941 A.W.R. (Rev.) 314 = 193 I.C. 436 = 1941 O.L.R. 343 = 7 B.R. 665 = 43 P.L.R. 318 = 13 R.P.C. 154 = I.L.R (1941) Kar. (P.C.) 22 = 1941 A.L.J. 530 = A.I.R. 1941 P.C. 21 (P.C.).**

——(Punjab)—Riwaj-i-am—Applicability. *See* 1940 Dig., Col. 551. GUR BAKHSH RAM *v.* MANAK CHAND. **191 I.C. 724 = 13 R.L. 328.**

——(Punjab)—*Riwaj-i-am—Entries in—Presumption—Rebuttal—Compiler's remarks—If sufficient.*

Whatever weight may be attached to the compiler's remarks, they are not sufficient to rebut the presumption arising from the entries recorded in the riwaj-i-am, especially when they are in accord with the earlier riwaj-i-am. A departure from the old Customary law may be discredited if the compiler thinks that the change was being introduced for a set purpose, but if the replies are in consonance with what had been the custom from time immemorial, the compiler's personal opinion that the rules were not being rigidly observed in practice will neither discredit the replies given nor lighten the burden on those who are required by the law to rebut the entries made in the Manual of Customary Law. A custom to be valid must be ancient, certain and invariable, and if a few violations are made, the violations themselves will not take the place of custom, if for no other reason because of their newness alone. (*Bhide and Din Mohammad, JJ.*) KHADAM HUSSAIN *v.* MOHAMMAD HUSSAIN. **195 I,C. 873 = 14 R.L. 106 = A.I.R. 1941 Lah. 73.**

——(Punjab)—*Shamilat—Partition — Portion in possession of one of co-sharers becoming valuable as building site—Unearned increment—If accrues to all.*

If a portion of Shamilat land in possession of one of the co-sharers becomes valuable by reason of its suitbility as a building site and nearness to a big factory, the unearned increment should not accrue to that co-sharer alone but to all the co-sharers. If the co-sharers are so numerous that the share of each in it is too small, the site should be excluded from partition, leaving the co sharer in possession as owner of his own undivided share and tenant-at-will of the rest on behalf of the proprietary body. As regards this remainder, he should pay the customary rent to his co sharers, and provided he fulfils these conditions he should not be disturbed until the time comes when the property is to be sold. The proceeds of such sale should then be divided among the proprietary body. (*Garbett, F.C.*) ROSHAN DIN *v.* MAHBUB ALI KHAN. **20 Lah.L.T. 21.**

——(Punjab)—Succession — Cognates. *See* 1940 Dig., Col. 551. TARA SINGH *v.* SURAJ KAUR. **I.L.R. (1941) Lah. 546 = 191 I.C. 422 = 13 R.L. 294.**

——(Punjab)— Succession—Collaterals—Right of representation—Khatris of Rawalpindi. *See* 1940 Dig., Col. 552. DIWAN CHAND *v* BELI RAM. **I.L.R. (1941) Lah. 620.**

——(Punjab)—*Succession—Daughters* versus *collaterals—Bajwa Jats of Sialkot District.*

According to the custom governing Bajwa Jats of the Sialkot District, daughters are entitled to succeed to non-ancestral property of a sonless proprietor in preference to his collaterals. (*Dalip Singh and Bhide, JJ.*) RAMI *v.* GIAN SINGH. **43 P.L.R. 665.**

——(Punjab)—Succession—Daughters *versus* collaterals—Gujjars of Shakargarh Tehsil of District Gurdaspur. *See* 1940 Dig., Col. 552. LABH *v.* FATEH BIBI. **I.L.R. (1941) Lah. 64 = 191 I.C. 152 = 13 R.L. 262.**

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——(Punjab)—Succession — Sisters, married—Sayyads of Jhang District. *See* 1940 Dig., Col. 552. ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH.
192 I C. 739 = 13 R.L. 408.

——(Punjab) — Succession—Sisters, unmarried—Alienation—Powers of—Sayyads of Jhang District. ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH.
192 I.C. 739 = 13 R.L 408.

DANGEROUS DRUGS ACT (II OF 1930), Ss. 13 (a) and 32—Scope—Charge of importing opium contrary to Act—Burden of proof—Accused found in possession of opium—No evidence of import from elsewhere—Offence—Conviction—Sustainability—Presumption of import—If justified. *See* 1940 Dig., Col. 554. RAGHUBAR DAYAL MISSIR *v.* EMPEROR.
191 I.C. 431 = 13 R.P. 346 = 7 B.R. 197 = 42 Cr.L.J. 189 = 1941 P.W.N. 239 = A.I.R. 1941 Pat. 177.

——**S. 14 (a)**—*Selling of cocaine—Sentence.*

Selling of cocaine is the most objectionable form of disposing of dangerous drugs made punishable by S. 14 (*a*) of the Dangerous Drugs Act. As persons who take cocaine very rapidly become drug addicts and their reclamation becomes impossible, the more rapidly such a practice is stamped out the better it will prove for the people. The sentence of two months' rigorous imprisonment awarded by the trial Court was enhanced to two years' rigorous imprisonment in revision. (*Davies.*) ZAHOOR ALI, *In re.* **1941 A.M.L.J. 12.**

DEBTOR AND CREDITOR—*Merger—Creditor succeeding to estate of debtor—Effect—Claim by other creditors—Right of retainer of heir—Principle—Applicability to Hindu Law—Widow obtaining decree against brother—Death of latter and widow becoming heir—Right to claim rateable distribution as against another creditor.*

Where a Hindu heir to whom the deceased was indebted succeeds to his property, only the net balance after the deduction of such a debt is taken by the heir. This principle of retainer is not a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it is the same hand that has to receive and pay, he cannot sue himself, and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative whether he be the executor or heir. The fact that he is a limited owner, such a Hindu widow, would not make any difference in the application of the principle. There is no reason why it should not be applied to the case of property vesting in an heir. So much of the property as is available in his hands must be deemed to have been appropriated and only the net balance of the estate must be deemed to have vested in him. So that if any other creditor brings a claim for his debt he would be entitled to assert the right of retainer and plead that the creditor can only claim payment from and out of the balance of the assets in his hands after deduction of his debt. There is nothing in the Hindu Law which precludes the application of this principle. The appellant, a Hindu widow, obtained a decree against *R*, her brother. She had obtained attachment of his property, before judgment and had also applied for execution. *R* died and subsequently the respondent obtained a decree against the appellant as the legal representative of *R* in respect of a debt due by him, the appellant having succeeded to the property of *R*. Respondent attached *R's* property in execution of his decree and had it put up for sale. Appellant applied for rateable distribution out of the sale proceeds under S. 73 of the C. P. Code. It was pleaded that there was a total merger of her decree

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when she became *R's* heir and there was no decree in respect of which she could claim rateable distribution.

Held, (1) that the appellant's claim to rateable distribution was justified and maintainable, although it was open to her under S. 47 to prefer the claim that the amount due to her under her debt should be paid first out of the sale proceeds and the balance only should be available for the respondent's decree; (2) that before rateable distribution could be ordered, an enquiry was necessary for ascertaining whether *R* had left any other estate besides the property attached and sold, and if it be found that there were assets of *R* which would cover the value of the appellant's debt to that extent it must be deemed to be satisfied and she could claim rateable distribution only for the balance; if there were no other assets of *R*, the appellant was entitled to participate in the sale proceeds along with the respondent. (*Venkataramana Rao, J.*) THANGATHAMMAL *v.* VEERAMA REDDIAR. **54 L W. 688 = (1941) 2 M.L.J. 1024.**

DECREE. *See* PRACTICE—DECREE.

DECREES AND ORDERS VALIDATING ACT (V OF 1936), S. 2—*Scope of—Decrees and orders in execution of High Court of Bombay—Questioning in Allahabad.*

S. 2 of the Decrees and Orders Validating Act makes provision not only for the sanctity of the decrees passed by the Presidency High Court but has declared that orders passed by those Courts will also be sacrosanct. Hence decrees passed by the High Court of Bombay and orders in execution thereof cannot be declared by the High Court of Allahabad to be *ultra vires* or without jurisdiction. (*Bajpai and Dar, JJ.*) MURLIDHAR *v.* GORAKH RAM SADHO RAM. **1941 A.L.J. 511 = 1941 O.A. (Supp) 682 = 1941 A.W.R. (H C.) 252 = 1941 R.D. 765 = 1941 A L W. 833 = A.I.R. 1941 All 358.**

DEED—*Construction — Agreement in compromise of disputes.*

Where an agreement in compromise of disputes provided that one of the parties was to 'remain owner and in possession of the immovable property, taluqdari and non-taluqdari for his lifetime without the power of transfer in any form' and that after his death the other party 'shall own and possess the entire movable and immovable property', it was held that the first party was the absolute owner of rents and profits which had been realised in his lifetime and that he could transfer them by gift or by transfer *inter vivos*. (*Yorke and Agarwal, JJ.*) HARI SARAN DAS *v.* HAR KISHAN DAS.
194 I C. 16 = 13 R.O. 549 = 1941 A.L.W. 179 = 1941 O.L R. 405 = 1941 O.W.N. 245 = 1941 A.W.R. (Rev.) 156 = 1941 O A 208 = A.I.R. 1941 Oudh 263.

——Construction—Assignment of rents and profits—If passes property itself—Mining lease—Assignment of income absolutely and for ever—If passes property itself. *See* 1940 Dig., Col. 561. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON.
192 I.C. 17 = 13 R.P. 362 = 7 B R 283.

——Construction—Contract for remuneration of agent—Principles. *See* PRINCIPAL AND AGENT—RELATIONSHIP. **1940 A.M.L.J. 74.**

——*Construction—Deed of guarantee—Surrounding circumstances—If can be looked into for deciding whether there is a continuing guarantee.*

In deciding the question as to whether there is a continuing guarantee, the whole of the sorrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is

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precluded from taking anything else than the deed of guarantee into consideration. (*Leach. C.J. and Horwill, J.*) NEDUNGADI BANK, LTD. *v.* DORAIKANNU AMMAL. **I.L.R (1941) Mad. 313 = 195 I C 408 = 14 R.M. 185 = 1941 M.W.N. 17 = 52 L W. 951 = A.I.R. 1941 Mad. 282 = (1941) 1 M.L J. 281.**

———Construction — Deed of transfer — General words—Interpretation of so as to give effect to intention of executant. *See* MYSORE T. P. ACT, S. 130.

19 Mys L.J. 327.

———Construction—Express covenant of title. *See* 1940 Dig., Col. 562. MAN SINGH *v.* BABU LAL.

16 Luck. 369 = 191 I.C 448 = 13 R.O. 242 = A I.R. 1941 Oudh 114.

———Construction—Form of transaction—If can be ignored - Rule in income-tax cases. *See* 1940 Dig., Col. 562. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KUMAR KAMAKSHA NARAIN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R.P. 295 = 1940 P.W.N. 1044 = 7 B.R. 172.**

———*Construction —Gift —Intention of donor—Conduct of parties relevancy.*

Where the language of a deed of gift is clear and free from ambiguity, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or donor is beside the point. (*Bennett and Ghulam Hasan, JJ.*) CHHEDI SINGH *v.* RAM SINGH.

193 I.C. 611 = 13 R O. 474 = 1941 A L.W. 307 = 1941 O.L R. 306 = 1941 O.W.N. 412 = 1941 O.A. 292 = 1941 A.W.R. (Rev) 243 = A.I.R. 1941 Oudh 369.

———*Construction—"Government"—Meaning of.*

The term "Government" used in an agreement without any qualification includes both the central and the Provincial Governments. (*Din Mahomed, J.*) LAHORE ELECTRIC SUPPLY CO., LTD. *v.* KUNDAN LAL. **42 P L.R. 798.**

———Construction—"Khat" or counter-part of lease—Sale by landlord of kudiwaram interest in private land in estate—Terms in khat repugnant to *rioti* interest—If void or to be given effect to. *See* MADRAS ESTATES LAND ACT, SS. 181 AND 187 (1) (C).

(1941) 1 M.L.J. 336 (F.B.).

———*Construction—Lease—Extent of property demised—Difference between area and description which to prevail—Rule—Document of title—Principles of construction—Prior documents relating to same property—Use of.*

In the case of a deed such as a lease, the question as to what has been demised turns upon the true construction of the lease. What the Court has to see is what are the operative provisions of the deed and what is actually granted by those operative portions. The proposition, that where the area goes against the boundaries the boundaries should prevail, cannot be accepted as a universal rule. The boundaries given in the schedule to the document cannot control the operative portion in the body of the document when they are merely descriptive. Documents of title are to be construed in accordance with their own terms when the property dealt with under the deed has been the subject of more than one transaction, the prior transactions cannot be regarded as controlling the construction of the later document, but can be referred to if they lend some independent corroboration of the view which the Court may take on a construction of the document itself. (*Rowland, J.*) EQUITABLE COAL CO., LTD. *v.* A. N. MITTER.

193 I.C. 737 = 1941 P.W.N. 643 = 13 R.P. 620 = 7 B.R. 633 = 22 Pat.L.T. 304 = A I.R. 1941 Pat. 472.

———*Construction — Lease or mortgage—Kabuliyat—Provision for payment of rent in advance in lump sum*

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—Lessee to remain in possession for fixed term—Provision for payment of rent at fixed rate after term in case lessee wished to retain premises—Mortgage or lease.

There is no question of property being held in mortgage unless it is held as security for the debt, and to constitute a mortgage there must also be provision, express or implied, for a right of redemption. A document which is a kabuliyat with a provision for payment of rent in advance in a lump sum, and which provides for the lessee remaining in possession for a fixed period of years in consideration of the advance paid, and for payment of a rent at fixed rate after the period fixed if the lessee wished to retain the premises after the period, can in no sense be described as a mortgage of any sort. It is merely a lease, and the lessee is in possession only as a tenant and not as a mortgagee, there being no provision whereby the property is held as security for debt and no provision at all for redemption. (*Chatterji and Meredith, JJ.*) GULAB CHAND PRASAD *v.* RAM KUMAR. **193 I.C 533 = 13 R.P. 601 = 22 Pat.L.T. 230 = 7 B.R. 554 = A.I.R. 1941 Pat. 296.**

———*Construction—Lease or sale.*

Where a deed was executed by an ex-proprietary tenant purporting to be a lease in perpetuity, the lessee being liable under the deed to pay the superior proprietor rent due to him from the ex-proprietary tenant and also to pay a smaller sum of money as rent to the ex-proprietor, it was held on a construction of it that it amounted to a lease and not a sale. It was further held that the absence of an express reservation of right of re-entry in case of default did not take it away from the category of leases. (*Bennett, J.*) BHONDU SINGH *v.* MAHADEO SINGH. **1941 O.W.N. 1320 = 1941 A.W.R. (Rev.) 1117 = 1941 O.A. 1002.**

———Construction—Lease or sale—Coal mining lease and sale of coal land—Distinction. *See* 1940 Dig., Col. 563. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R.P. 295 = 1940 P.W.N. 1044 = 7 B.R. 172.**

———*Construction—Mortgage or charge—Use of words 'mortgage' and 'redemption'.*

When persons are used to recognised legal terms in a form of transaction, it is to be presumed that they intend that those terms should have their ordinary meaning. When a person definitely states in a document that he is mortgaging a property and then refers to its redemption, the document must be treated as creating a mortgage and not merely a charge which does not carry with it an interest in the property. It is immaterial that the document does not state in precise terms that any interest is being transferred. (*Tek Chand and Beckett, JJ.*) SAMPURAN SINGH *v.* AHMAD DIN. **43 P.L.R. 277 = A.I.R. 1941 Lah. 274.**

———*Construction—Mortgage or lease.*

Where a document purported to grant a lease of a share of certain property for a period of five years to the grantee at a certain rent per annum and the grantee was given a right '*tarradud wa abad karna*' and that he might keep the land as his khudkasht but might not let it to relatives or others for cultivation, nor get any one else's name entered in the papers and it also recited that a certain sum was taken by the grantor as '*peshgi*' on the security of the share and that he would redeem it by a particular date, it was held that the document was actually a mortgage and in nature and effect a usufructuary morgage with a minimum period of five years for redemption. (*Yorke, J.*) MAHOMED JAFAR *v.* LAL BAHADUR. **192 I.C. 420 = 13 R.O. 356 = 1941 A.W.R. (Rev.) 13 = 1941 R.D. 11 =**

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1941 O.L.R. 179=1940 O.A. 1284=1940 O.W.N. 1352=A.I.R. 1941 Oudh 198.

———*Construction—Mortgage or sale—Option to repurchase within ten years—Sale to become absolute in default of payment.*

Where a transferor under a document of apparent sale is allowed by the terms of it to repurchase at any time during the tenth year, the provision is as consistent with a mortgage as with a sale: rather it suggests the former. Further, a provision that if the entire consideration money is not paid by the executant to the vendees before the expiry of the tenth year, the sale shall be deemed to be an absolute sale, in no way operates against the theory of mortgage; on the contrary it supports it. (*Bennett and Madeley, JJ.*) SHAMBHU SINGH *v.* JAGDISH BAKHSH SINGH. **195 I C 828=14 R.O. 123=1941 O.L.R. 626=1941 A.L.W. 852=1941 O A. 722=1941 A.W.R (Rev.) 757=1941 O.W N. 994=A.I.R. 1941 Oudh 582.**

———*Construction—Partition—Sons given shares and wife given a certain area for maintenance—Nature of interests taken—Devolution.*

Where by a deed of partition equal shares were given to the two sons of the proprietor and an area of 125 bighas was reserved to the wife for maintenance, it was held that as there were no words in the deed to show that the grant to the wife was a grant for life, and as there was no restriction on alienation on her part and no provision for its ultimate devolution on her death, the interest created was not merely a life interest. It was further held that the deed could not be construed to mean as a transfer of 125 bighas in favour of the sons subject to a charge of maintenance and as the intention was to keep this land as separate and distinct from the proprietary share it did not on the death of the lady merge in the proprietary share and pass to the holder of it but devolved upon her heirs. (*Ghulam Hasan, J.*) KAMESHWAR DATT *v.* KESHO DAT RAM.

196 I.C. 350=14 R.O 155=1941 R.D 888=1941 O.L.R. 677=1941 O.A. 763=1941 A.W R. (Rev.) 829=1941 O.W.N. 1047

———*Construction—Principles.*

The cardinal rule of construction of deeds is to ascertain the intention of the executant as disclosed from the language used in the deed. Such intention should be effectuated so far and as nearly as may be consistent with the law to which the executant was subject. (*Bennett and Ghulam Hasan, JJ.*) CHHEDI SINGH *v.* RAM SINGH. **193 I.C. 611=13 R.O. 474=1941 A L.W. 307=1941 O.L.R. 306=1941 O W.N. 412=1941 O.A. 292=1941 A.W.R. (Rev.) 243=A.I.R. 1941 Oudh 369.**

———Construction — Principle — Construction as a whole to ascertain intention. *See* 1940 Dig, Col. 563. GANPAT DAS *v.* HARIVALLABH. **13 R.N 265=192 I.C. 513=A.I R. 1941 Nag. 1.**

———Construction—Real character—Ascertainment—Test—Description by party, if a guide. *See* 1940 Dig., Col. 564. RAMMAN LAL *v* RAGHUNATH SHANKAR. **I.L.R. (1941) A. 17=194 I.C. 347=13 R.A. 495=1941 A.L.J. 55=1941 O.W.N. 388=1941 R.D 180=1941 A L.W. 277=A.I.R. 1941 All 56.**

———*Consideration—Recitals — Plea of want of consideration and incorrectness of recitals—Burden of proof.*

The burden of proving that the recitals in a settlement deed are not correct and that the deed is invalid for want of consideration is on the person who alleges the same. (*Abdul Rahman, J.*) SUBBAYYAN CHETTIAR *v.* PONNUCHAMI CHETTIAR. **1941 M.W N. 639=A.I.R. 1941 Mad. 727=(1941) 1 M.L.J. 807.**

DEED.

———Construction—Rules as to—Intention of party. *See* 1940 Dig., Col. 564. MAHOMED ALI *v.* DINESH CHANDRA RAY. **193 I.C. 540=13 R.C. 413.**

———*Construction—Sale—Discrepancy between description and boundaries.*

Where a sale deed contained a description of the property as follows: "One tiled house . . . and there is courtyard beyond . . . . In this there are a pucca latrine and a water pipe. Length of all is 33 feet south north and breadth 18 feet east west. This land together with the site, superstructure and the land within the boundary limits. . . . . Boundaries of this (are as follows):—On the east there is a lane of 3 feet and a half as also a Savari bungalow . . . . . "and the house was only 14 feet wide, on a question as to whether the lane on the east was included in the sale or not, it was *held* that the sale deed contained a prior description which was particular and which was not cut down by a general description as to boundaries and that the lane was included in the conveyance. (*Stone, C.J.*) MAHOMED ABDUL KARIM *v.* ABDUL SATTAR. **1941 N.L.J.242=A.I.R. 1941 Nag. 162.**

———*Construction—Sale of khewat land including* "jumla Haquq mutalqa"—*Sale, if includes appurtenant shamilat.*

Where in a deed of sale of khewat land, the *shamilat* is not expressly mentioned as having been sold, but the property sold includes "*jumla Haquq mutalqa*", the sale not only relates to the khewat land but also includes the appurtenant *shamilat*. (*Tekchand, J.*) MENGHA RAM *v.* MAKHNA. **43 P.L.R. 424=A.I.R. 1941 Lah. 416.**

———*Construction—Settlement deed by Hindu in favour of his wife for maintenance—Unchastity of wife after death of settlor—If entails forfeiture of estate.*

A Hindu by a settlement deed gave certain properties to his wife. The deed *inter alia* provided that the wife "shall during her life live in and enjoy the under-mentioned properties." After the lifetime of the settlor, his widow became unchaste. The heirs of the settlor thereupon claimed that the widow forfeited the estate on account of her unchastity.

Held, that in the absence of any *dum casta* clause in the deed of settlement under which the properties had to come to vest in the wife for her life, no forfeiture could be held to have been incurred on account of her subsequent unchastity. (*Abdur Rahman, J.*) SUBBAYYAN CHETTIAR *v.* PONNUCHAMI CHETTIAR. **1941 M.W.N. 639=A.I.R 1941 Mad. 727=(1941) 1 M.L.J. 807.**

———*Construction—Theka or mortgage.*

Where the terms of a document were such as are consistent with a *theka* and in all its terms the document was described as a *thekanama* and not as a mortgage deed and the only uncommon condition was that the lessee was not liable to be ejected until certain security deposited by him had been paid off, it was held that the document was a pure lease and not a mortgage and that even the uncommon condition was not such as to turn the document into a mortgage, for a *theka* lease may contain any conditions which the proprietors might agree to. (*Harper, S.M. and Sathe, J.M.*) MAKKA LAL *v*, GANGA SINGH. **1940 O.W.N. 1233=1940 R.D. 582=1941 A.W.R. (Rev.) 80 (2)=1941 O.A. (Supp.) 69.**

——— Construction—Usufructuary mortgage — Rehan deed—Advance of money to executant—Undertaking to deliver possession and authorization to him to retain possession till repayment—Absence of words of hypothecation—Effect of. *See* T. P. ACT, SS. 58 (d) AND 68. **7 B.R. 512.**

DEED.

———*Construction—When a question of fact and when one of law.*

What English words together form the equivalent of a given series of words of other language is a question of fact while what in particular circumstances and a given context, a given set of English words connotes is, generally, a question of law. (*Blagden, J.*) BHAWANI SANKAR JAISI *v.* GANGA PRASAD.

A.I.R. 1941 Rang. 244.

———Construction—Will or gift or contract—Deed executed jointly by donor and donee. *See* 1940 Dig., Col. 565. MAHOMED ALI *v.* DINESH CHANDRA RAY.

193 I.C. 540 = 13 R.C. 413.

———*Material alteration — Effect —. Alteration of written contract—Arbitration clause in such contract—If becomes unenforcible.*

An alteration in a material part of a written contract made by a party thereto without the consent of the other party makes the contract void to this extent, that the party responsible for the alteration cannot enforce the contract against a party not responsible. The avoidance operates as from the time of alteration so as to prevent the person who has made the alteration from putting the contract in suit to enforce against the other party any promise thereby made. An agreement in the contract to submit all disputes to arbitration is such a promise and it is, therefore, not enforcible from the time of the alteration of the contract against the party not responsible for it. (*Lort Williams, J.*) BAHADUR MULL CHAUDHURI *v.* NAGAR MULL MADAN GOPAL.

I.L.R. (1941) 1 Cal. 451 = 197 I.C. 22 = 45 C.W.N. 795 = A.I.R. 1941 Cal. 534.

———Material alteration—Effect of—Rule of English Law as to—Applicability to India. *See* 1940 Dig. Col. 566. NATHU LAL *v.* GOMTI KUER. **67 I.A. 318 = I.L.R. (1940) Kar. (P.C.) 287 = 72 C.L.J. 509 = 22 P.L.T. 533 = 1941 P.W.N. 192 = (1941) 1 M.L.J. 204 (P.C.)**

———*Material alteration—Effect—Suit on basis of deed—Oral evidence inadmissible to prove contents—Plaintiff responsible for alteration—Secondary evidence—Admissibility—Right to decree.*

When there is a document and under the law no evidence other than the document itself or secondary evidence of its contents can be used to prove a contract, that document, if available, must be produced before the Court or a case must be made out for admitting secondary evidence. But if the plaintiff who sues on the document has made alterations and interpolations in it, he does not place the original document before the Court because it has lost its identity by having been altered in the meantime; and as the plaintiff himself has been responsible for destroying its identity, he cannot in justice and equity be allowed to adduce secondary evidence of its contents. The effect is that the plaintiff is not entitled to succeed in his suit. (*Mahomed Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS.

22 Pat.L.T. 666.

———Recitals—Value of—If *prima facie* evidence against executant—Execution of deed by guardian on behalf of minor—Effect of. *See* 1940 Dig., Col. 566. RAMUDU *v.* SANYASI NAIDU. **A.I.R. 1941 Mad. 97 = (1940) 2 M.L.J. 668.**

———Rectification—Mistake of parties—Burden of proof—Mortgage deed—Mistake in—Decree in suit on—Mistake repeated in decree—Power of Court to rectify or set aside decree and mortgage deed—Limits to—Mortgage—If merged in decree. *See* 1940 Dig. Col. 566. NOORUDDIN ESMAILJI *v.* MAHOMED UMAR SUBRATI. **192 I.C. 109 = 13 R.B. 223.**

DEFENCE OF INDIA RULES (1939), R. 34.

———*Validity—Execution—Document not signed by all by whom it purports to be executed.*

Where the intention of the parties to a contract is that the document shall not be complete till it is signed by all by whom it purports to have been executed the document cannot be taken into consideration. But if the intention is that the signatures of those who have signed the document shall be enough to perfect the contract then the document is complete and the contract contained therein can be enforced. (*Almond, J.C. and Mir Ahmad, J.*) KALU RAM *v.* FEROZ SHAH.

195 I.C. 185 = 14 R. Pesh. 10 = A.I.R. 1941 Pesh. 45.

———*Validity—Plea of invalidity as being opposed to public policy—Burden of proof.*

A person who wants an agreement or a conveyance to be declared invalid on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23 of the Contract Act. (*Abdur Rahman, J.*) SUBBAYYAN CHETTIAR *v.* PONNUCHAMI CHETTIAR. **1941 M.W.N. 639 = A.I.R. 1941 Mad. 727 = (1941) 1 M.L.J. 807.**

DEFENCE OF BURMA ACT. *See* BURMA DEFENCE ACT.

DEFENCE OF INDIA ACT, S. 2 and Rules 34 (vi) (j) and 38 (1) (a)—*Defence of India Act if* ultra vires *the central legislature—R. 34 if within the competence of central government—Refusal to accept currency note—If an offence.*

The Defence of India Act is not *ultra vires* the central legislature. R. 34 of the rules of the Defence of India Act is within the competence of the central government in accordance with the provisions of S. 2 of the Defence of India Act. Any person who refuses to accept a currency note upon the ground that it is worth nothing is doing an act which tends to undermine public confidence in the note and his action comes within the provisions of Rr. 34 and 38 of the Defence of India Act Rules. (*Allsop and Braund, JJ.*) MEHR SINGH *v.* EMPEROR. **196 I.C. 295 = 14 R.A. 155 = 1941 A.L.W. 741 = 1941 O.A. (Supp.) 566 = 1941 O.W.N. 898 = 4 F.L.J. (H.C.) 268 = 1941 A. Cr.C. 167 = 42 Cr.L.J. 839 = 1941 A.L.J. 352 = 1941 A.W.R. (H.C.) 240 = A.I.R. 1941 All. 321.**

DEFENCE OF INDIA RULES (1939), R. 6 (5)—*Sentence—Rule as to—Gravity of offence—Relevancy—Imprisonment for first offenders—Propriety.*

Offences under R. 6 (5) of the Defence of India Rules, 1939, may obviously differ very much in their gravity, and they cannot be dealt with by any rule of thumb sentence. If there is any reason for supposing that a man has entered a prohibited area with a view to obtaining information which might be useful to the enemy, he would deserve a severe sentence. Again, if a man has entered a prohibited area knowing full well that it is prohibited having climbed over a fence or eluded a sentry or done something of that sort, he would deserve a more severe sentence than a man who has entered a prohibited area without appreciating that it is a prohibited area; but a man who enters a prohibited area inadvertently should be dealt with more leniently. Sentencing first offenders for offences of this type to a term of imprisonment would only be a very good way of manufacturing criminals for the future, though it cannot be laid down as a general rule that sentences of imprisonment shall not be imposed in the case of these offences. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* JOSEPH ABDULLAHI. **43 Bom.L.R. 839 = A.I.R. 1941 Bom. 355.**

———**R. 34**—*'Prejudicial act'—Shouting of antiwar slogans.*

DEFENCE OF INDIA RULES (1939), R. 34.

The shouting anti-war slogans is a 'prejudicial act' within the meaning of R. 34 of the Defence of India Rules. (*Bhide, J.*) HIGH COURT BAR ASSOCIATION, LAHORE *v.* EMPEROR. **195 I.C. 674 = 14 R.L. 90 = 1941 A.Cr.C. 162 = 42 Cr.L.J. 765 = 43 P.L.R. 396 = A.I.R. 1941 Lah. 301.**

——**R 34 (6)**—*Prejudicial act—Speech by accused—If to be taken as a whole—Portion of speech—If can be "prejudicial act."*

In a prosecution under R. 34 (6) of the Defence of India Rules in respect of a speech delivered by the accused, it cannot be held that the speech of the accused must be considered as a whole and that he cannot be convicted unless the whole speech be found to be "a prejudicial act." Even a particular portion of a speech can constitute a prejudicial act. (*Burn, J.*) KALYANARAMA AYYAR *v.* EMPEROR. **1941 M.W.N. 1035.**

——**Rr. 34 (6) and 38**—*"Prejudicial act"—Tirade against police—Offence.*

Petitioner made a speech which consisted of a tirade against the police. He said that although they were poorly-paid men of no status, yet they give themselves airs and strut about doing no work. He suggested that they are acting against the workers in the interests of the capitalists. The speech also contained threats of what may be done to the police if they continue as they are at present.

Held, that the speech, read as a whole, could not be said to be a prejudicial act within the meaning of R. 34 (6) of the Defence of India Rules, so as to render the petitioner liable to conviction under R. 38 of the Rules. (*Horwill, J.*) SOMASUNDARAM, *In re.* **195 I C. 189 = 14 R.M. 147 = 53 L W. 362 = 1941 M.W.N. 370 = 42 Cr.L.J. 702 = A.I.R. 1941 Mad. 597 = (1941) 1 M.L J. 464.**

——**Rules under Rr. 34 (6) 'K. and P.), 38 (5) and 121**—*Stages in the commission of an offence generally—Communication to Magistrate of intention to shout anti-war slogan—If an offence.*

There are four stages ordinarily in the commission of an offence, namely intention, preparation, attempt and the final act constituting the offence. Intention *per se* is not ordinarily punishable at all. Preparation is punishable in rare cases as for example, S. 399 of I. P. Code. Attempt is punishable in a large majority of cases while the final act constituting the offence is always punishable. Preparation consists in devising or arranging the means or measure for the commission of an offence. The mere communication of a letter to the District Magistrate containing an intention on the part of the writer to shout anti-war slogans at a particular place on a particular day is not an offence under R. 121 read with Rr. 38 (5) and 34 (6) (K. and P.). Intention is not to be confused with preparation. The communication of the letter does not come under preparation because it does not in any way devise or arrange any means or measure for the commission of the offence, that is, the shouting of the slogan. The intent on to shout the slogan might be given up at any time before the offence is actually committed. Hence mere expression of an intention is not an offence. (*Ganga Nath J.*) NURUL HASAN *v.* EMPEROR. **1941 A.W.R. (H C.) 375 = 1941 A.L.W. 1084 = 1941 O.A (Supp.) 923 = 1941 A.L J 687.**

——**Rr. 34 (6) (d) and (k) and 38 (5)**—*Speech at public meeting—Exhorting audience to desist from enlisting in the army or assisting in prosecution of war—Offence.*

A person making a speech at a public meeting exhorting the audience to desist from enlisting in the army or assisting the prosecution of the war in any manner

DEFENCE OF INDIA RULES (1939), R. 121.

is guilty of "prejudicial acts" as defined by R.34 (6) (*d*) and (*k*) of the Defence of India Rules, and is liable to conviction under R. 38 (5). (*Lakshmana Rao, J.*) SRINIVASA RAO *v.* EMPEROR. **196 I C. 543 = 53 L.W. 711 = 42 Cr.L.J. 895 = (1941) M.W.N. 446 A.I.R. 1941 Mad. 687.**

——**R. 38 (1) (a)**—Charge of offence amounting to sedition—Cognizance on report of public servant—Competency of Court to take—Complaint by or under the authority of Provincial Government—If necessary—Cr. P. Code, S. 196—Scope. *See* 1940 Dig., Col. 567. RAMANUJA AYYANGAR, *In re.* **I.L.R (1941) Mad. 169 = 195 I.C. 49 = 14 R.M. 115 = 42 Cr L.J. 652 = A I.R. 1941 Mad. 363 = (1940) 2 M.L.J. 830.**

——**R. 90-B (3) (a)**—*Offence—Money found on person on search in excess of limit prescribed—Person not ordered or asked to declare details of money—Conviction—Sustainability.*

It is a condition precedent to liability under R. 90-B (3) (*a*) of the Defence of India Rules, 1939, that the officer of Customs should order a person (such a traveller) to declare with full details the money and gold which he had with him. Where there is no evidence of such an order having been made or even a request to the person concerned to make a declaration, he cannot be convicted under R. 90-B (3) (*a*) on the mere ground that on a search money in excess of the limit prescribed was found on his person. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GHULAMALLI HUSSAIN. **43 Bom L.R 872 = A.I.R. 1941 Bom. 412.**

——**R. 90-B (4) and (6)**—*Search—Money found in excess of limit allowed—Order as to disposal—Jurisdiction of Court—Cr. P. Code, S. 517—If subject to R. 90-B (6).*

Where a person is properly searched by a Customs Officer under sub-R. 4 of R. 90-B of the Defence of India Rules and such person is found to have in his possession money in contravention of R. 90-B (2) read with R. 121, the Customs Officer is entitled to seize the money in excess of that amount which is permitted to be carried. Money up to the limit permitted cannot be seized but must be refunded to the searched person. The excess found has, under R. 90-B (6), to be disposed of in such manner as the Central Government may direct The money properly seized never becomes subject to the jurisdiction of the Court by which the person searched is tried for his offence, and the Court has no jurisdiction to make any order as to the disposal of such money. R. 90 B (6) prevails over S. 517, Cr. P. Code, in view of S. 3 of the Defence of India Act. The Court has only jurisdiction to determine whether property has been rightly seized under R. 90-B (4) ; but if it comes to the conclusion that the property was rightly seized, it has no jurisdiction to make any order as to its disposal. That is entirely a matter for the Central Government. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GULAMALLI HUSSAIN. **43 Bom.L R. 872 = A.I.R. 1941 Bom. 412.**

——**R. 121**—*'Preparatory act'—What amounts to—Intimation to magistrate of intention to shout anti-war slogans—If offence.*

Rule 121 of the Defence of India Rules does not make mere intention to contravene any of the provisions of the Rules punishable. It makes attempt abetment, and acts preparatory to the contravention of the rules punishable, but not mere intention to contravene them. The act preparatory to the contravention of the rules, is presumably one that prepares the way (*i.e.*) facilitates the contravention of the rules, in some manner or other and not merely an act which precedes the contravention

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of the rules, but does not facilitate the contravention in any way. The mere sending of a letter by a person to the District Magistrate intimating that he intended to shout anti-war slogans does not constitute an act "preparatory to" the contravention of rules framed under the Defence of India Act, within the meaning of Rule 121 and is not an offence punishable under that rule. (*Bhide, J.*) HIGH COURT BAR ASSOCIATION LAHORE *v.* EMPEROR. 195 I.C. 674 = 14 R.L. 90 = 1941 A.Cr.C. 162 = 42 Cr.L.J. 765 = 43 P.L.R. 396 = A.I.R. 1941 Lah. 301.

——Rules under R. 130-A (b)—*Scope—If* ultra vires—*Offences under the Act—Bail—Right of accused to be released on bail—Cr. P. Code—Applicability.*

R. 130 A, Cl. (*b*) of the rules framed under the Defence of India Act of 1939 is *ultra vires* the Central Government. A power given to make rules with regard to arrest and trial by S. 2 (3)(1) of the Act, implies a power to make rules for the custody of persons pending trial even apart from the general power conferred by S. 2 (1). Hence no person accused of an offence under the Defence of India Act or the rules there under can be released on bail unless the Court is satisfied that there are reasonable grounds for believing that he is innocent. In respect of offences, under the Defence of India Act, that Act governs all other statutory provi-ions and therefore the provisions of the Criminal Procedure Code with regard to bail do not apply. The trial of such offences is governed by the special rules under the Act. though the offences are now tried in the ordinary Criminal Courts and not by special tribunals. (*Leach, C.J. and Happell, J.*) BHUVARAHA AIYANGAR, *In re.* (1941) 2 M.L.J. 1014.

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 2—"*Agriculturist*"—*Meaning of —Privilege if hereditable or acquired by birth.*

A person, in order to claim the status of an agriculturist, must prove that he ordinarily engaged personally in agricultural labour, that is, he was regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough. The privilege of an agriculturist is not hereditable, but personal; nor can that privilege be acquired by birth. (*Wassoodew, J.*) GANGADHAR KASHINATH *v.* DATTATRAVA VISHVANATH. 194 I.C. 602 = 14 R.B. 1 = 43 Bom.L.R. 341 = A.I.R. 1941 Bom. 209

——S. 10-A—*Applicability—Right to benefit of—Condition precedent—Proof that plaintiff was agriculturist at date of suit—Necessity.*

If a plaintiff in a suit for redemption of a mortgage invokes the Court's jurisdiction under S. 10 A of the Dekkhan Agriculturists' Relief Act, he must be an agriculturist within the meaning of S. 2 of the Act at the date when the suit is instituted. S. 10-A requires that there should be an agriculturist plaintiff to a suit for redemption at the time of its institution. It is not sufficient if he acquires such status pending the suit. (*Wassoodew, J.*) GANGADHAR KASHINATH *v.* DATTATRAYA VISHVANATH. 194 I.C. 602 = 14 R.B. 1 = 43 Bom.L.R. 341 = A.I.R. 1941 Bom. 209.

——S. 15 B—Applicability—Suit on mortgage—Defendant not agriculturist at time of preliminary decree—Subsequent acquisition of status before final decree—Right to claim relief. *See* 1940 Dig., Col. 568. SIDDAPPA GANGAPPA *v.* RAMACHANDRA VISHNU. I.L.R. (1941) Bom. 59 = 13 R.B. 290 = 192 I C. 820 = A.I.R 1941 Bom. 30.

——S. 22—"*Belonging to*" — *Interpretation—It refers to beneficial title.*

DIVORCE ACT (1869), S. 7.

The expression "belonging to" in S. 22 of the Dekkhan Agriculturists' Relief Act not being a term of art refers to the beneficial title, and the question which has to be determined is whether at the critical moment the party to whom the property belongs beneficially is an agriculturist. (*Beaumont, C.J. and Sen, J.*) VISHVANATH VITHALSA *v.* BALARAM ANANDRAM. I.L.R. (1941) Bom. 431 = 197 I.C. 72 = 43 Bom.L.R. 325 = A.I.R. 941 Bom. 186.

——S. 22—*Construction—Question of status raised at time of order for attachment—Adverse decision—Right to raise plea again at time of order for sale.*

S. 22 of the Dekkhan Agriculturists' Relief Act must be read literally, and it must be held that where there is not a single order for attachment and sale, but there is an order for attachment alone intended to be followed by an order for sale, it is open to the judgment-debtor to set up his status of an agriculturist both when an order for attachment is sought and also subsequently on the application for an order for sale. A decision adverse to the judgment-debtor on his plea of being an agriculturist raised at the time of the order for attachment does not preclude him from raising the question again at time of the order for sale. The matter is not *res judicata*. (*Beaumont, C.J. and Sen, J.*) VISHVANATH VITHALSA *v* BALARAM ANANDRAM. I.L.R. (1941) Bom 431 = 197 I.C. 72 = 43 Bom.L.R. 325 = A I.R. 1941 Bom. 186.

DISSOLUTION OF MUSLIM MARRIAGES ACT (1939), S. 2 (ii)—*Failure to maintain—If must be wilful.*

There is nothing in the wording of S. 2 (ii) to suggest that the failure to maintain the wife must be wilful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever. (*Beckett, J.*) MANAK KHAN *v.* MT. MULKHAN BANO. 194 I.C. 567 = 14 R.L. 1 = A.I R. 1941 Lah. 167.

—— S. 2 (ii)—*Retrospective effect.*

When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should be applied even though this may involve giving retrospective effect to some of its provisions. Consequently, S. 2 (*ii*) must be taken as intended to apply with retrospective effect. (*Beckett, J.*) MANAK KHAN *v.* MT. MULKHAN BANO. 194 I C. 567 = 14 R.L. 1 = A.I R. 1941 Lah. 167.

DIVORCE—Costs of wife for defence—Husband, if should pay for—Default in payment—Procedure. *See* 1940 Dig., Col. 569. YAQUB MASIH *v.* CHRISTINA MASIH. I.L.R (1940) All. 802 = 192 I C. 831 = 13 R A. 368 = A.I.R. 1941 All. 93.

——Order for custody of child—Form—Limitation of period—Practice. *See* 1940 Dig., Col. 569. DORIS ROYSTON *v.* FREDERICK ROYSTON. 191 I C. 797 = 13 R.R. 152.

DIVORCE ACT (VI OF 1869), S. 3 (3)—Jurisdiction—Parties belonging to and marrying at place within jurisdiction of Court at Mangalore—Last place of residence together—Husband leaving for Rangoon but having no fixed residence there though employed there—Jurisdiction of Mangalore Court to entertain application by wife. *See* 1940 Dig., Col. 570. JOHN BAPTIST D'SOUZA *v.* LIZZIE JANE LOBO. 193 I C. 382 = 13 R.M. 652.

——S. 7—Procedure—Petition for judicial separation by wife on ground of adultery and cruelty—Decree—

DIVORCE ACT (1869), S. 8.

Subsequent petition for dissolution of marriage on same grounds—Competency — Fresh evidence of adultery alone in subsequent petition—Sufficiency for decreeing dissolution. *See* 1940 Dig., Col. 570. MANJULA BAI *v.* JANOJI RAO. **191 I.C. 430 = 13 R.M 495 = (1940) 1 M.L.J. 210.**

——**S. 8**—"*High Court*"—*Meaning of*—*Application under section*—*To whom to be made.*

The expression "High Court" as used in S. 8 of the Divorce Act does not mean either the original or the appellate side of the High Court, but means the High Court as one whole. But the litigant, when he wants to have an order under that section, would have to approach that particular department of the High Court which is empowered to deal with this matter by its rules framed under S. 13 of Act 24 and 25, Vict., Chap. 104, which is substantially repeated in S. 108 of the Government of India Act, 1919 and S. 223 of the Government of India Act, 1935. (*Mukherjea and Roxburgh, JJ.*) MALATI *v.* SURENDRA NATH. **I.L.R. (1941) 2 Cal. 373 = 45 C W.N. 916.**

——**S. 10**—*Ground for divorce*—*Adultery committed outside India.*

A husband praying for the dissolution of his marriage on the ground that his wife had been guilty of adultery, is entitled to rely upon adultery committed by her outside India. (*Henderson and Edgley, JJ.*) G. AYNSLEY CLIFFORD *v.* EVID CLIFFORD. **45 C.W.N. 249.**

——**S. 10**—Hindu marrying christian wife—Second marriage with Hindu during subsistence of first marriage—If a ground for divorce. *See* 1940 Dig., Col. 571. CHITNAVIS *v.* CHITNAVIS. **I.L.R. (1941) Nag. 260.**

——**S. 10**—*Petition*—*Contents.*

Evidence in divorce proceedings to prove the case of the petitioner must be confined to the pleas set out in the petition. Consequently it is essential, as laid in S. 10 to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded. (*Mya Bu, Dunkley and Shaw, JJ.*) MA DUN MAY *v.* SAW JAMES. **193 I.C 301 = 13 R.R. 24 = A.I.R. 1941 Rang. 110.**

——**Ss. 12 and 14**—*Duty of Courts to consider matters mentioned in*—*Undefended case.*

It is obligatory on a Court entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in Ss. 12 and 14 and that obligation is not extinguished by the mere fact that the case is an undefended one. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) THOMPSON *v.* THOMPSON. **195 I.C. 325 = 14 R.R. 37 = A.I.R. 1941 Rang. 193 (S.B.).**

——**S. 14**—*Delay*—*Discretion to excuse*—*When can be exercised.*

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. (*Mya Bu, Dunkley and Shaw, JJ.*) MA DUN MAY *v.* SAW JAMES. **193 I.C. 301 = 13 R.R. 241 = A.I.R. 1941 Rang. 110 (F.B.).**

——**S. 17**—*Decree absolute*—*Allegation as to husband's adultery not substantiated.*

Where the wife has made allegations before the District Judge that her husband was committing adultery by keeping a mistress, the decree against her ought not to be made absolute without further inquiry. And where the allegations made by the wife are denied by the husband, and the wife though given an opportunity to prove the truth of her allegations, declines to cite witnesses and there is in fact no evidence to support her allegations, the decree may be made absolute. (*Roberts, C.J., Dunkley and Blagden, JJ.*) SAW TUN WIN *v.* MA HNIN BYU. **196 I.C. 412 = 14 R.R. 88 = A.I.R. 1941 Rang. 249 (S.B.).**

EASEMENTS ACT (1882), S. 7.

EASEMENT—*Acquisition*—*Compromise conferring right to construct bundh on another's land*—*Easement to maintain bundh*—*Right to repair bundh*—*If acquired.*

Where a compromise confers upon the defendant a right to construct a bundh on the plaintiff's land the defendant cannot set up adverse possession with regard to the land and can claim nothing more than a right of easement to maintain a bundh on the land. The right to repair the bundh must be presumed in defendant's favour, such right being incidental to the existence of the bundh. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I.C. 313 = 14 R.P. 100 = 22 Pat.L.T. 699 = 7 B.R. 897 = A.I.R. 1941 Pat. 260.**

——*Acquisition*—*Grant*—*Presumption from long user.*

A right of easement which has been enjoyed for a very long time must be referred to a legal origin and therefore the owner of the servient tenement must be presumed to have granted the right to the dominant tenement. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I.C. 313 = 14 R.P. 100 = 22 Pat.L.T. 699 = 7 B.R. 897 = A.I.R. 1941 Pat. 260.**

——*Right of way*—*Obstruction by stranger*—*Right of action*—*If exists when right has not been acquired by prescription.*

A person who is in enjoyment of an easement, such as a right of way, but who has not acquired a title to it by prescription or otherwise, cannot ordinarily maintain an action to prevent its obstruction by a stranger. An action can only be maintained in very exceptional cases where access to his land would otherwise be cut off altogether or if the obstruction to the user of the right of way will have the effect of substantially depriving a person of the enjoyment of his property. (*Leach, C.J., Venkataramana Rao and Horwill, JJ.*) VENKATANARASIMHARAJU *v.* RAMASWAMI. **I.L.R. (1941) Mad. 367 = 194 I.C. 130 = 13 R.M. 743 = 1941 M W.N. 20 = 53 L.W. 8 = 1941 A.W.R. (Supp.) 1 = 1941 O.A. (Supp.) 58 = A.I.R. 1941 Mad. 176 = (1941) 1 M.L.J. 145 (F.B.).**

EASEMENTS ACT (V OF 1882)—*Principles underlying*—*Applicability to Bengal.*

It is true that the Easements Act does not apply to the Province of Bengal but nevertheless the principles underlying that Act have often been applied in deciding questions regarding the right of easement. (*Sen, J.*) BARODA PRASAD PAL *v.* ASUTOSH PAL. **A.I.R. 1941 Cal. 289.**

——**Ss. 5, 15 and 47**—*Right of repairs*—*If extinguished by non-user for two years prior to suit.*

The right of repairs being a discontinuous easement is not extinguished even though it was not enjoyed within two years next preceding the suit. (*Nivogi, J.*) DHONBA *v.* BAYABAI. **1941 N L.J. 655.**

——**S. 7 (b)**—*Right to discharge surface water on land at lower level*—*Nature of*—*Such right, if may be extinguished*—*Change in original disposition of lands*—*Effect of.*

It is now well settled that the right of an upper landowner to throw his surface water on to land at a lower level is a natural right, and not in the strict sense of the word an easement. In other words, it is a right which is not acquired, but is an incident of property owing its origin to the disposition and arrangements of nature. It is incapable, therefore, of being lost by

non-user or extinguished permanently, and the maxim "*tantum prescriptum quantum possessium*" has no application. But these natural rights and liabilities may be altered by contract or grant, express or implied, as well as by enjoyment of an adverse easement obstructing the flow of the water from the higher to the lower ground. It follows, therefore, that if any artificial alteration is made in the configuration or disposition of the lands or any conditions are otherwise created affecting the exercise by the upper owner of his natural right to discharge his surface water to the lower level such as by excavating a khal or channel between the two tenements then this fact alone will not be sufficient to determine whether the natural right is thereby merely suspended for the time being or finally extinguished. The purposes for which, and the circumstances in which, the altered conditions are brought into existence as well as the subsequent mode of user or enjoyment will all have to be looked into. If, for instance, the khal appears to be only an arrangement made by the 'servient' owner in his own land for the reception of the waters coming from above, this will not in fact constitute even a temporary interruption of the natural right, but will really be one mode of submitting to the exercise of such right. If, on the other hand, it should appear that the khal has been excavated by the "dominant" owner with the express idea of relieving the lower land of the burden which rests on it by virtue of its natural position, this may well be regarded as a permanent abandonment of the natural right, and there can accordingly be no question of its revival at a later stage, merely because the khal no longer serves as a proper means of drainage. It may also well be that though there is no express abandonment, still an abandonment may be inferred from the fact of long and continuous interruption of the natural right caused by the khal and submitted to by the dominant owner. The facts may, again, show that the khal is only such interruption of the natural right on the part of the owner of the servient land as to constitute no more than an adverse easement in which case of course the natural right merely remains suspended so long as the easement remains operative by actual enjoyment. Where in addition to the khal the servient owner takes other measures, such as putting up a bund or embankment, to obstruct the flow of the water from the higher level to his land, the adverse enjoyment may easily be supposed to continue even after the khal is silted up. (*Biswas, J.*) NATABAR SASMAL *v.* KRISHNA CHANDRA.

74 C.L.J. 95.

——S. 13—*Easement of necessity—Right of way—Extent.*

Under S. 13 (*a*) of the Easements Act a person is entitled to get a way for enjoying his *barwarchi khana*. He is entitled to a way up to the public road. (*Agarwal, J.*) HASAN BAHADUR *v.* ABIDA. **194 I.C. 859 = 14 R.O. 43 = 1941 A.W.R. (Rev.) 529 = 1941 O.L.R. 530 = 1941 O A. 517 = A.I.R. 1941 Oudh 585.**

——S. 13 (d)—*Common ownership— Subsequent transfer—Transferor's right to irrigate his field from the fields transferred—Nature of easement.*

The scheme of S. 13, Easements Act, is perfectly clear. It provides for six different situations which may arise where one person transfers or bequeaths immovable property. Cls. (*c*) and (*d*) deal with the effect on the transferor's rights. The dominant heritage is only entitled to the quasi-easements if they are apparent and continuous, where property was originally in the ownership of two brothers and after partition one of the brothers sells certain of his plots to another and the

latter obstructs, the irrigation of the transferor's lands from the lands transferred, the transferor can claim such a right even though the deed of transfer is silent on the point. The easement claimed is an apparent and continuous easement and it must be deemed to have been reserved by the transferor when he parted with the other fields. (*Clarke, J.*) RAMLAL *v.* RAKHDU PANDU.

197 I.C. 17 = 1941 N L J. 415 = A.I.R. 1941 Nag. 287.

——S. 15—*Lessor and lessee—Acquisition of right by lessee as against lessor.*

It is true that a lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming title thereto and of right within the meaning of the third clause of S. 15 of the Easements Act; in such a case the tenant's occupation is in the sight of the law that of his landlord. But where a lessee of land owns a building built upon land leased to him, he may, so far as the use of light and air or support for his building is concerned, acquire rights of easement in respect of such light, air or support under Cls. (1) and (2) of S. 15, and these rights cannot be objected to as being incapable of being acquired by him on behalf of his lessor as well as against him, for those rights are acquired by him for himself, and for none other than himself, as owner of the building. (*Davis, C J. and Tyabji, J.*) HAJI ABDULLAH HAROON *v.* MUNICIPAL CORPORATION OF KARACHI.

I.L.R. (1941) Kar. 381 = A.I.R. 1941 Sind 211.

——S. 15 (3)—"*Claiming title thereto*"—*Construction.*

The words "claiming title thereto" in the third clause of S. 15 of the Easements Act cannot be interpreted merely as referring to the plaintiff or the defendant, as the case may be, claiming a title to an easement in the litigation going on. These words were not introduced by accident to the third clause of S. 15, and they are not a meaningless addition to it. They indicate a very important requirement to make prescription for such easements as come within that clause effective. Under that clause it is not sufficient for the purpose of prescribing for the easements covered by the clause that they should have been enjoyed with a dominant tenement as an easement without interruption and for twenty years. They must have been enjoyed openly and by persons claiming title to them as easements and as of right. (*Reilly, C.J. and Subramanya Aiyar, J.*) RAMAMURTHI *v.* NARASAMMA.

19 Mys.L.J. 339.

——S. 18—Customary easement—Requisites. *See* 1939 Dig., Col. 515. GANPATRAO *v.* SHEIKH BADAR.

I.L.R. (1941) Nag. 460.

——S. 29—*Right to let out drain water—Putting up of a pipe in a well—If increases burden of easement.*

Where drain water has been passing through a drain over another's lands and from there on to the public way, from the putting up of a pipe in a well in the dominant owner's land, it could not be inferred as a matter of law that there has been so much increase in the burden of easement as to destroy the easement. (*Dar, J.*) BHOLA NATH *v.* PAHALWAN SINGH.

195 I.C. 364 = 14 R.A. 27 = 1941 A.L.J. 282 = 1941 A.W.R. (H.C.) 171 = 1941 O.A. (Supp.) 337 = 1941 R.D. 366 = 1941 A.W R. (Rev.) 377 = 1941 A.L.W. 507 = A.I.R. 1941 All. 289.

——S. 33—*Burden of proof—Action for infringement—What plaintiff has to prove.*

In an action for an injunction to restrain infringement of the right to light and air, the plaintiff, in order to succeed, must prove an invasion of his legal right to the easement, sufficient to amount to a nuisance. The

EASEMENTS ACT (1882), S. 33.

easement has not to be measured by the amount of light and air that had been enjoyed. There is no infringement unless that which has been done amounts to a nuisance. A finding that the place still remained a well lighted and well ventilated place, in spite of the alleged infringement, would be fatal to the plaintiff's case, as under S. 33 of the Easements Act the plaintiff cannot succeed in a suit for disturbance of an easement unless he proves substantial damage. The quantity of light to which a right can be acquired is what is required for the ordinary purposes of inhabitance or business of the tenement according to ordinary notions. (*Davis, C.J. and Tyabji, J.*) HAJI ABDULLAH HAROON *v.* MUNICIPAL CORPORATION OF KARACHI.

I.L.R. (1941) Kar. 381 = A.I.R. 1941 Sind 211.

——**S. 33**—Construction and scope—Light and air—Obstruction to—Blocking up of window not causing actual damage—Suit for injunction—Cause of action—Relief—Award of damages. *See* 1940 Dig, Col. 573. SOFIA BI BI SAHEBA *v.* VASUDEVA CHETTY.

191 I.C. 832 = 13 R.M. 513 = (1940) 2 M.L.J. 381.

——**S. 33**—*Substantial damage—What amounts to—Test—Onus.*

In order to establish substantial damage under S. 33 of the Easements Act, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which can be ascribed to the interruption of the free passage of light and air. The state of the property at the time of the alleged disturbance of the easement has to be looked to. not as it was before, or as it might be at a future date. The plaintiff cannot claim that sources of light and air alleged to be liable to obstruction at a later date, should be excluded from consideration. (*Davis, C. J. and Tyabji J.*) HAJI ABDULLAH HAROON *v.* MUNICIPAL CORPORATION OF KARACHI.

I.L.R. (1941) Kar. 381 = A.I.R. 1941 Sind 211.

——**S. 46**—*Owners of dominant tenement acquiring right of co-sharer in servient tenement—Easement, if extinguished.*

Before there can be any extinguishment of an easement, there must be a merger of the servient and dominant tenements so as to result in the single ownership of both. Where the owner of the dominant tenement acquires the right of a co-sharer in the servient tenement, the ownership of the two tenements does not merge into one and therefore there is no extinguishment but merely a suspension of the easement (right of way) which can revive after a partition decree. (*Sen, J.*) BARODA PRASAD PAL *v.* ASUTOSH PAL.

A.I.R. 1941 Cal. 289.

——**S. 56**—*Licence—Transfer contrary to law—Effect.*

Obiter.—A transfer by a licensee in favour of a third person which contravenes the provisions of S. 56 of the Easements Act, makes the transferee who is not in possession a trespasser as against his transferor, a rank trespasser as against the original grantor who will at once have a right to eject the transferee. (*Yorke and Ghulam Hasan, JJ.*) HIRDEY NARAIN *v.* BABU RAM.

191 I.C. 885 = 13 R.O. 316 = 1941 O.L.R. 69 = 1941 A.W.R (C.C.) 22 = 1940 O.A. 1251 = 1940 O.W.N. 1318 = A.I.R. 1941 Oudh 172.

——**S. 60**—Revocation—Licensee building works of permanent nature—Licensor's right to revoke licence. *See* 1940 Dig.. Col. 775. JAGAT SINGH *v.* DISTRICT BOARD, AMRITSAR.

I.L.R (1941) Lah. 413 = 94 I.C. 518 = 13 R.L.540 = 43 P.L.R. 544.

ELECTRICITY ACT (1910), S. 9.

——**S. 60**—*Trees planted under—If go with land—Right of licensee to remove—Principles.*

Trees planted under a licence do not go with the land and the person who planted the trees is entitled to cut and remove them; but he should restore the land in the condition in which it was before the trees were planted. The principle applicable to removal of buildings on another man's land would also apply to trees. (*Pandrang Row, J.*) VELAYUDHA MAISTRY *v.* MARI AMMAL.

1941 M.W.N. 87 = 53 L.W. 230 = A.I.R. 1941 Mad. 379 = (1941) 1 M.L.J. 161.

EAST INDIA COMPANY ACT (1773), S. 36—*Power to legislate—If confined to Calcutta.*

Section 36 empowered the Governor General in Council to legislate not only for the settlement at Fort William but also for other factories and places subordinate or to be subordinate thereto. (*Harries, C.J., Fazl Ali and Manohur Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR.

20 Pat. 573 = 194 I.C. 663 = 14 R.P. 17 = 7 B.R. 818 = 1941 I.T.R. 386 = 4 F.L.J. (H.C.) 178 = 22 Pat.L.T. 863 = A.I.R. 1941 Pat. 306 (S.B.).

EJECTMENT—*Suit for—Who can maintain.*

A person suing another for Khas possession must, no doubt, show a better title in him than the defendant, and must establish that he has the present right to get possession of the property. But it cannot be said that none but an owner can maintain a suit for ejectment. (*Mukherjea, J.*) DISTRICT BOARD OF TIPPERAH *v.* SARAFAT ALI.

195 I.C. 594 = 14 R.C. 117 = 73 C.L.J. 281 = A.I.R. 1941 Cal. 408.

ELECTION—*Corruption—Effect on election—Test.*

Where corruption has been proved as against a person elected, it is the duty of Court in each case to look to the particular circumstances, and especially to the number of votes recorded and to the majority obtained, to see whether the result may have been affected by the corruption proved. The absolute majority obtained is an important ingredient in deciding this. If the return could have been affected by the corruption the election should be held invalid. It is not sufficient to show that it has not in fact been affected. (*Sharpe, J.*) WILCOX *v.* PATEL.

1941 Rang.L.R. 638.

ELECTRICITY ACT (IX OF 1910), S. 9 (2)—Applicability—Issue of debenture bonds, without sanction of Government—Debenture trust deed, transferring property to trustees, and creating a charge—Extent of its validity. *See* 1940 Dig., Col. 574. MANMOHAN DAS *v.* OFFICIAL LIQUIDATORS.

192 I.C. 367 = 13 R.A. 318.

——**S. 9 (2)**—*'Transfer'—Creation of charge, if amounts to.*

Per *Full Bench.*—A 'charge' is a 'transfer' within the meaning of sub-S. (2) of S. 9 of the Indian Electricity Act.

Per *Iqbal Ahmad, C.J.*—Even though a 'charge' may not be a 'transfer' within the meaning of the Transfer of Property Act, there is no adequate reason to give a restricted meaning to the word transfer in the Electricity Act; the more so as the last mentioned Act is not in *pari materia* with the Transfer of Property Act. The word transfer is used in S. 9 (2) in a wide sense as embracing the transactions which either in present or in future may lead to the passing of the undertaking from one person to another. (*Iqbal Ahmad, C.J., Allsop and Yorke, JJ.*) U. P. GOVERNMENT *v.* MANMOHAN DAS.

196 I.C. 425 = 14 R.A. 161 = 1941 A.W.R. (H.C.) 269 = 1941 A.L.J. 518 = 1941 O.A. (Supp.) 727 = 1941 A.L.W. 880 = A.I.R. 1941 All. 345 (F.B.).

ELECTRICITY ACT (1910), S. 12.

——**S. 12**—*Jurisdiction of Civil Court—Questions whether bracket should be fixed on particular private wall by licensee and whether owner of wall should be given compensation.*

The Civil Courts have no jurisdiction to decide as to whether a bracket should be fixed on a particular private wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it. It is entirely for the District Magistrate to decide these questions. (*Mir Ahmad, J.*) AMAR SHAH SINGH *v* KHATTAR ELECTRICAL ENGINEERING AND GENERAL SUPPLY CO., LTD. **196 I.C. 547 = A.I.R. 1941 Pesh. 73.**

——**S. 22**—*Licensee failing to supply energy—Consumer's right and remedy—Scheme of the Act—Bar of jurisdiction of civil Court.*

A person entitled to supply of energy under S. 22 of the Electricity Act, has a cause of action for a suit for damages on account of a licensee's failure to supply energy according to S. 22 and para. VI to the schedule. A civil Court including the Judge, Small Cause Court has jurisdiction to entertain such suit. From the general scheme of the Act it is clear that most of the disputes are to be decided by arbitration. If the intention was to bar the civil remedy a similar provision would have been inserted for the breach of S. 22 also. (*Ismail and Mulla, JJ.*) JAI RAJ BEHARI *v.* U. P. ELECTRIC SUPPLY CO. LTD. **I.L.R. (1941) All. 425 = 195 I.C. 659 = 14 R.A. 69 = 1941 A.L.J. 331 = 941 A.W.R. (H.C.) 198 = 1941 O.A. (Supp.) 412 = 1941 A.L.W. 450 = 1941 O.W.N. 606 = A.I.R. 1941 A. 301.**

——**S. 44 (d)**—*Prosecution under—Onus of proof.*

The latter part of S. 44 of the Electricity Act does not exonerate the prosecution from discharging the onus which lies on it to show that there has been improper use of the energy of a licensee, but merely provides that in case there has been such improper use, the consumer himself will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. (*Edgley, J.*) A. C. MAJUMDAR *v.* EMPEROR. **I.L.R. (1940) 2 Cal. 571 = 193 I.C. 746 = 13 R.C. 472 = 42 Cr.L.J. 472 = A.I.R. 1941 Cal. 87.**

ELECTRICITY RULES (1922), R. 40-A—*Bombay Government Notification dated* 15-11-1934—"*Their own works*"—*Interpretation of*—"*Works*"—*Meaning of.*

The words "their own works" in the notification dated 15-11-1934, issued by the Government of Bombay under R. 40-A of the Electricity Rules, 1922, cannot be interpreted as being limited to works carried out on the premises of the various bodies referred to there. The words mean works carried out by the exempted bodies themselves or perhaps works belonging to them; and by "works" is meant the kind of works referred to in the rule and not the kind of works referred to in the definition in the Electricity Act. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v* RAGHUNATH RAMCHANDRA **194 I.C. 554 = 13 R.B. 374 = 42 Cr.L.J. 588 = 43 Bom L.R. 99 = A.I.R. 1941 Bom. 100.**

——**R. 40-A**—*Electricity Rules*, 1937, *R.* 48—*Applicability—Installation works carried out after March*, 1937 *and before 22nd March*, 1938—*General Clauses Act* (1937), *S.* 24.

R. 48 of the Indian Electricity Rules, 1937, introduced by the Notification dated 27 3 1937, did not come into force until 22 3-1938; and R. 48 cannot therefore apply to any installation works carried out before 22 3 1938, and after March 1937. Nor would the old R. 40-A of the Electricity Rules, 1922, apply, because under the Notification of 23-3-1937, the old R. 40-A was superseded when the new rules were made applicable on 27-3-1937. S. 24 of the General Clauses Act of 1897 is of no avail in such a case and R. 40-A of the old rule cannot be regarded as superseded only when the new R. 48 came into force, because the notification of March, 1937, expressly superseded the rules of 1922. Further S. 24 of the General Clauses Act would come into operation where a Central Act or Regulation has been repealed and re-enacted, and neither a Central Act nor a Regulation would include a rule made under an Act. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* RAGHUNATH RAMCHANDRA. **194 I.C. 554 = 13 R.B. 374 = 42 Cr.L.J. 588 = 43 Bom L.R. 99 = A.I.R. 1941 Bom. 100.**

EVIDENCE.

ELECTRIC SUPPLY — *Rules*—"*Commercial premises*"—*Meaning of*—*Coffee-hotel.*

"Commercial premises" in the context of the classification rules for electric supply by an electric licensee means nothing more than "premises used for purposes of business." The words cannot be read as being in contradiction to trade premises. Premises used for running a coffee hotel must be regarded as "Commercial premises" for the purpose of fixing rates for the supply of electric energy. (*Patanjali Sastri, J.*) PALGHAT ELECTRIC CORPORATION, LTD. *v.* VEERARAGHAVA AYYAR. **1941 M.W.N. 253 = 53 L.W. 359 = A.I.R. 1941 Mad. 439 = (1941) 1 M.L.J. 411.**

EMIGRATION ACT (VII OF 1922), Ss 25 (2) (b) and 30 (3)—Applicability—"Assistance"—Meaning of. *See* 1940 Dig., Col. 575. PUBLIC PROSECUTOR *v.* MAHOMED ABDULLAH. **42 Cr.L.J. 26.**

ESCHEAT—*See* CROWN.

ESTOPPEL. *See* (1) EVIDENCE ACT, SS. 115 & 116.
(2) PRACTICE—ESTOPPEL.

EVIDENCE— *Admissibility—Book on history and social customs—Author alive and available but not called as witness—Admissibility of book in evidence to prove custom—Reference to book in appeal—If justified when custom has not been pleaded.*

Reference to a work of history and social customs at the appellate stage of a case in proof of a custom which has not been pleaded is irregular and must be avoided. Such a work by an author who is alive and available as a witness to the custom set up is inadmissible in evidence when the author is not called as a witness and no reason is adduced for not calling him. (*Agarwala, J.*) MANU ORAON *v.* ABRAHAM ORAON. **192 I.C. 290 = 7 B.R. 374 = 13 R.P. 450 = 21 Pat L.T. 1118 = 1940 P.W.N. 1040 = A.I.R. 1941 Pat. 146.**

——*Admissibility—Conditional order as to — Propriety.*

There can be no conditional admissibility of a document. There cannot be an order that while a document is inadmissible as lease, it is admissible as a receipt. If it is held to be not a lease, it can be admitted unconditionally. But if it is held to be a lease, it cannot be admitted as a receipt. (*Shirreff, J.M. and Sathe, A.M.*) GAINDA LAL *v.* MAVASI. **1941 O.A. (Supp.) 823 = 1941 A.W.R. (Rev.) 979 = 1941 R.D. 932.**

——*Admissibility—Dispute as to construction of bundh—Report by plaintiff's manager that bundh was constructed on behalf of defendant—Admissibility.*

In a dispute relating to the construction of a bundh between the parties to the suit the defendant sought to produce a report made by the plaintiff's manager containing a note to the effect that the bundh was constructed on behalf of the defendant on the ground that the manager purported to act as an agent on behalf of the plaintiff and having regard to the circumstances under which the report was made, he must be presumed to

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have been authorized by him to make the statements which were to be found in the document.

Held, that the report was admissible in evidence. (*Faz' Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO.

195 I.C. 313=7 B.R. 897=14 R.P. 100= 22 Pat.L.T. 699=A.I.R. 1941 Pat. 260.

———*Admissibility—Document required produced by witness—Demand for document not describing it fully —Admissibility of document.*

Where a document called from a witness is produced by him and that is the document required, he should be allowed to prove it so that it can be admitted in evidence, although the demand for the document does not describe it as fully as it may. (*Harries, C.J. and Manohar Lall, J.*) SUCHANDRA BHUSAN KUMAR LAL *v.* LALOO MODI. **192 I.C. 67=7 B.R. 317= 13 R.P. 397=22 Pat.L.T. 656=A.I.R. 1941 Pat. 202.**

———Adoption—Statements recorded in official documents—Value of. *See* 1940 Dig., Col. 575. ARJUNA NAIKO *v.* MODONOMOHONO NAIKO. **192 I.C. 536= I.L.R. (1941) Kar. (P.C.) 349=13 R.P.C. 144= 1941 O.L.R. 226=7 B.R. 548.**

———*Appreciation—Information gained from other cases—If can be relied on.*

A Judge cannot travel beyond the record of the case before him and rely for the rejection of an important witness in the case on information gained from other cases heard by him. (*Din Mahomed, J.*) FAZAL BEGUM *v.* HAKIM ALI. **193 I.C. 327=13 R.L. 451= A.I.R. 1941 Lah. 22.**

———Appreciation—Version spread over several consecutive stages. *See* 1940 Dig., Col. 576. NAND KISHWAR BUX ROY *v.* GOPAL BUX RAI. **I.L.R. (1940) Kar. (P.C.) 235.**

———Burden of proof—Sale in execution of decree against executor—Allegation that decree was a personal one. *See* 1940 Dig., Col. 576 DEBI CHARAN *v* SHEO SHANKAR. **16 Luck. 213=A.I.R. 1941 Oudh 146.**

———Caste—Proof—Certificate or bond containing person's own statement—Value of. *See* 1940 Dig., Col. 576. SHARIFA BEGAM *v.* COURT OF WARDS. **191 I.C. 676=13 R.L. 343.**

———*Chance witness—Value to be attached.*

A 'chance witness' whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation, though not necessarily a false witness, it is proverbially rash to rely upon such evidence. (*Sir George Rankin.*) ISMAIL AHMED PEEPADI *v.* MOMIN BIBI. **193 I.C. 209= 1941 A.L.W. 412=1941 O.W.N. 565= 194 O.L.R. 323=1941 O.A. 450= 1941 A.W.R. (P.C.) 27=7 B.R. 650= 0 R.P.C. 167=A.I.R. 1941 P.C. 11 (P.C.).**

———*Child witness—Reliability—Tests.*

The proper tests to be applied with reference to the evidence of a child witness are how consistent the story is with itselt, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. (*Agarwal and Madeley, JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 A.W.R. (C.C.) 354=1941 O.A. 943= 1941 O.W.N. 1246.**

———Criminal cases—Decisions in—Value of in civil suits. *See* 1940 Dig., Col. 576. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275= 7 B.R. 153=A.I.R. 1941 Pat. 118.**

———*Document—Genuineness—Denial and subsequent admission—Value.*

EVIDENCE ACT (1872), S. 2.

There is no ground why a party having once denied cannot on a reconsideration subsequently admit the genuineness of a document, and if this is so a Court could not be precluded from taking such document into consideration. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRIDHAR. **192 I.C. 259=13 R.O. 338= 1940 O.A. 1293=1940 O.W.N 1344= 1941 O.L.R. 93=1941 A.W.R. Rev.) 9= 1941 R.D. 6=A.I.R 1941 Oudh 189.**

———Parcha—Parcha *granted by canal authorities— Admissibility to prove possession—Evidentiary value.*

A canal *parcha* is very good evidence of possession and is admissible to prove khas possession. The canal authorities grant *parcha* for irrigation of the land to those persons whom they find in possession of land and the *parcha* has therefore great evidentiary value. (*Peck.*) BHOLA PRASAD *v.* LALDHARI KANDU. **7 B.R. 410= 1941 P.W.N. 428.**

———*Record requisitioned—When becomes evidence in the case.*

A record which has been requisitioned does not become part of the evidence in a pending case merely from the fact that it has been requisitioned. If any document or statement contained in the record are relied upon by a party then they must be duly proved and brought on the record as evidence in the pending case. (*Sathe, A.M.*) SURYAPAL SINGH *v* NAT RAM SINGH. **1941 R.D. 868=1941 O.A. (Supp.) 788= 1941 A.W.R. (Rev.) 914.**

———Registration endorsement—If proof of execution. *See* 1940 Dig., Col. 577. GANPATRAO *v.* NAGORAO. **193 I.C. 41=13 R.N. 287.**

———*Settlement record—Entry in, presumption of correctness.*

The entry in the current settlement record carries with it a strong presumption of correctness unless it is rebutted. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I.C. 313=14 R.P. 100=7 B.R. 897= 22 Pat.L.T. 699=A.I.R. 1941 Pat. 260.**

———Suspicion—Not evidence *See* 1940 Dig., Col. 577. SRI RAM MISRA *v.* EMPEROR. **1941 A.W.R. (Rev.) 64=1941 O.A (Supp.) 51= 1941 A.L.J. (Supp.) 34.**

———*Value—Evidence and affidavits filed in prior litigation—Use to which they can be put to.*

Evidence in a previous suit or affidavits filed in a previous litigation do not prove anything. Such evidence or such affidavits can be used powerfully when put to a witness as a means of destroying that witness's testimony and if the attack thus launched is successful it results in the witness leaving the box discredited. That does not however prove what is contained in his previous evidence or affidavits The matter ends with a witness discredited. (*Stone, C.J. and Bose, J.*) SAFIYABI *v.* ABDUL KARIM. **1941 N.L.J. 596.**

EVIDENCE ACT (I OF 1872), S. 2 (1)—*Evidence not authorised by Act—Exclusion of—Discretion of Judge.*

S. 2 (1) of the Evidence Act in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. (*Lord Atkin*) SRIS CHANDRA NANDY *v.* RAKHALANANDA THAKUR **I.L.R. (1941) 1 Cal. 468= 1941 P.W.N. 263=193 I.C. 220= 1941 O.A. 457=1941 A.W.R. (P.C.) 34= 1941 O.L.R. 329=7 B.R. 656=13 R.P.C. 173= 73 C.L.J. 555=I.L.R. (1941) Kar. (P.C.) 54.**

EVIDENCE ACT (1872), S. 4.

43 Bom.L.R. 794 = 1941 O.W.N. 572 = 22 Pat.L.T. 286 = 53 L.W. 469 = 1941 M.W.N. 354 = 1941 A.L.W. 419 = 45 C.W.N. 435 = A.I.R. 1941 P.C. 16 = (1941) 1 M.L.J. 746 (P.C.).

——**Ss. 4 and 114, Ill. (d)**—*Presumption as to subsistence of marriage—Power of Court to draw.*

Under S. 4, Evidence Act it is open to a Court in India upon proof of a marriage either to regard as proved the subsistence of that marriage on a later date, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of S. 4 of the Act in a judicial manner according to the circumstances of the case. (*Sir George Rankin.*) ISMAIL AHMED PEEPADI *v.* MOMIN BIBI.

193 I.C. 209 = 1941 A.L.W. 412 = 1941 O.L.R. 323 = 1941 O.A. 450 = 1941 A.W.R. (P.C.) 27 = 7 B.R. 650 = 0 R.P.C. 167 = 1941 O.W.N. 565 = A.I.R. 1941 P.C. 11 (P.C.).

——**S. 8**—Applicability—Voluntary report to police by accused subsequent to first information report. *See* CR. P. CODE, S. 162 AND EVIDENCE ACT, S. 8.

1941 O.W.N. 722.

——**Ss. 8 and 27**—*Conduct, statements and acts — Difference and relation between—Accused taking property from different places and handing them over to police—Admissibility.*

'Conduct' may in certain circumstances include statements as well as acts, but in doing so it still retains the difference between an act and a statement. A statement must consist of words, whether they be spoken, or written, or spelled out as would be done by a mute person on his fingers; and words would not always be statements. Acts however exclude words and cannot be translated into words. So where an accused takes certain articles belonging to the deceased from various places and hands them over to the police, cannot be said to be making a statement much less making a statement amounting to a confession. To such a case S. 8 of the Evidence Act applies. (*Ismail and Hamilton, JJ.*) EMPEROR *v.* NANUA. **I.L.R. (1941) All. 280 = 1941 O.A. (Supp.) 229 = 193 I.C. 873 = 1941 O.W.N. 337 = 1941 A.Cr.C. 91 = 13 R.A. 463 = 1941 A.L.W. 241 = 42 Cr.L.J. 485 = 1941 A.L.J. 86 = 1941 A.W.R. (H.C.) 65 = A.I.R. 1941 All. 145.**

——**S. 8**—*Conspiracy—Acts of conspirators—Relevancy—Conduct subsequent to the carrying out of object of conspiracy—If can be taken note of.*

What the conspirators did, that is to say, their conduct, is relevant under S. 8 of the Evidence Act and it is immaterial whether the conduct on which the prosecution relies was previous or subsequent to carrying out of the object of the conspiracy. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR.

191 I.C. 466 = 1941 O.W.N. 133 = 42 Cr.L.J. 165 = 1941 A.Cr.C. 21 = 1941 A.W.R. (C.C.) 59 = 13 R.O. 248 = 1941 A.L.W. 107 = 1941 O.A. 65 = A.I.R. 1941 Oudh 130.

——**S. 10**—*Conspiracy—Hearsay evidence as to parties to—Admissibility.*

It cannot be said that evidence which is of a hearsay nature should not be admitted under S. 10 of the Evidence Act. Any statement made by one conspirator to another indicating in anyway the complicity of a third conspirator, is a relevant fact and as such admissible. (*Zia-ul-Hasan and Bennett, JJ.*) SHYAM KUMAR SINGH *v.* EMPEROR. **191 I.C. 466 = 1941 O.W.N. 133 = 42 Cr.L.J. 165 = 1941 A.Cr.C. 21 = 1941 A.W.R. (C.C.) 59 = 13 R.O. 248 = 1941 A.L.W. 107 = 1941 O.A. 65 = A.I.R. 1941 Oudh 130.**

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——**S. 10**—Statement by co-conspirator after completion of conspiracy—Admissibility. *See* 1940 Dig., Col. 578. MIRZA AKBAR *v.* EMPEROR. **67 I.A. 336 = I.L.R. (1940) Lah 612 = I.L.R. (1940) Kar. P.C. 302 = 1941 O.W.N. 43 = 43 Bom.L.R. 20 = 45 C.W.N. 269 = 43 P.L.R. 69 = 1941 A.L.W. 48 = 73 C.L.J. 252 = 1941 A.Cr.C. 11 = (1940) 2 M.L.J. 811 (P.C.).**

——**S. 13**—Custom of sale by ryots of houses—Copies of sale deeds—Admissibility. *See* 1940 Dig., Col. 758. NARAIN SINGH *v.* NET RAM.

I.L.R. (1940) All. 726 = 192 I.C. 570 = 13 R.A. 335.

——**S. 13**—*Judgment* inter partes—*Finding not operating as* res judicata—*Value of.*

Although a finding in a previous suit *inter partes* does not operate as *res judicata*, it is the paramount duty of the party against whom it is given to displace that finding. (*Syed Nasim Ali and Rau, JJ.*) SAMBHU NATH BHAKAT *v.* SREE SREE SRIDHAR THAKUR. **73 C.L.J. 76.**

——**S. 13**—*Judgment not* inter partes — *Admissibility.*

A judgment in a prior suit between parties different from those to a later suit though it cannot operate as *res judicata* in respect of the matters decided by it, may yet be admissible in evidence as material evidence on any particular issue common to both the suits. (*Harper, S.M.*) PIRAN KOER *v.* DALLU.

1941 A.W.R. (Rev.) 433 = 1940 R.D. 623 = 1941 O.A. (Supp.) 559 = 1941 R.D. 480.

——**S. 13**—Sale certificate—Admissibility. *See* 1940 Dig., Col. 579 BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSE. **191 I.C. 824 = 13 R.C. 285.**

——**S. 13**—Statement as to tenancy right in village by Kulkarni—Admissibility. *See* 1940 Dig., Col. 580. SHANKARRAO DAGADUJIRAO *v.* SAMBHU.

I.L.R. (1941) Bom. 107 = 73 C.L.J. 612 = I.L.R. (1940) Kar. (P.C.) 380 = 43 Bom.L.R. 1 = (1941) 1 M.L.J. 427 (P.C.).

——**S. 13 (a)**—Proof of permanent tenancy—Tenancy transferable only if permanent—Statements in deeds of transfer—Admissibility. *See* EVIDENCE ACT, S. 32 (7). **45 C.W.N. 590.**

——**S. 14**—*Scope and applicability of.*

S. 14 of the Evidence Act applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does in a trial for the offence of arson. (*Roberts, C.J. and Dunkley, J.*) A. H GHANDHI *v.* THE KING.

1941 Rang.L.R. 566 = A.I.R. 1941 Rang. 324.

——**S. 15**—*Admissibility under—Conditions to be satisfied.*

Evidence of a single act is admissible and in this sense one evidentiary fact can form a series within the meaning of S. 15, Evidence Act, with the fact to be proved. The acts of which evidence is tendered must be of the same specific kind as that in question. (*Roberts, C.J. and Dunkley, J.*) A.H. GHANDHI *v.* THE KING. **1941 Rang.L.R. 566 = A.I.R. 1941 Rang. 324.**

——**S. 17**—*Admission—Plea of a particular status based on a document—If can operate as an admission.*

A plea of a particular status taken on the basis of a document is a matter which relates to the interpretation of that particular document and cannot operate as an admission under S. 17 of the Evidence Act. The nature of the document and the status of the parties concerned have to be determined according to the terms of the

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document itself and by a competent Court. No amount of interpretation of the document by a party can therefore operate as an admission. (*Harper, S.M. and Sathe, J.M.*) MAKKA LAL *v.* GANGA SINGH.

1941 A.W.R. (Rev.) 80 (2) = 1940 O.W.N. 1233 = 1940 R.D. 582 = 1941 O.A. (Supp) 69.

——**S. 17**—*Applicability—Filing of arrears of rent suit—If an admission against the zamindar—Landlord and tenant.*

Mere acceptance of rent does not constitute settlement of land, nor would the filing of an arrears of rent suit constitute such a settlement. But the latter would operate as an admission under S. 17, Evidence Act, against the zamindar. (*Harper, S.M. and Sathe, J.M.*) BISHNATH SINGH *v.* RAGHUNATH SINGH.

1941 A.W.R. (Rev) 454 = 1941 O.A. (Supp.) 386 = 1941 R.D. 414.

——**Ss. 18 to 21**—*Applicability — Admissions in criminal cases—Admissibility against accused as statements against interest—Self-exculpatory statements not being full confessions—If to be excluded—Extra judicial confessions—Admissibility and use of.*

It cannot be said that Ss. 18 to 21 of the Evidence Act do not apply to admissions in criminal cases. The illustrations given apply to criminal cases, and there is nothing in the sections to suggest that they apply to civil cases and civil cases only. Incriminating statements made by an accused under S. 164, Cr. P. Code, though not admissible as confessions in evidence will not necessarily be excluded. They may be admitted as admissions against interest under Ss. 18 to 21 of the Evidence Act. The fact that the statement is not a full confession but is only a partial confession or something less than a confession or is of a self-exculpatory nature cannot be made a ground for excluding it either from evidence or from consideration. It is true that extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to have no reasonable doubt as to their truth. (*Davis, C. J. and Weston, J.*) MAHOMED BAKHSH BAGO *v.* EMPEROR.

I.L.R. (1941) Kar. 257 = 195 I.C. 458 = 14 R.S. 35 = 42 Cr.L.J. 741 = A.I.R. 1941 Sind 129.

——**Ss. 21 and 34**—Admission—Admissibility on behalf of person making it—Statement in Zamindary papers—If evidence on behalf of zamindar. *See* 1940 Dig., Col. 581 LALA RAJBALI LAL *v.* PARTAPPUR CO., LTD. **191 I.C. 296 = 13 R.P. 293 = 7 B.R. 170.**

——**S. 21**—*Admissions made to third party—Admissibility.*

A statement made by a party to the suit to a third party or stranger of which the other party had no knowledge, and the truth of which he never directly or indirectly admitted, is altogether inadmissible in evidence. (*Davies.*) RAMA NAND *v.* HAR NATH.

1940 A.M.L.J. 115.

——**Ss. 21 to 27**—*Scope and effect of—Admissions admissible in civil cases—If inadmissible in criminal cases Enquiry by Magistrate into conduct of police officers—Statements by officers—Admissibility in criminal trial on charge of wrongful confinement and hurt for extorting confession.*

Ss. 21 to 27 of the Evidence Act do not suggest that statements which would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused person might make many admissions which do not itself implicate him in any criminal charge; and these would be admissible under S. 21 of the Evidence Act in a trial on a criminal charge against him Where in the course of an inquiry into the conduct of certain police officers held

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by a Magistrate who is deputed for the purpose, the officers who are not even under arrest make certain statements to the Magistrate, such statements are admissible in evidence against them in a trial on a charge against them under Ss. 348 and 330, I. P. Code, of wrongful confinement and hurt for the purpose of extorting a confession. Such statements are not statements recorded under S. 164, Cr P. Code. (*Horwill, J.*) TITAS *v.* EMPEROR. **197 I.C. 81 = 1941 M.W.N. 505 = 54 L.W. 81 = A.I.R. 1941 Mad. 720.**

——**S. 21**—*Wrong admissions—Binding nature.*

Where the admissions are wrong in point of fact and are made in ignorance of legal rights they have no binding effect. (*Yorke and Ghulam Hasan, JJ.*) MUNIA *v.* MANOHAR LAL. **194 I.C. 161 = 13 R.O. 558 = 1941 O.A. 422 = 1941 A.L.W. 492 = 1941 O.W.N. 648 = 1941 A.W.R. (Rev.) 395 = 1941 R.D. 359 = 1941 O.L.R. 428 = A.I.R. 1941 Oudh 429.**

——**Ss. 21 (1) and 32**—*Admission by wife as to her marriage—Question of marriage in dispute—Admission if admissible and if can be proved by wife.*

Where a woman has described herself as the wife of a person in a contemporaneous transaction, it would be admissible in evidence when there is a dispute as to the fact of marriage, because she had the special knowledge in respect of the marriage and it could be proved by her. (*Yorke and Agarwal, JJ.*) BASHIRAN *v.* MAHOMED HUSAIN. **16 Luck. 615 = 13 R.O. 433 = 193 I.C. 161 = 1941 O.L.R. 259 = 1941 O.W.N. 249 = 1941 A.W.R. (C.C.) 98 = 1941 O.A. 211 = A.I.R. 1941 Oudh 284.**

——**Ss. 24 and 26** — "Accused"—Meaning of—Coroners' Act, S. 19—Statement recorded under—Admissibility at trial. *See* 1940 Dig., Col. 582. EMPEROR *v.* BHAGWANDAS BISESAR.

I.L.R. (1941) Bom. 27 = 13 R.B. 277 = 192 I.C. 671 = A.I.R. 1941 Bom. 50.

——**S. 24**—*Confession—What is—Admission of presence in company of dacoits but no admission of commission of dacoity—If confession.*

Where an accused person states to the police that he was in the company of dacoits but never says that he committed dacoity, the statement does not amount to a confession. (*Rowland and Shearer, JJ.*) ADHIK LAL PATHAK *v.* EMPEROR. **1941 P.W.N. 653.**

——**S. 24**—*Construction—Proof of voluntary character of confession—If required.*

Under S. 24 of the Evidence Act, unless it appears to a Court that an inducement, threat or promise was held out by a person in authority, a confession would be relevant without any formal proof of the voluntary nature of the statement and formal evidence that the statement was voluntary is not required from the prosecution in practice. (*Horwill, J.*) BOYA CHINNA PAPANNA, *In re.* **54 L.W. 327 = 1941 M.W.N. 929 = (1941) 2 M.L.J. 1070.**

——**S. 24**—"*Inducement*" — *Statement made in answer to question by police as to whether accused committed offence and asking him to produce weapons coupled with a promise that nothing would happen if they were produced—Admissibility.*

After the police arrested the accused (five persons) the first accused was questioned by the Sub-Inspector in those words. "Did you commit the offence? Produce the sticks and knives used by you. You need not be afraid if you do so." All the five accused said "we admit the offence." The Sub-Inspector then took them to the house of the first accused, and they made state-

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ments, the first accused producing a knife and the others stick."

Held, that the statements which were of a confessional nature and which were made in answer to a direct inducement, namely, a promise that nothing would happen to them if they produced the sticks and knives which were used, were not receivable in evidence by reason of S. 24 of the Evidence Act; the fact that they were true statements could not make them admissible, because the statement being excluded under S. 24, their truth could not be the subject of inquiry.

Held, further, that the statements being statements made whilst producing the material objects concerned, were not statements in consequence of which a fact was discovered within the meaning of S. 27 of the Evidence Act. (*Burn and Mockett, JJ.*) EMPEROR *v.* LAKSHMUDU. **1941 M.W.N. 956.**

——**S. 24**—*Retracted confession—Value of—Need for corroboration.*

Although it is not illegal to act upon a retracted confession so far as the maker thereof is concerned provided the Court believes it to be true, it is generally unsafe as a rule of prudence to rely upon a retracted confession made by an accused unless it is corroborated in material particulars so as to satisfy the Court that the confession may be acted upon. A retracted confession is very slight evidence against the co-accused who are named as participants in the crime. (*Manohar Lal and Mercdith, JJ.*) DIKSON MALI *v.* EMPEROR. **196 I.C. 597 = 8 B.R. 49.**

——**S. 24**—Retracted extra-judicial confession—Admissibility—Value. *See* 1940 Dig., Col. 582. BHAROSA RAMDAYAL *v.* EMPEROR. **193 I.C. 6 = 42 Cr.L.J. 390 = 13 R.N. 318 = A.I.R. 1941 Nag. 86.**

——**S. 25**—*Admissions not amounting to confession—Admissibility.*

Under S. 25 only confessions are excluded and not admissions not amounting to a confession. The accused, a police officer, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount.

Held, that statement as to acceptance of bribe being confession was inadmissible under S. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up being admission was admissible. (*Skemp, J.*) SAFDAR ALI SHAH *v.* EMPEROR. **193 I.C. 878 = 13 R.L. 503 = 42 Cr.L.J. 497 = A.I.R. 1941 Lah. 82.**

——**S. 25**—*Applicability—Self exculpatory report to police—If a confession.*

A self-exculpatory report made by an accused to the police cannot amount to a confession and there is no reason to exclude it from consideration. (*Bennett and Ghulam Hasan, JJ.*) EMPEOR *v.* BHAGI.

194 I.C. 236 = 1941 A W.R. (C C) 188 = 1941 A.Cr.C. 127 = 13 R O 578 = 1941 O.L.R 441 = 42 Cr.L J. 539 = 1941 A.L.W. 581 = 1941 O A. 483 = 1941 O.W.N. 722 = A.I.R. 1941 Oudh 359.

——**S. 25**—*Confession by accused—Admissibility in his favour.*

The prohibition contained in S. 25 of the Evidence Act applies only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and does not apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence. (*Young, C.J. and Beckett, J.*) HASIL *v.* EMPEROR.

43 P.L R. 672.

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——**S. 25**—*Construction and scope—Trial on charge of murder—Confession to police of offence of culpable homicide—Admissibility in evidence against accused.*

The prohibition contained in S. 25 of the Evidence Act is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of any offence made by the accused to a police officer, and it makes no difference whether the offence is one of which the accused can be convicted at the trial at which it is sought to prove the confession made to a police officer. The admissibility of a confession does not depend upon the offence charged. A confession made by an accused to the police of an offence of culpable homicide not amounting to murder is not admissible in a trial for murder on the same facts. (*Davis, C.J. and Tyabji, J.*) ALI GOHAR *v.* EMPEROR.

I.L.R. (1941) Kar. 292 = 196 I.C. 61 = 14 R S. 52 = 42 Cr.L J. 805 = A I.R. 1941 Sind 134.

——**S. 26**—*Confession after arrest by and while under control of chaukidar—Admissibility, if affected by temporary absence of chaukidar—Pointing out of the place of occurrence—Nothing found—Admissibility.*

Where a confession is made by the accused while in police custody after he was arrested by the chaukidar and was being escorted under his control, its admissibility is not affected by the possibility of its having been made during the temporary absence of the chaukidar. Where a place is pointed out by the accused to a police officer as the place of occurrence and nothing is found there, the pointing out of the place is really evidence of a confession of his guilt and is therefore inadmissible under S. 26. (*Yorke and Bennett, JJ.*) BIRJA *v.* EMPEROR. **195 I.C. 493 = 14 R.O. 94 = 1941 A.Cr.C. 187 = 1941 O.L.R. 595 = 1941 A.W R. (C.C) 279 = 42 Cr.L.J. 749 = 1941 O.W N. 953 = 1941 C.A. 668 = A.I.R 1941 Oudh 563.**

——**S. 26**—*Custody of police—Accused sent in charge of constable for medical examination—Confession made to doctor not in constable's immediate presence—Admissibility.*

The accused was sent in charge of a head constable of police to the hospital for medical examination. While being medically examined but not in the immediate presence of the head constable she made a confession to the doctor.

Held, that the accused was in the custody of the police when she made the confession to the doctor and therefore it was inadmissible under S. 26. (*Almond, J.C. and Soofi, J.*) MT. HASSAN PARI *v.* EMPEROR.

193 I.C. 284 = 42 Cr.L.J. 381 = 13 R. Pesh. 51 = A.I R. 1941 Pesh. 22.

——**S. 27**—*Applicability—Confessional statement made to police officer before coming into custody of officer.*

S. 27 of the Evidence Act has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. (*Wadsworth and Somayya, JJ.*) GURUSWAMI GOUNDER, *In re.* **197 I C. 54 = 54 L.W. 136 = 1941 M.W.N. 766 = A I.R. 1941 Mad. 765 = (1941) 2 M.L.J. 209.**

——**S. 27**—*Applicability — Discovery by accused accompanied with statement—Admissibility of statement.*

Where facts are discovered by the accused himself combined with a statement, such a statement is not admissible under S. 27, Evidence Act. The Court must distinguish between cases where discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. While in the

former case a statement of the accused leading to discovery is admissible, the statement in the latter case is inadmissible under S. 27. (*Burn and Mockett, JJ.*) YERRANNA, *In re.* **193 I.C. 465 = 13 R.M. 694 = 42 Cr.L.J. 424 = 1940 M.W.N. 1238 = 52 L.W. 898 = A.I.R. 1941 Mad. 306**

——**S. 27**—Applicability—"Leading to discovery"—Statement leading to discovery not immediately but ultimately—Admissibility. *See* 1940 Dig., Col. 583. RAMAMURTHY. *In re* **193 I.C. 347 = 13 R.M. 667 = 42 Cr.L.J. 407 = A.I.R. 1941 Mad. 290.**

——**S. 27**—Applicability—Statement made while producing material objects concerned in crime—Admissibility. *See* EVIDENCE ACT, S. 24.

1941 M.W.N. 956.

——**S. 27**—*Scope—Charge under S.* 401, *I. P Code—Confession of one accused showing connection with gang in one theft—Stolen articles recovered from him in consequence—Admissibility of confession.*

One of several accused charged under S. 401, I. P. Code, made a confession proving that he was connected with a gang in a particular theft, and in consequence of this confession certain articles concerned in the theft were recovered from him.

Held, that the confession was clearly admissible under S. 27 of the Evidence Act as it led to the discovery of the articles which were the subject of theft. (*Horwill, J.*) SUBBARAYA AYYAR *v.* EMPEROR

194 I.C. 857 = 42 Cr.L.J. 631 = 14 R.M. 138 = 53 L.W. 567 = 1941 M.W.N. 371 = A.I.R. 1941 Mad. 658.

——**S. 27**—Scope and applicability. *See* 1940 Dig., Col. 584. BHAROSA RAMDAYAL *v.* EMPEROR.

193 I.C. 6 = 42 Cr.L.J. 390 = 13 R.N. 318 = A.I.R. 1941 Nag. 86.

——**S. 27**—Scope—If repealed by S. 162, Cr. P. Code—Information leading to discovery of fact—If rendered inadmissible by S. 162, Cr. P. Code. *See* CR. P. CODE, SS. 1 (2) AND 162.

43 Bom.L.R. 157

——**S. 27**—*Scope—If repealed by S.* 162—*Statement to police officer during investigation by person in police custody—Admissibility*

S. 27 of the Evidence Act is a special law within the meaning of S. 2 (1) of the Cr. P. Code, and is not specifically repealed by S. 162, Cr P. Code. Hence a statement made by an accused person in police custody to a police officer during investigation is admissible in evidence if made in the circumstances mentioned in S. 27 of the Evidence Act. (*Rowland and Shearer, JJ.*) ADHIK LAL PATHAK *v.* EMPEROR.

1941 P.W.N. 653.

——**S. 27**—*Scope—If proviso to Ss.* 25 *and* 26.

S. 27 of the Evidence Act has to be read as a proviso not only to S. 26 but to Ss. 25 and 26 taken together (*Rowland and Shearer, JJ.*) ADHIK LAL PATHAK *v.* EMPEROR. **1941 P.W.N. 653.**

——**S. 27**—Statement to police—Recording of—Duty of police—Statement made second time repeating previous statement — Admissibility in evidence. *See* 1940 Dig., Col. 585. CHENNA REDDI, *In re.*

194 I.C. 527 = 42 Cr L.J. 582 = 14 R.M. 18 = 52 L.W. 981.

——**Ss. 27 and 25**—Statements in inadmissible confessions—If excluded for purposes of S. 27. *See* 1940 Dig., Col. 585. BHAROSA RAMDAYAL *v.* EMPEROR.

193 I.C. 6 = 42 Cr.L.J. 390 = 13 R.N. 318 = A.I.R. 1941 Nag. 86.

——**S. 29**—If cures absence of warning as required by S. 164, Cr. P. Code. *See* CR. P. CODE, S. 164 AND EVIDENCE ACT, S. 29. **1941 A.L.J. 86.**

——**S. 30**—Confession—Admissibility against co-accused—Conditions of. *See* 1940 Dig., Col. 585. EMPEROR *v.* BHAGWANDAS BISESAR.

I.L.R. (1941) Bom. 27 = 13 R.B. 277 = 192 I.C. 671 = A.I.R. 1941 Bom. 50.

——**S. 30**—Confession of accused falling under S. 27—Admissibility and use of against co-accused—Absence of sufficient independent evidence—Effect. *See* 1940 Dig., Col 586. RAMI REDDI, *In re.*

195 I.C. 53 = 42 Cr.L.J. 654 = 14 R.M. 116 = A.I.R. 1941 Mad. 238.

——**S. 30**—Confession of co-accused—Admissibility and value of as against other accused. *See* 1940 Dig., Col. 586. KARUPPAN CHETTI, *In re.*

193 I.C. 14 = 42 Cr L J. 396 = 13 R.M 654 = A.I.R. 1941 Mad. 267.

——**S. 30**—*Confession of co-accused implicating other accused—Corroboration—Necessity for independent evidence.*

Where a statement by an accused person implicates the other accused, it would require the strongest independent evidence if any reliance is to be placed upon it at all. Under S. 30 of the Evidence Act, such a statement can only be taken into consideration; it is not evidence against the other accused. (*Burn and Mockett, JJ.*) YERRANNA, *In re.* **193 I.C. 465 = 42 Cr.L.J. 424 = 13 R.M. 694 = 1940 M.W N. 1238 = 52 L.W. 898 = A.I.R 1941 Mad. 306.**

——**S. 30**—Confession—Use against co-accused—Extent. *See* 1939 Dig., Col. 528. BALIRAMSINGH *v.* EMPEROR. **I.L.R. (1941) Nag. 506.**

——**S. 30**—*Retracted confession of co-accused—Value of.*

The very existence of S. 30 of the Evidence Act postulates that a confession of a co-accused may be used in cases where the evidence afforded and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. It is wrong to state that when a confession is retracted, it has no value at all as against the co-accused. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—where a confession is self-inculpatory—in respect of the person who made it and the person implicated therein. There is no reason to hold that merely because a confession has been retracted in the Court of Session, it was involuntarily made. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuasion by their fellows who have not confessed. Retracted confessions must no doubt be used with caution but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or not (*Grille, J.*) ABDUL GAFOOR, *In re.*

I.L.R. (1941) Nag. 169 = 193 I.C. 265 = 13 R.N. 311 = 42 Cr.L.J. 363 = 1941 N.L J 345 = A.I.R. 1941 Nag. 145.

——**S. 31**—*Admissions—Absence of rebutting evidence—Value.*

Though admissions are not conclusive evidence of the matter admitted, where there is no rebutting evidence at all, the admissions are enough to establish the

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facts contained in them. (*Harper, S.M. and Sathe, J.M.*) MATHURA *v* RAMESHWAR. **1941 O.A. (Supp.) 420 = 1941 R.D. 405 = 1941 A W.R. (Rev) 461 = 941 A.L.J. (Supp.) 89.**

——**S. 32** *-Dying declaration—Murder charge—Several people implicated—Corroboration, if necessary.*

A dying declaration which names only one person, where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant, is the very strongest possible form of evidence. But where a large number of people are implicated, it is a very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted. (*Young, C.J. and Sale, J.*) KHURSHID HUSSAIN *v.* EMPEROR. **196 I.C. 700 = 43 P L.R. 598 = A.I.R. 1941 Lah. 368.**

——**Ss. 32 and 33**—*Relative scope of.*

Ss. 32 and 33, Evidence Act, give different instances where evidence is relevant. S. 32 makes relevant statements by a deceased person as to the cause of his death ; S. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two distinct cases. It cannot be said that S. 33 governs S. 32. (*Mosely, J.*) SULAIMAN *v.* THE KING. **1941 Rang.L.R. 258 = 197 I.C. 131 = A.I.R. 1941 Rang. 301.**

——**Ss. 32, 33 and 145**—*Prior statements--Relevancy.*

A previous statement by a person is not relevant when it is not covered by Ss. 32, 33 and 145 of the Evidence Act unless it is an admission in which case only it becomes relevant under S. 21 of the Act. (*Harper, S.M. and Sathe, J.M.*) SADHU RAM *v.* JUNGA. **1941 O.A. (Supp) 460 = 1941 R.D. 503 = 1941 A.W R. (Rev.) 501.**

——**S. 32 (1)**—Dying declaration—Corroboration — Necessity for—Nature of corroboration. *See* 1940 Dig., Col. 587. RAMAMURTHY, *In re.* **193 I.C. 347 = 13 R.M. 667 = 42 Cr.L.J. 407 = A.I.R. 1941 Mad. 290.**

——**S. 32 (1)**—*Dying declaration—If can be acted-on—Duty of Court.*

It is, no doubt, improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person. But in cases where the assailant has not been recognized, the Court must not ignore the possible temptation that there may be, if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated provided that the Court is fully satisfied that it is true. But before so acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. Special caution is needed in dealing with a dying declaration when the prosecution evidence shows signs of attempt to improve and develop it at successive stages, or when there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders. (*Rowland and Shearer JJ.*) MAHOMED ARIF *v.* EMPEROR. **7 B.R. 717 = 194 I.C. 186 = 42 Cr.L.J. 527 = 13 R.P. 692 = A.I.R 1941 Pat 409.**

——**S. 32 (1)**—*Dying declaration—Mode of proof.*

Where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record

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seriatim in his evidence if he is satisfied that it was correctly recorded ; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question. (*Mosely, J.*) SULAIMAN *v.* THE KING. **1941 Rang.L.R. 258 = 197 I.C. 131 = A.I.R 1941 Rang. 301.**

——**S. 32 (1)**—Statements about the transaction which resulted in death—Admissibility—Nature of the proceedings. *See* 1940 Dig., Col 587. PARMANAND *v.* EMPEROR. **I.L.R. (1941) Nag. 110 = 42 Cr L.J. 17.**

——**S. 32 (1)**—Statement by deceased expressing mere suspicion about accused with regard to some matter not connected with the occasion of death—Admissibility—Duty of Public Prosecutor to see that inadmissible evidence is not placed before the Court. *See* 1940 Dig., Col. 587. APPALANARASAYYA, *In re.* **I.L.R. (1941) Mad 81 = 192 I C. 586 = 13 R.M. 581 = 42 Cr.L.J. 308 = A.I.R. 1941 Mad. 101 = (1940) 2 M.L.J. 715.**

——**S. 32 (1)**—*Statement by deceased person—Admissibility—Conditions.*

In order that a statement made by a deceased person may be admissible under S. 32 (1) of the Evidence Act, it must be a statement made by him as to the cause of his death or to any of the circumstances of the transaction which resulted in his death, in a case in which the cause of that person's death comes into question. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I C 107 = 7 B R. 875 = 14 R.P 84 = 1941 P.W.N. 255 = 22 Pat.L T. 327 = A.I.R. 1941 Pat. 362.**

——**S. 32 (1)**—*Statement relevant under—Statement made to Magistrate not authorised to record it—Admissibility.*

Where a statement is relevant under the provisions of S. 32 (1), Evidence Act, it is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record statement of a witness under S. 164, Cr. P. Code. (*Mosely, J.*) SULAIMAN *v.* THE KING. **1941 Rang.L.R. 258 = 197 I.C 131 = A.I R. 1941 Rang. 301.**

——**S. 32 (2) and (3)**—Applicability—Memorandum of property made by deceased person for own information—Statement not made in course of business and containing nothing against pecuniary interest—Admissibility. *See* 1940 Dig., Col. 588. SABHAGIBAI *v.* PERKASH CHAND. **191 I.C. 111 = 13 R S. 125.**

——**S. 32 (2)**—Chowhuddibandi papers of Zamindary — Admissibility. *See* 1940 Dig , Col. 588. GADADHAR CHOWDHURY *v.* SARAT CHANDRA. **195 I.C 412 = 14 R C. 86 = 72 C.L.J. 320 = A I R. 1941 Cal. 193.**

——**S. 32 (2)**—Jama Wasil baki papers—Need for corroboration—Bengal Tenancy Act, S. 50. *See* 1940 Dig., Col. 588. ABDUL WAHED *v.* NAGENDRA CHANDRA LAHIRI. **I.L.R (1940) 2 Cal. 559 = 192 I.C 685 = 13 R.C. 335.**

——**Ss 32 (3) and 157**—Deed not *inter partes*—Recital in as to boundary—Admissibility. *See* 1940 Dig , Col. 588. THYAGARAJAN CHETTY *v.* NARAYANA THEVAN. **192 I.C. 95 = 13 R.M. 530.**

——**S. 32 (3)**—*Scope—Statement against interest—Mortgage by trustee—Trust properties recited as being own properties—Suit to remove trustee—Compromise decree declaring properties trust properties—Suit to redeem mortgage after death of mortgagor trustee—Decree—Admissibility to prove title of trust to properties.*

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Sub-cl. (3) of S. 32 of the Evidence Act, read with the opening words of the section is to the effect that a statement made by a person who is dead is admissible in evidence when the statement is against his pecuniary or proprietary interest. *G.H.*, who was the superintendent of a mosque in Madras, mortgaged certain properties of the mosque in 1873, holding himself out to be the owner. In 1874, a suit was filed in the High Court of Madras by a Mahomedan on behalf of himself and other members of the Mahomedan community of the locality where the mosque was situate against *G. H.* for removing him from the office of superintendent, alleging that he had wrongfully alienated the properties belonging to the trust. The suit was compromised, and the decree which was passed in accordance with the compromise declared that certain properties belonged to the mosque. The area of these properties was defined. In 1935 the trustees of the mosque brought a suit for redemption of properties which fell within the area of the properties dealt with in the earlier compromise decree. The compromise decree in the suit of 1874 was sought to be relied on in proof of the title of the mosque to the properties in suit.

Held, that *G. H.*, being dead, and the compromise decree being in effect a statement by him that these properties belonged to the mosque, a statement against *G. H's* proprietary interest, the decree was admissible in evidence under S. 32 (3) of the Evidence Act to establish the title of the mosque, though the statement could not affect the interests of the mortgagee or his successors in interest. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) VENKATASUBBIAH CHETTY *v.* JUMMA MOSQUE, MYLAPORE. **53 L.W. 731=1941 M.W.N. 532 = A.I.R. 1941 Mad. 666=(1941) 1 M.L.J. 754.**

——**S. 32 (5)**—*Pedigree—Proof—Statement by dead member of family—Admissibility.*

Statement as to relationship made by a dead member of the family who had special means of knowledge in respect of the relationship of the parties at a time before the question in dispute was raised is admissible to prove correctness of the pedigree. (*Bhide and Din Mohammad, JJ.*) KHADAM HUSSAIN *v.* MOHAMMAD HUSSAIN. **195 I.C. 873=14 R.L. 106=A.I.R. 1941 Lah. 73.**

——**S. 32 (5)**—*Statement as to existence of relationship—Statement by deceased that his property would go to a particular person—Admissibility.*

Among Burman Buddhists, who are incapable of making wills a declaration as to the devolution of property may be a declaration as to some degree of relationship, and might also be relevant as conduct by the alleged adoptive father which throws a light upon the question at issue. (*Roberts, C.J. and Dunkley, J.*) MA NYUN YIN *v.* MA KYIN. **1941 Rang.L.R. 445= A.I.R. 1941 Rang. 276**

——**S. 32 (5)**—*Statement as to non-existence of relationship—Admissibility.*

Where the question at issue is whether a certain person died issueless, a statement of a deceased that that person died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether that person left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. The existence of any relationship within the meaning of S. 32 (5) of the Evidence Act includes the non-existence of such relationship. If a statement relating to the existence of such relationship is evidence under that sub-section, any statement which implies that there is no existence of such relationship between two persons also comes under that sub-section. (*Manohar Lall and Chatterji, JJ.*) SUBA RAUT *v.* DINDAYAL CHOU-

EVIDENCE ACT (1872), S. 35.

DHURY. **191 I.C. 674=7 B.R. 274= 3 R.P. 392=A.I.R. 1941 Pat. 205.**

——**S. 32 (7)**—*Proof of permanent tenancy—Tenancy transferable only if permanent—Statements in deeds of transfer—Admissibility.*

Per *Pal, J.*—Where the permanent character of a tenancy is in issue and the tenancy would be transferable only if it were permanent, every transaction of transfer will be relevant under S. 13 (*a*) of the Evidence Act as a transaction by which such permanent right was asserted. Statements supporting such permanent right made by dead persons in the documents evidencing these transactions would, therefore, be admissible under S. 32 (7) of the Act. (*Nasim Ali and Pal, JJ.*) JOGENDRA KRISHNA *v.* SUBASHINI. **I.L.R. (1941) 2 Cal. 44= 74 C.L.J. 145=45 C.W.N. 590= A.I.R. 1941 Cal. 541.**

——**S. 34**—Books of account—Admissibility—If can establish liability. *See* 1940 Dig., Col. 589. LAL CHANDRA MOOL SINGH *v.* TEJ BAHADUR SINGH. **16 Luck. 36.**

——**S. 34**—*Construction—Books of account—Entries in—Proof of correctness and of books being kept in regular course of business—Sufficiency—Corroboration—Necessity for.*

S. 34 of the Evidence Act cannot be read as meaning that there should be independent evidence, besides the entries in books of account, that such and such articles valued at such and such amount were supplied on such and such date. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in the entries actually took place. In the case of transactions which are numerous and which extend over some length of time it is not reasonable to expect independent evidence to be given to prove each and every particular transaction. In such a case the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books would not be enough. There must be some evidence to corroborate those entries. The evidence of the person who wrote the account books and in whose presence the transactions took place would be the best corroboration. Since he cannot possibly have independent recollection of the various transactions, he may, as provided in S. 159 of the Evidence Act, refresh his memory by referring to the account books. But, it is not necessary for him to prove that such and such articles valued at specific amounts were supplied on specified dates. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect would be the same. Where however, the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions. Mere general evidence to prove that the account books were regularly kept is not enough. (*Chatterji and Manohar Lall, JJ.*) RAMGOBIND PRASAD *v.* GULAB CHAND SAHU. **20 Pat. 273= 196 I.C. 57=14 R.P. 172=7 B.R. 990= 22 Pat. L.T. 383=A.I.R. 1941 Pat. 430.**

——**S. 35**—*Entry as to age in school register—Admissibility.*

There is a presumption that when a boy is admitted into the school he was accompanied by some close relative of his who must have been aware of his age. The entry regarding the age of the boy in the school register is therefore admissible. (*Almond, J.C. and*

EVIDENCE ACT (1872), S. 35.

Soof, J.) KALA RAM *v.* FAZAL BARI. **194 I.C. 824 = 14 R.Pesh. 6 = A.I.R. 1941 Pesh. 38.**

——**S. 35**—Entry as to age in school register—Admissibility and value. *See* 1940 Dig., Col. 589. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA. **I.L.R. (1941) 1 Cal 234 = 193 I.C. 419 = 13 R.C. 396 = A.I.R. 1941 Cal. 41.**

——**S. 35**—Entry in birth register—Relevancy and value of in regard to legitimacy of child—Name of mother and not of father given by informant—Effect of *See* EVIDENCE ACT, S. 112 **54 L.W. 411.**

——**S. 35**—Process-server's report — Admissibility—Process-server not called a witness. *See* 1940 Dig., Col. 590. REWATI *v.* MOHAN LAL. **192 I.C. 45 = 13 R.L. 353.**

——**S. 35**—Register of rent suits—Admissibility. *See* 1940 Dig., Col. 590. BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSE. **191 I.C. 824 = 13 R.C. 285.**

——**S. 36**—Rennel's maps—Admissibility. *See* 1940 Dig., Col. 590. GADADHAR CHOWDHURY *v.* SARAT CHANDRA. **195 I.C. 412 = 14 R.C. 86 = 72 C.L.J. 320 = A.I.R. 1941 Cal. 193.**

——**S. 36**—*Rennel's maps—Value of.*

So far as river surveys and road surveys are concerned, Rennel's maps (1769-71) are scientific and accurate ones, only the village sites shown in his map are approximate. Rennel's maps can be made the basis for adjudication of land revenue. (*Mitter and Khundkar, JJ.*) SECRETARY OF STATE *v.* MIDNAPORE ZAMINDARY CO., LTD. **197 I.C. 5 = A.I.R. 1941 Cal. 520.**

——**S. 36**—*Thak and survey maps—Conflict between—Preference.*

Where the Thak and revenue survey maps differ and the Thak map agrees with the local landmarks, the Thak map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis. (*Akram, J.*) MANTAJADDIN *v.* ALAM. **73 C.L.J. 47.**

——**S. 40**—*Judgment against some of defendants in previous suit—Admissibility.*

S. 40 of the Evidence Act does not lay down that the judgment must prevent the Court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the Court from taking cognizance of the suit so far as it relates to some of the parties thereto, then also S. 40 would apply. Accordingly a judgment passed in a previous suit against some of the defendants is admissible in evidence under the section in a subsequent suit filed against them as well as others. (*Sen, J.*) BHOLANATH CHATTERJI *v.* MONMOTHA NATH DUTTA. **45 C.W.N. 420.**

——**Ss. 43 and 44**—Applicability--Judgment appointing guardian for minor—If open to attack collaterally. *See* GUARDIANS AND WARDS ACT, S. 48. **1941 M.W.N. 237 = (1941) 1 M.L.J. 492.**

——**S. 43**—Judgment not *inter partes*—Admissibility—Extent. *See* 1940 Dig., Col. 591. GADADHAR CHOWDHURY *v* SARAT CHANDRA. **195 I.C. 412 = 14 R.C. 86 = 72 C.L.J. 320 = A.I.R. 1941 Cal. 193.**

——**S. 45**—*Expert evidence—Opinion of finger-print expert—Duty of Court to examine expert and hear his reason for his opinion.*

A Court is not bound to accept the evidence of an expert, such as a finger-print expert, even though there are no special reasons for not accepting it. The expert, however, must be given an opportunity of explaining to the Court the reasons for his opinion, as it is only after hearing the expert's reasons and elucidation that the Court would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory. (*Horwill, J.*) CROWN PROSECUTOR *v.* GOPAL. **195 I.C. 183 = 14 R.M. 145 = 42 Cr.L.J. 696 = 53 L.W. 396 = 1941 M.W.N. 218 = A.I.R. 1941 Mad. 551 = (1941) 1 M.L.J. 475.**

EVIDENCE ACT (1872), S. 63.

——**S. 45**—Expert witness—How to be treated. *See* 1940 Dig., Col. 592. E. M. BAINES *v.* RAM SAHAI SETHI. **192 I.C. 747 = 13 R.L. 404.**

——**S. 45**—Foot-print expert—Opinion of—Value of—If conclusive—Duty of Court to form own opinion. *See* 1940 Dig., Col. 592. PULLAYYA, *In re.* **192 I.C. 704 = 13 R.M. 587 = 42 Cr.L.J. 316 = A.I.R. 1941 Mad 88.**

——**Ss. 48 and 35**—*Answers in Wilson's Manual—Admissibility.*

The answers to the questions given in Wilson's Manual are clearly admissible under S. 48 of the Evidence Act, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence, if it existed. They are also admissible under S. 35 of the Act, as entries relating to a relevant fact contained in what may be regarded as a public record made by a public servant in the discharge of his official duty. (*M. R. Jayakar.*) SUBHANI *v.* NAWAB. **I.L.R. (1941) Lah. 154 = 193 I.C. 436 = 7 B.R. 665 = 1941 O.L.R. 343 = 43 P.L.R. 318 = 3 R.P.C. 154 = I.L.R. (1941) Kar. (P.C.) 22 = 1941 A.L.J. 530 = 43 Bom.L.R. 432 = 1941 O.A. 347 = 1941 A.W.R. (Rev.) 314 = A.I.R. 1941 P.C. 21 (P.C.).**

——**S. 54**—*Scope of—If deals with mode of proof of previous convictions.*

S. 54 of the Evidence Act does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases. (*Davis, J.C. and Tyabji, J.*) POKAR CHUHARMAL *v.* EMPEROR. **I.L.R. (1941) Kar. 308 = 197 I.C. 98 = A.I.R. 1941 Sind 173.**

——**Ss. 60 and 67**—*Prior statements—Mode of proof.*

Ss. 60 and 67 deal respectively with the proof of oral and written statements. These two sections do not lay down that such statements can be proved only by calling in the deponents themselves as witnesses. (*Harper, S.M. and Sathe, J.M.*) SADHU RAM *v.* JUNGA. **1941 A.W.R. (Rev.) 501 = 1941 R.D. 503 = 1941 O.A. (Supp.) 460**

——**Ss. 60 and 118**—*Statement of child to other people—Child not examined as witness—Admissibility.*

Evidence of statements made by a child to other people, or of conduct amounting to a statement, is not admissible in a criminal trial, when such child is not examined as a witness by reason of incompetency to depose. (*Bartley and Akram, JJ.*) KASHI NATH PANDE *v.* EMPEROR. **I.L.R. (1941) 2 Cal. 180.**

——**S. 63 (3)**—*Uncertified copy of deposition—Admissibility.*

An uncertified copy of a deposition can be used as secondary evidence only if it can be regarded as a copy made from or compared with the original. Where the man who is alleged to have made the copy is dead and so also is the man who compared it with the original, and their signatures only have been proved by a clerk who was acquainted with their handwriting, it cannot be accepted as evidence as it is not sufficiently proved that it was made from or compared with the original. (*Mukherjea, J.*) NARENDRA CHANDRA DE *v.* RAJENDRA CHANDRA CHANDA. **197 I.C. 45 = 45 C.W.N. 654 = 73 C.L.J. 159 = A.I.R. 1941 Cal. 506.**

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——**S. 65 and C. P. Debt Conciliation Act, S. 6** —*Debtor's application to Debt Conciliation Board if an admission of liability within S.* 65 (b).

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within S. 65 (*b*), Evidence Act. It is a statement. Under S. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount: on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything. (*Stone, C.J. and Vivian Bose, J.*) UDHAO NANAJI *v.* NARAYAN VITHOBA. **194 I.C. 120= 3 R.N. 356= 1941 N.L.J. 134=A.I.R. 1941 Nag. 95.**

——**S.** 65—*Secondary evidence—Original not produced by person in possession though called upon—Allegation of collusion between him and opposite party—Right to adduce secondary evidence.*

Where a party has taken all the necessary steps for the production of an original document but the document is not produced by the person in whose possession it is, he being alleged to be in collusion with the opposite party, the former is entitled to offer secondary evidence as to the contents of the documents in question. (*Harries, C.J. and Fazl Ali, J.*) SHIVA SHANKAR BHARTHI *v.* BENI RAM. **22 Pat.L.T. 200.**

——**S. 65 (c)**—*Applicability—Previous convictions—Proof—Secondary evidence—Admissibility.*

S. 65 (*c*) of the Evidence Act is not inapplicable to the case of previous conviction and secondary evidence could be admissible to prove previous convictions in cases where the records of the previous trials and convictions have been destroyed and are not available. But a mere conviction slip is not such secondary evidence. (*Davis, C.J. and Tyabji, J.*) POKAR CHUHARMAL *v.* EMPEROR.

I.L.R. (1941) Kar. 308=197 I.C. 98= A.I.R. 1941 Sind 173.

——**Ss. 65 (e) and 74**—Income-tax return—Statement of assessee showing details of income and profit and loss statement—If public documents — Certified copies—Admissibility in evidence—Income-tax Act, S.54—Scope. *See* 1940 Dig., Col., 593. RAMA RAO *v.* VENKATARAMAYYA. **192 I.C. 548= 13 R M. 565=(1940) 2 M.L.J. 257 (F.B.).**

——**S.** 68—Attesting witness—Duty to call—Hostility of witness if an excuse. *See* 1940 Dig., Col. 593. KALI CHARAN *v.* SURAJ BALI. **191 I.C. 215= 13 R.O. 222=A.I.R. 1941 Oudh 89.**

——**S.** 68—*Attesting witness not proving mortgage—If bars proof by other evidence.*

Under S. 68 of the Evidence Act what is necessary is that an attesting witness, if available, should be called in evidence. It is wrong to think that a mortgage deed can be proved only by an attesting witness. If the latter is unable to prove it, there is no bar to its being proved by other evidence. (*Yorke and Agarwal, JJ.*) BASHIRAN *v.* MAHOMED HUSAIN. **16 Luck. 615= 3 R.O. 433=193 I.C. 161=1941 O.L.R. 259= 1941 A.W.R. (C.C) 98=1941 O.A. 211= 1941 O.W.N. 249=A.I.R. 1941 Oudh 284.**

——**S.** 68—*Attesting witness—Requirements regarding.*

Under S. 68, Evidence Act, it is not necessary that an attesting witness should prove execution of a deed. It is sufficient that he is called and if he does not recollect or denies the execution, the document can be proved by other evidence. (*Agarwal, J.*) SARJOO *v.* JAGATPAL SINGH. **1941 O.W.N. 1298= 1941 A.L.W. 1099= 1941 A.W.R. (Rev.) 1109=1941 O A. 983.**

EVIDENCE ACT (1872), S. 80.

——**S.** 68—Attesting witness—Sub-Registrar. *See* 1940 Dig., Col. 593. GANPATRAO *v.* NAGORAO. **193 I.C. 41=13 R.N. 287.**

——**S.** 68—*Proof of attestation—Procedure—Handwriting only proved—Presumption.*

No doubt only one attesting witness need be called, if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses. (*Mya Bu and Mosely, JJ.*) MAHOMED OSMAN *v.* JAMBULINGAM CHETTIAR. **195 I.C. 221=14 R.R. 30= A.I.R. 1941 Rang. 122.**

——**S. 68, Proviso**—'Execution'—Meaning in the case of mortgage. *See* 1940 Dig., Col. 594. KALI CHARAN *v.* SURAJ BALI. **191 I C. 215= 13 R.O. 222=A.I.R. 1941 Oudh 89.**

——**S. 68 Proviso**—'Specifically denied'—What may amount to. *See* 1940 Dig., Col. 594. KALI CHARAN *v.* SURAJ BALI **191 I.C. 215= 13 R.O. 222=A.I.R. 1941 Oudh 89.**

——**S.** 74—*Dakhal dihani—If a public document—Proof of.*

In view of the definition of public documents in S. 74, Evidence Act, a document purporting to transfer possession under the orders of Court—a document of Dakhal dihani—is a public document and can be proved by means of a certified copy. (*Sathe, A.M.*) ASHRAFUNNISSA *v.* BISHAMBHAR NATH.

1941 R.D. 867 (1)=1941 O.A. (Supp.) 781 (1)= 1941 A.W.R. (Rev.) 907 (1).

——**S.** 74—*Survey and settlement report.*

A survey and settlement report prepared by an Assistant Superintendent of Survey being a public document is admissible in evidence. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I.C. 313=14 R.P. 100= 7 B.R. 897=22 P.L.T. 699=A.I R. 1941 Pat 260.**

——**S.** 76—*Certified extracts given by patwaris—Admissibility.*

Patwaris have been declared to be public officers under the Evidence Act, and certified extracts given by them from their records, are certified copies under S. 76, Evidence Act, and are admissible without further proof (*Sathe, A M.*) VIDHYA SAGAR *v.* SHAMSHUDDIN. **1941 O.A. (Supp.) 807=1941 A.W.R. (Rev.) 933= 1941 R.D. 920.**

——**Ss. 76 and 77**—Uncertified copy of public document—Admissibility. *See* 1940 Dig., Col. 595. KHADIM ALI *v.* JAGANNATH. **16 Luck. 230= 191 I.C. 166=A.I.R. 1941 Oudh 77.**

——**S. 77**—*Statements and Applications in revenue cases—Proof of—Certified copies—Admissibility.*

In proof of the fact of a statement made in a correction of papers case and an application made in execution no better evidence could be produced than the production of certified copies taken from the judicial files. Formal proof of signatures on the application is not necessary; still less is any further proof necessary in case of the statements. (*Shirreff, J.M.*) RAM DAS *v* SADDU KEWAT. **1941 O A. (Supp) 679= 1941 A.W.R. (Rev.) 769=1941 R.D. 793.**

——**S. 80**—*Applicability—Statement recorded by Magistrate under S.* 164, *Cr. P. Code—Dying declaration of witness—Witness surviving injury and giving*

evidence at trial—Statement made by him and recorded by Magistrate—Admissibility—Magistrate—If to be called to prove.

If a person whose dying declaration is recorded by a Magistrate in hospital dies subsequently, the statement made by him in hospital can only be proved by the Magistrate who has recorded it or some one else who heard that statement But when that person survives and gives evidence at the trial his statement is admissible in evidence for the purpose of corroborating or contradicting him. It is not necessary that the recording Magistrate should be called as witness to prove the statement. A statement recorded by a Magistrate under S. 164, Cr. P. Code, in the course of an investigation is evidence in a judicial proceeding, which under S. 80 of the Evidence Act can be proved without calling the person recording the same. (*Agarwala, J.*) BISHUNDHARI GOPE *v.* EMPEROR. **1941 P.W.N. 622.**

——**S. 80**—*Applicability — Statement recorded by person not authorised by law to record it—Mode of proof of statement properly recorded.*

The presumption mentioned in S. 80, Evidence Act, could not arise in a case where the statement of a person as to the cause of his death is recorded by a magistrate not authorised by law to record it, and it has to be proved. But where it is recorded as authorised by law, it is not necessary that it should be proved by the magistrate who recorded it, when the statement is not made in the presence of the accused. All that is required is that there must be proof of the identity of the person who made the statement. (*Mosely, J.*) SULAIMAN *v.* THE KING. **1941 Rang L.R. 258 = 197 I.C. 131 = A.I.R. 1941 Rang. 30.**

——**S 83**—Thakbast map and thakbast kasra—Entries as to irrigation rights—Presumption of correctness—Evidentiary value of. *See* 1940 Dig., Col. 595. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275 = 7 B.R. 153 = A.I.R. 1941 Pat. 118.**

——**S. 90**—Applicability—Copy not 30 years old. *See* 1940 Dig., Col. 595. GANPATRAO *v.* NAGORAO. **193 I.C. 41 = 13 R.N. 287.**

——**S. 90**—*Applicability—Document not purporting to be in any person's handwriting or to be signed by any known person—Presumption—If arises.*

S. 90 of the Evidence Act cannot be relied upon for the proof of a document which does not purport to be in any person's handwriting or to be signed by any known person. In suit in a Civil Court for rent of lands within an estate under the Madras Estates Land Act, the plaintiff who had to prove that the lands were not ryoti lands, tendered in evidence accounts showing the actual history of the payments of rent in respect of the lands in suit before 1893. These accounts, however, did not purport to be signed by any one or to be in any particular person's handwriting.

Held, the accounts could not be admitted in evidence as no presumption could be drawn regarding them under S. 90 of the Evidence Act. (*Wadsworth, J.*) NAGARAJA RAO *v.* KOOTHAPPAN. **53 L.W 634 = 1941 M.W.N. 518 = A.I.R. 1941 Mad. 602 = (1941) 1 M.L.J. 759.**

——**Ss. 90 and 65**—*Copy admissible under S. 65—Presumption, if can be drawn.*

Where a copy is admissible under the provisions of S. 65, a presumption of correctness under the provisions of S 90 can be drawn in respect of the copy as well. (*Almond, J.C. and Soofi, J.*) GURDIT SINGH *v.* SIRI RAM. **A.I.R. 1941 Pesh 89.**

——**S. 90**—*Production of copy—Presumption.*

If a copy more than 30 years old is produced from proper custody, the signatures authenticating the copy

may be presumed to be genuine; but the production of a copy is not in itself sufficient to justify any presumption of due execution of the original. (*Beckett, J.*) HARNAM SINGH *v.* DISTRICT OFFICIAL RECEIVER. **A.I.R. 1941 Lah. 400.**

——**S 90**—*Scope of—Presumption of genuineness of original from certified copy—If can arise.*

It is not permissible to invoke the assistance of S. 90 of the Evidence Act to prove the genuineness of original by the production of the certified copy. (*Ghulam Hasan, J.*) AMJAD HUSAIN *v.* RAISUNNISA **194 I.C. 855 = 14 R.O. 45 = 1941 O.L.R. 534 = 1941 O.W.N. 669 = 1941 R.D. 387 = 1941 O.A. 462 = 1941 A.W.R. Rev) 408 = A.I.R. 1941 Oudh 433.**

——**S. 91**—*Scope and effect of—Contract reduced to writing when made—Oral evidence to prove contents—Admissibility.*

Where the terms of a contract have been reduced to writing at the same time as it is made, the document only, or if permissible, a secondary evidence of its contents can be the only evidence available to prove the document under S. 91 of the Evidence Act the parties are debarred from adducing oral evidence to prove such contract. (*Mahomed Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. **22 Pat.L.T. 666.**

——**S. 92**—*Adjustment of decree—Oral contract—Admissibility.*

Per *Young, C.J.*—S. 92 of the Evidence Act clearly refers to a contract, grant or other disposition of property entered into by agreement between the parties to the document. It cannot refer to a decree which is imposed upon one of the parties by force *majeure*. There is no mutuality about a decree which is passed in accordance with the wishes of one party and contrary to the wishes of the other. The section cannot, therefore, bar the setting up of an oral contract to operate as an adjustment of a decree. (*Young, C.J. Dalip Singh and Monroe, JJ.*) UDHAM SINGH *v.* ATMA SINGH. **I.L.R. (1941) Lah. 383 = 194 I.C. 1 = 1941 O.W.N. 815 = 13 R.L. 507 = 1941 R.D. 574 = 1941 O.A. (Supp.) 560 = 941 A.L.W 665 = 1941 A.W.R. (Rev.) 657 = 43 P.L.R 192 = A.I.R 1941 Lah. 149 (F B.).**

——**S. 92**—Applicability—If limited to parties and representatives. *See* 1940 Dig., Col., 596. SURAVYA *v.* MANGAVVA. **A.I.R. 1941 Mad. 345.**

——**S. 92**—*Construction—"Between the parties to any such instrument"—Meaning of.*

The words "between the parties to any such instrument" in S. 92 of the Evidence Act refer to the parties who on the one side and the other came together to make the contract or disposition of property, and do not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. (*Fazl Ali, J.*) LAKSHMANA SAHU *v.* SIMACHALA PATRA. **194 I.C. 739 = 14 R.P. 58 = 7 B.R. 817 = A.I.R. 1941 Pat. 211.**

——**S 92**—*Intention of parties—Acknowledgment of liability—Oral evidence—Admissibility—Surrounding circumstances—It can be looked into.*

The law is well settled that to prove an acknowledgment of liability oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given. It is equally settled that in construing such a writing it is legitimate to look to the surrounding circumstances. (*Mitter and Akram JJ.*) MAHOMED HAIDERALI KHAN *v.* BROJENDRA KUMAR. **45 C.W.N. 208.**

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——**S. 92**—*Mortgage—Stipulation that payment should be proved only by endorsements on bond—Payment evidenced by receipt—If can be proved.*

There was a stipulation in a mortgage-bond to this effect: "When I shall pay any *kist* I shall get the payment endorsed on the back of the bond. Except such endorsement on the back of the bond any other receipt or oral or documentary evidence regarding payment will not be entertainable in Court and will be null and void." The mortgagor made a payment which was not endorsed on the bond, but the payment was evidenced by a receipt signed by the mortgagee.

Held, that although it was open to the mortgagee to refuse to appropriate towards the mortgage-debt any payment which might be made by his debtor and not endorsed on the mortgage bond, the condition that he need not appropriate it to the mortgage debt had on the face of the receipt been waived by him for the receipt clearly showed that he had in fact appropriated the payment to the mortgage-debt, notwithstanding that he had in the bond reserved himself power not to do so.

Held also, that the undertaking given by the mortgagor that he should not offer any other evidence of payment except endorsements on the bond and that if he did, the Court should not receive it, was not binding upon the Court which was not a party to the undertaking, and that if evidence was tendered what the Court was to see was whether it was admissible under the Evidence Act and not whether in tendering it some breach of contract had been committed, and that in tendering it the mortgagor had committed a breach of his undertaking. The mortgagee's remedy was to sue for damages for the breach. (*Rowland, J.*) SAGO RAI *v.* RAMJEE SINGH. **196 I.C. 645 = 14 R.P. 220 = 8 B.R. 70.**

——**S. 92**—*Scope—Mortgage—Provision that payments towards debt should be proved only by endorsements on bond—If precludes proof of payment by other evidence.*

Where a mortgage deed contains a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt should be payments endorsed on the mortgage deed itself, it does not preclude the parties from adducing other evidence to prove discharge. It is open to the mortgagor to rely on evidence other than the endorsements on the mortgage bond in support of his plea of discharge. S. 92 of the Evidence Act does not bar such evidence. (*Agarwala, J.*) RAM KIRPAL CHOUDHURY *v.* BALESWAR CHOUDHURY. **192 I.C. 861 = 7 B.R. 423 = 13 R.P. 524 = A.I.R. 1941 Pat. 246.**

——**S. 92, proviso (1)**—*Life insurance policy—Proof that assignee effected insurance for his own benefit—Admissibility.*

Under S. 92, proviso (1) of the Evidence Act, it is open to a Life Insurance Company to prove facts which show that the contract of insurance was illegal. The company is, therefore, entitled to prove facts showing that the insurance was really effected by the assignee of the policy for his own use and benefit and not for the use and benefit of the assured. (*Abdul Rashid, J.*) MANI SHANKAR SOMESHWAR PANDYA *v.* ALLIANZA UND STUTTGARTER LABENS VERSICHERUNGS BANK. **193 I.C. 155 = 13 R.L. 429 = 42 P.L.R. 801 = A.I.R. 1941 Lah. 33.**

——**S. 94**—*Absence of ambiguity—Reference to surrounding circumstances and conduct—Permissibility.*

Contemporaneous circumstances and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed and legal construction can be put on it. (*Agarwal, J.*) BISHESHWAR SINGH *v.* ACHHAIBAR DIN. **195 I.C. 242 = 1941 O.L.R. 558 = 1941 A.L.W. 670 = 14 R.O. 63 = 1941 R.D. 489 = 1941 O.A. 560 = 1941 A.W.R. (Rev.) 581 = 1941 O.W.N. 820 = A.I.R. 1941 Oudh 507.**

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——**S. 96**—Promissory note bearing both English and Malayalam dates—Inconsistency—Evidence as to date of note—Admissibility. *See* LIMITATION ACT, S. 25 **(1941) 1 M.L.J. 502.**

——**S. 101**—Onus immaterial—Both sides entering into evidence. *See* 1940 Dig., Col. 598. NAND KISHWAR BUX ROY *v.* GOPAL BUX RAI **I.L.R. (1940) Kar. (P.C.) 235.**

——**Ss. 102 and 105**—*Scope of burden of proof on the prosecution and accused.*

(*Per Iqbal Ahmad, C.J.*).—The burden of proving the existence of circumstances bringing the case within the 'exception' or 'proviso' is no doubt cast on the accused by S. 105, Evidence Act, but this does not in any way absolve the prosecution of the burden laid on it by S. 102. The burden of proof, so far as the entire 'proceeding' is concerned, remains on the prosecution, even though the burden of the 'fact in issue' pleaded by the accused is cast upon him. Hence it is manifest that even in cases to which S. 105 applies the prosecution has to prove the guilt of the accused. (*Iqbal Ahmad, C.J., Collister, Allsop, Bajpai, Ismail, Braund and Mulla, JJ.*) PARBHOO *v.* EMPEROR. **1941 A.W.R. (H.C.) 320 = 1941 A.L.W. 1037 = 1941 A. Cr.C. 267 = 1941 O.A. (Supp.) 885 (1) = 1941 A.L.J. 619 = A.I.R. 1941 All. 402 (F.B.).**

——**S. 103**—Scope and effect of—Good faith—Burden of proof under S. 14, Limitation Act. *See* LIMITATION ACT, S. 14. **(1941) 1 M.L.J. 257.**

——**S. 105**—*Effect on the onus of the Crown.*

Per *Collister, J.*—The onus is certainly on the Crown to prove all the facts which constitute the elements of the offence, and if there is any reasonable doubt left in the mind of the Court as to whether these facts have been established the accused person is entitled to the benefit thereof; but this general onus is subject by statute, to the special onus which S. 105, Evidence Act imposes on the accused person, and when the Legislature has enacted specific provisions in the Evidence Act as to what amounts to proof or disproof, the Court will not be justified in falling back upon the general principle that the Crown must prove the prisoner's guilt. So far as Courts in India are conserned, the law of evidence is embodied in the Evidence Act and the Courts in India are strictly bound by its provisions when considering the question of onus of proof and its discharge. (*Iqbal Ahmad, C. J., Collister, Allsop, Bajpai, Ismail, Braund and Mulla, JJ.*) PARBHOO *v.* EMPEROR. **1941 A.W.R. (H.C.) 320 = 1941 A.L.W. 1037 = 1941 A. Cr.C. 267 = 1941 O.A. (Supp.) 885 (1) = 1941 A.L.J. 619 = A.I.R. 1941 All. 402 (F.B.).**

——**S. 105 and Penal Code, S. 96**—*Plea of a general exception in defence—Evidence failing to affirmatively substantiate plea but creating reasonable doubt—Accused if entitled to be acquitted.*

Held, by the Full Bench (*Collister, Allsop and Braund JJ.* dissenting):—Having regard to S. 96 of the I. P. Code and S. 105 of the Evidence Act, in a case in which any general exception in the I. P. Code is pleaded by an accused person and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances

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bringing the case within the general exceptions pleaded, the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception. (*Iqbal Ahmad. C.J. Collister, Allsop, Bajpai, Ismail, Braund and Mulla, JJ.*) PARBHOO *v.* EMPEROR.

1941 A W.R. (H.C) 320 = 1941 A.L W. 1037 = 1941 A.Cr.C. 267 = 1941 O.A. (Supp) 885 (1) = 1941 A.L.J. 619 = A.I.R. 1941 All. 402 (F.B.).

——**S. 105**—*Plea of self-defence—Burden of proof—Statement of accused—When can be acted on.*

Per *Young, C.J.*—There appears in some quarters to be the opinion that where an accused person has admitted participation in a fight, in which one of the other party is killed or injured, but pleads that he acted in the exercise of the right of self-defence, it lies heavily upon him under all circumstances to prove under S. 105 of the Evidence Act the facts necessary to establish his plea. It must be remembered that in the vast majority of such cases in this country the accused persons are usually the only persons who could appear as witnesses in their own self-defence and they are barred from doing so by the law of procedure. The Courts, therefore, must be prepared to take their statements into consideration. In a case where the prosecution evidence is wholly unreliable and there is no other evidence to suggest that that part of their statements in which they put forward the plea of self-defence, is not correct, the Court has no other alternative but to accept their statements and act upon them. (*Young, C.J. and Skemp, J.*) GULAB *v.* EMPEROR.

196 I.C. 390 = 14 R.L. 155 = 42 Cr.L.J. 861 = 43 P.L.R. 144 = A.I.R. 1941 Lah. 333.

——**S. 105**—*Scope—Burden of proof — Exception contained in body of statute and one not so included—Distinction, if any.*

The rule laid down in S. 105 of the Evidence Act is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception ; there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* DAHYABHAI SAVCHAND.

195 I.C. 825 = 14 R.B. 82 = 42 Cr.L.J 783 = 43 Bom L.R. 519 = A.I.R. 1941 Bom. 273.

——**S. 105**—Self-defence—Plea in answer to charge of murder—Burden of proof. *See* 1940 Dig., Col., 599. SUBBIGADU *In re.* **192 I.C. 525 = 13 R.M 583 = 42 Cr.L.J. 305 = A.I.R. 1941 Mad. 230 = (1940) 2 M.L J. 1018.**

——**S. 106**—Negligence alleged against public body—Burden of proof. *See* 1940 Dig , Col., 599. RAMDAS TOPANDAS *v.* SUKKUR MUNICIPALITY.

192 I.C. 494 = 13 R.S. 191.

——**S 110**—*Boundary dispute—Possession of disputed land—If important element.*

In the case of a boundary dispute between the parties the possession of the disputed land is an important element to be taken into consideration in determining the dispute. (*Nasim Ali and Pal. JJ.*) FANINDRA NATH DUTTA *v.* SATYA CHARAN DE. **A.I.R. 1941 Cal. 632.**

——**S. 112**—Applicability—Maternity in dispute. *See* 1940 Dig., Col., 600. NAND KISHWAR BUX ROY *v.* GOPAL BUX RAI. **I.L.R. (1940) Kar. (P.C.) 235.**

——**S. 112**—*Presumption under—Rebuttal—Mere denial of paternity by parents—Sufficiency—Proof of non-access—Necessity.*

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Though it may be proved that a person was born before the *rukhsati* and that the conduct of the parents was such as to throw doubts on his legitimacy, that would not be sufficient to rebut the presumption raised by the fact of the birth of the person concerned during the continuance of a valid marriage between the parents. Under S. 112, Evidence Act that fact must be considered conclusive proof that he is the legitimate son of the parents unless it can be shown that the parents had no access to each other at any time when he could have been begotten. (*Bennet and Madeley, JJ.*) MASOOMA BEGAM *v.* MAHOMED RAZA.

1941 A.W.R. (C.C.) 366 = 1941 O.A. 956 = 1941 O W.N. 1285.

——**S. 112**—*Scope and effect—Proceedings under S. 488 for maintenance of illegitimate child—Admission of paternity by alleged putative father—Relevancy in absence of proof of non-access between applicant and her husband.*

In proceedings under S. 488, Cr. P. Code, all admission of paternity of an illegitimate child by the alleged putative father are irrelevant in view of the clear wording of S. 112, Evidence Act, if the applicant mother fails to prove that she and her husband had no access at the time when the child could have been begotten. (*Horwill, J.*) RAJI BAI AMMAL *v.* NATHAR SAHIB.

1941 M.W.N. 1037 = (1941) 2 M.L.J. 693.

——**S. 112**—*Scope—Rebuttal of presumption of legitimacy—What amounts to—Burden of proof of non-access—Evidence Act, S 35.*

The effect of S. 112 of the Evidence Act is that where a child is born during lawful wedlock, that child will have to be assumed to be the child of the man who was at the time the husband of the mother, unless it is shown that they had no opportunity of sexual intercourse in consequence of which the child could have been begotten. Every assumption is to be made in favour of legitimacy of a child born in lawful wedlock, and the onus of proving non-access or illegitimacy is on the party alleging the same. The law requires in such cases the positive proof of a negative fact, that is, non-access as between the parties to the marriage, and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The fact of non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character, but unless such evidence is forthcoming, it will not be possible for any Court "to believe it to be probable that there was no access." An entry in the birth register containing the name of the mother only does not warrant the inference that the child born is not illegitimate. An entry in the birth register may be relevant under S. 35 of the Evidence Act to show the date of birth, but the question as to how far the fact that the name of the mother and not that of the father was given by the informant would bear on the question of the child's legitimacy, even if it is assumed to be relevant, depends largely on the means the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant is a stranger, who did not know the father, the statement, even if relevant, would be wholly unimportant, and the entry would be of no value when the informant is not examined and no explanation is given for his non-examination by the party relying on the entry in support of his plea of illegitimacy. (*Abdur Rahman, J.*) MANICKA MUDALIAR *v.* AMMAKANNU. **54 L.W. 411.**

——**S. 114**—*Birth of children—Presumption that they were born alive.*

In the case of a young woman giving birth to her first child and entirely unattended during the process no pre-

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sumption can reasonably be made under S. 114 that the child was born alive. (*Almond, J.C. and Soofi, J.*) MT. HASSAN PARI *v.* EMPEROR. **193 I.C. 284 = 42 Cr.L.J. 381 = 13 R. Pesh 51 = A.I.R. 1941 Pesh. 22.**

——**S. 114**—*Business acts—Presumption.*

Under S. 114 of the Evidence Act, there is a presumption not only that official acts are regularly performed but also that ordinary business acts are normally carried out. Therefore, in the absence of any evidence to the contrary, the Court can presume that a power-of-attorney which was stamped was in fact stamped by the proper officer in the Financial Commissioner's Office. (*Blacker, J.*) THE PEOPLES' INSTALMENT AND SAVINGS BANK, LTD., LAHORE *v.* GIAN CHAND.
196 I.C. 619 = 14 R.L. 161 = 43 P.L.R. 499 = A.I.R. 1941 Lah. 345.

——**S. 114**—*Finger-prints of accused found on piece of stolen property—Presumption.*

It is more than doubtful if any presumption under S. 114 can arise against any person merely because his finger-prints were found upon a piece of stolen property. (*Bartley and Mahomed Akram, JJ.*) TARA MIA *v.* EMPEROR. **196 I C. 679 = A.I.R. 1941 Cal. 479.**

——**S. 114**—*Knowledge of place of concealment—Presumption.*

The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge participated in the act of concealment, if the place is not his own. (*Bhide and Din Mohammad, JJ.*) DAS RAM *v.* EMPEROR.
43 P.L.R. 600 = A.I.R 1941 Lah. 471.

——**S. 114**—Presumption as to legal proceedings. *See* AGRA TENANCY ACT, S. 44 AND EVIDENCE ACT, S. 114. **1941 R.D. 198.**

——**S. 114 (a)**—*Presumption of guilt—When could arise.*

The onus in a criminal case always rests on the prosecution and never shifts on to the accused. Before raising a presumption of guilt under S. 114 (*a*) of the Evidence Act the jury or the Court, will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not and to find out for itself whether the explanation given by the accused even though not believed in its entirety, is such as to raise a reasonable doubt in the mind of the jury or the Court as to the guilt of the accused. (*Ghulam, Hasan, J.*) NAND LAL *v.* EMPEROR.
196 I C. 166 = 14 R.O. 150 = 1941 A.Cr.C. 229 = 1941 A.W.R. (C.C.) 287 = 1941 O.L.R 649 = 42 Cr.L.J. 818 = 1941 O.A. 773 = 1941 O.W.N. 1061 (2) = A.I.R. 1941 Oudh 618.

——**S. 114, Ill. (a)**—*Presumption—When to be drawn—Duty of Court—Old brass bell stolen in Bombay city found with accused thirteen days after theft—Presumption—If can be drawn.*

The question as to what period is covered by the expression "soon after" in Ill. (*a*) to S. 114 of the Evidence Act must vary according to the circumstances of each case. The Court is not bound to draw this presumption and the Court must always ask itself whether in the circumstances of a particular case the presumption is one which in fairness to the accused can be drawn. In the case of property of some value, where it is very unlikely that the man from whom the accused got it had come by it honestly, or in the case of property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a big and prominent city of a common article like an old brass bell.

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Where an old bell stolen in the city of Bombay was found with the accused thirteen days after the theft, it would not be right to presume that the accused knew or had reason to believe that it was stolen merely on the ground that he was shown to be in possession of it thirteen days after the theft. (*Beaumont, C. J. and Macklin, J.*) EMPEROR *v.* MAVJI NANJI.
196 I C. 526 = 14 R.B 131 = 42 Cr.L J. 893 = 43 Bom.L.R. 629 = A.I.R. 1941 Bom. 325.

——**S. 114, Ill. (b)**—*Accomplice—Value of evidence of.*

Though Ill. (*b*) to S. 114 of the Evidence Act provides that a Court 'may' presume that the evidence of an accomplice is unworthy of credit. unless corroborated the word 'may' is not 'must.' Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances, one of which being that he is an accomplice, whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. (*Thomas, C.J.*) JAGDISH NARAIN *v.* EMPEROR. **1941 A.W.R. (C.C.) 358 = 1941 O.A. 947 = 1941 O.W.N. 1255.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration—Circumstantial evidence—If sufficient.*

It is firmly established both in England and India that in practice an accomplice must be corroborated in material particulars before the accused can be convicted. The corroboration however need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime. (*Skemp, J.*) SAFDAR ALI SHAH *v.* EMPEROR. **193 I.C. 878 = 13 R L. 503 = 42 Cr.L.J. 497 = A.I.R. 1941 Lah. 82.**

——**S. 114 (d)**—*Duty of Court—Presumption—If to be raised.*

The presumption mentioned in S. 114 (*d*) of the Evidence Act is a permissive presumption and a Court of fact cannot be compelled to raise the presumption in favour of either party. (*Agarwala, J.*) JAGDISH CHANDRA DEO DHABAL *v.* BISESWAR LAL.
194 I.C. 428 = 13 R.P. 715 = 7 B.R. 767 = A.I.R. 1941 Pat. 536.

——**S. 114, Ill. (e)**—*Presumption under—When raised.*

S. 114, Ill. (*e*) of the Evidence Act simply raises a presumption as to the regularity of the procedure, if the official act is as a matter of fact proved to be done and not otherwise. (*Nasim Ali and Mukherjea, JJ.*) MANINDRA CHANDRA ROY *v.* GOPI BALLAV SEN.
195 I.C. 69 = 14 R.C. 123 = 45 C.W.N. 44 = A.I.R. 941 Cal. 353.

——**S. 114, Ill. (g)**—*Defendant not entering witness box—When justified.*

Generally speaking there is a good deal to be said for the contention that a suit should succeed on the ground that the defendant had not cared to enter the witness box and testify as to the truth of his case. But if a defendant is of opinion after the plaintiff's case had been completed that the evidence was so discrepant and doubtful as to make it impossible for any Court to believe it, then if he so liked to take the risk he is justified in not giving evidence. (*Davies.*) BHANWAR LAL *v.* BALURAM. **1940 A.M.L.J. 93.**

——**S. 114, Ill. (g)**—*Failure to produce relevant receipts—Inference.*

EVIDENCE ACT (1872), S. 115

Where there is a dispute as to the area actually settled with the defendants and the receipts given by the plaintiff for the *nazarana* paid which would enable the ascertainment of the actual area settled, are not produced by the defendants, it goes to show that the defendants are deliberately keeping them back as they went against them. (*Sathe, J.M.*) AMREZ SINGH *v.* SHUKURULLAH.
1940 R D. 608 = 1941 A.W.R. (Rev.) 95 = 1941 O.A. (Supp) 83

——**S. 115**—Abandonment of property—Sales and purchases without protest—Subsequent assertion of title—If permissible. *See* ABANDONMENT.
1941 Rang.L.R. 153.

——**S. 115**—Acquiescence—Building on another's land not *bona fide*—Plea of estoppel—If can avail. *See* 1940 Dig., Col. 601. KANHAIYA LAL *v.* HAMID ALI.
15 Luck. 619.

——**S. 115**—*Acquiescence—Division of holding by litigation—Stranger profiting from it and abiding by it—If can later on seek to question it.*

A person though not a party to the litigation that effected a division of holding, has nevertheless profited from it and has all along abided by it, cannot later on seek to question the division of holding on the ground that he was not a party to that litigation. (*Sathe, J.M.*) CHIRANJI LAL *v.* RAM PRASAD.
1941 A.W.R. (Rev.) 924 = 1941 O.A. (Supp.) 798 = 1941 R.D 813.

——**S. 115**—*Acquiescence—Mortgage by son of house left by deceased father—Widow of deceased signing mortgage deed after hearing its contents—Right of residence and maintenance as against mortgagee—Estoppel.*

Where a house left by a Hindu father is mortgaged by his son and the widow of the deceased has signed the mortgage deed after hearing its contents and as token of consent, the widow has acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance, she is estopped from claiming those rights against the mortgagee. (*Almond, J.C. and Mir Ahmad, J.*) JASODAN DEVI *v.* JAI GOPAL. **193 I.C 631 = 13 R. Pesh. 63 = A.I.R. 1941 Pesh 17**

—— **S. 115**——*Acquiescence—Requisites.*

Acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. (*Thomas, C.J. and Ghulam Hasan, J.*) RAM AVADH PANDE *v.* GHISA PANDE.
95 I.C. 880 = 1941 R.D. 782 = 14 R O. 128 = 1941 O.A. 725 = 1941 A W.R. (Rev.) 760 = 1941 O.W N 1021 = 1941 O.L.R. 630 = 1941 A.L.W. 871 = A.I R. 1941 Oudh 611.

——**S. 115**—*Consent decree—Estoppel—Test.*

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise must depend upon the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree"? 35 Mad. 75, Rel. on. A bond was payable in ten annual instalments. The plaintiff instituted a suit for recovery of certain sum when two instalments remained unpaid. This suit was compromised and the parties came to an agreement that a decree for the two instalments should be passed, but that no further claim should be made by the plaintiff without going into the accounts relating to the balance. In a subsequent suit by the plaintiff it was pleaded by the defendant *inter alia* that full consideration for the bond had not been paid:

Held, that the compromise decree in the previous suit could not be considered to be tantamount to an admission that full consideration had been paid for the bond. Hence the consent decree in the previous suit was not a bar to the pleas raised by the defendant in the subsequent suit. (*Bhide, J.*) ATA MOHAMMAD *v.* LACHHMAN DAS.
193 I.C 781 = 13 R.L 492 = A.I.R. 1941 Lah. 116.

——**S. 115**—*Description in suit as occupancy tenant—If operates as estoppel in suit to eject him as non-occupancy tenant.*

The mere description of the tenant as an occupancy tenant would not constitute an estoppel in a suit to eject him as non-occupancy tenant. To constitute estoppel the action of the opposite party must have led the other party to do something that they would not otherwise have done. (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAR SINHA.
1941 R D. 678.

—— **S. 115**—*Essentials of estoppel—Plea of a particular status based on a document—If can operate as an estoppel.*

Under S. 115, Evidence Act, a person is estopped only when he has by his declaration or act intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. If a person in suit claims a certain status on the strength of the interpretation put by him on a certain document, he cannot be said to have led the other party to believe a thing or act on its belief, for it was open to the latter to examine the document and to decide for himself whether the interpretation put by the opposite party was correct or not. The action of the defendants in resisting various suits and applications filed by the plaintiff against them in Revenue Courts on the ground that a particular document was a mortgage and not a *theka*, cannot operate as an admission or as an estoppel against those defendants in subsequent suits. (*Harper, S.M and Sathe, J.M.*) MAKKA LAL *v.* GANGA SINGH. **1940 O.W.N. 1233 = 1940 R.D. 582 = 1941 A.W.R (Rev.) 80 (2) = 1941 O.A (Supp.) 69.**

——**S 115**—Estoppel—None if truth known *See* 1940 Dig., Col. 604 LORIND CHAND *v.* PUNJAB NATIONAL BANK, LTD.
191 I C 830 = 13 R L. 336.

——**S. 115**—*Estoppel under—Plea when can be raised—Invalid mortgage—Valid sub mortgage by mortgagee—Representation by owner as to validity of mortgage—Owner if can sue to recover possession based on title.*

In order that an estoppel can be raised under the provisions of S. 115, Evidence Act, the representation must be a representation of fact and not of law; and also there can be no estoppel against the provisions of a statute. Where a person mortgaged his property over 100 Rs. in value by an unregistered instrument but the mortgagee in his turn created a sub mortgage by a proper registered instrument, it was *held* the mortgagor could sue to recover the property basing his claim on his title though he might have made representations to his mortgagee which might amount to recognition of the legality of his mortgage. The representation was *held* to be in regard to a matter of law and not in regard to a matter of fact. (*Roberts, C.J. and Dunkley, J.*) MA MO E *v.* MA KUN HLAING. **1941 Rang.L.R 309 = 197 I.C 20 = A.I.R. 1941 Rang, 234.**

——**S. 115**—*Inconsistent pleas—Forum of proceedings.*

EVIDENCE ACT (1872), S. 115.

A party cannot be allowed to claim first that legal proceedings should have been brought in one Court and then subsequently turn round so as to adopt an entirely opposite position. (*Tek Chand and Beckett, JJ.*) ANNU MAL HAR NARAIN *v.* BRIJ LAL.

196 I.C. 6 1= 4 R.L. 164= 43 P.L.R. 479= A.I.R. 1941 Lah. 327.

——**S. 115**—*Landlord and Tenant—Ejectment under S. 61 of the Oudh Rent Act for arrears of rent—Subsequent suit for arrears—Effect.*

Where after an order for ejectment under S. 61 of the Oudh Rent Act for arrears of rent, the landlord files a fresh suit for arrears of rent, it operates as an admission on the part of the Zamindar that the defendant is his tenant in spite of the previous decree for his ejectment and operates also as an estoppel under S. 115 of the Evidence Act against the landlord seeking execution of his ejectment decree. (*Harper, S.M. and Sathe, J.M.*) MOHAMMAD TAQI *v.* CHITARU **1941 R.D 415= 1941 A.W.R. (Rev) 475= 1941 O.A. (Supp.) 434.**

—— **S 115**—*Minority—Estoppel—Contract Act, S. 11.*

A person is not estopped from setting up the plea of minority in avoidance of a contract. S. 115 of the Evidence Act which is the law of procedure cannot override S. 11 of the Contract Act, the substantive law. (*Akram, J.*) NAKUL CHANDRA *v.* SASADHAR SAHA. **45 C.W.N. 906.**

——**S. 115**—*Minor — Promissory-note after majority for amounts advanced after majority and during minority—Validity—Right of minor to challenge.*

Quaere : Whether a minor is debarred from challenging the validity of a handnote executed by him after he comes of age for a consideration part of which is paid to him after he has become a major and part of which consists of his promise to pay for the amounts advanced to him or for him during his minority. (*Manohar Lall and Chatterji, JJ.*) JAIGOBIND PRASAD SAHU *v.* MT. HIRIA. **20 Pat. 130 = 196 I.C 220 = 8 B.R. 8 = 14 R.P. 183 = A,I.R. 1941 Pat. 433.**

——**S. 115**—*Mortgagor and mortgagee—Doctrine of estoppel—Basis of—Mortgagor denying mortgage and mortgagee accepting that position—Doctrine, if applicable.*

It is a well-recognised doctrine that neither the mortgagor nor the mortgagee can deny the title of the other at the time of the mortgage. They can only show that the title had ceased after the mortgage. This doctrine of estoppel has for its basis the relationship of mortgagor and mortgagee and is based on the principle that one who derives a benefit from the other cannot deny the other's title. There is no scope for the application of the doctrine to a case where the mortgagor takes up the position that he is not the mortgagor, the executant of the mortgage deed not having authority to sign on his behalf, and the mortgagee accepts that position. (*Mitter and Khundkar, JJ.*) JASODA BAI *v.* MANGAL CHAND. **45 C W.N. 470.**

——**S. 115**—*Representation on point of law—If estoppel.*

It is well established that a representation on a question of law does not amount to an estoppel. (*Harries, C.J. and Manohar Lall, J.*) TIKA SAO *v* HARI LAL. **195 I.C. 428 = 7 B.R. 924 = 14 R P 122 = A.I.R. 1941 Pat. 276.**

——**S. 115**—Statute—Estoppel against. *See* CHOTA NAGPUR TENANCY ACT, S. 46 (6), **7 B.R. 624.**

——**S. 116**—*Applicability—Lease of lands belonging to lessor as well as to his relation—Lease reciting all lands as being in lessor's possession and enjoyment and containing covenant by lessee for payment of rent to lessor—Suit for rent—Plea of payment of part rent to real owner—Estoppel.*

EVIDENCE ACT (1872), S. 135.

A tenant cannot be permitted to show that in granting him the lease, the landlord acted as agent of another person who was the real owner, and that the liability to pay rent to the lessor cannot be discharged by payment to that alleged owner. To so permit the tenant would be contrary to the rule of estoppel laid down in S. 116 of the Evidence Act. The plaintiff sued for recovery of rent payable under a registered *Kadapa* executed to him by the defendant It appeared that the property leased consisted partly of lands, belonging to the plaintiff and partly of lands belonging to his adoptive mother which were under his management. The *Kadapa*, however, recited that the property leased was in the absolute possession and enjoyment of the plaintiff, and it contained a covenant by the defendant to pay rent to the plaintiff. In defence to the claim the defendant pleaded that part of the rent had been paid to the plaintiff's adoptive mother who was the real owner of part of the property.

Held, that S. 116 of the Evidence Act estopped the defendant from denying that the plaintiff had title to the entire property demised under the lease or from pleading discharge by payment to the real owner. (*Patanjali Sastri, J*) VENKATANARASIMHACHARYULU *v.* GANGARAJU. **1941 M W N. 404 = 53 L.W. 492 = A I.R. 1941 Mad. 607 = (1941) 1 M.L.J. 554.**

——**S. 116**—*Denial of landlord's title—Permissibility.*

Once a complete relationship of landlord and tenant is established, the rule of estoppel comes into operation and prevents the tenant from denying the authority and title which he admitted to rest in the landlord who inducted him into possession of the land (*Mukherjea, J.*) DISTRICT BOARD OF TIPPERAH *v.* SARAFAT ALI. **195 I C. 594 = 14 R.C. 17 = 73 C.L.J. 281 = A.I.R. 1941 Cal 408.**

——**S. 116**—Estoppel of tenant—Derivative title of plaintiff. *See* 1940 Dig., Col 605. PARKASH KAUR *v.* GIAN CHAND. **191 I.C. 555 = 13 R.L. 318.**

——**S. 116**—*Scope—Estoppel—If applies to tenant not put in actual possession by lessor.*

Under S. 116 of the Evidence Act as it prevails in Mysore the estoppel applies to a tenant who has executed a "lease-deed" in favour of his lessor even if he has not been put in actual poseession by the lessor. (*Reilly, C.J. and Venkataranga Iyengar, J.*) GURUMURTHIAH *v.* SEETHARAMAIYA. **19 Mys.L.J. 310.**

——**S. 135 and C. P. Code, S. 151**—*Party present during examination of his witness—If debarred from giving evidence—Powers of Court—Limits to the exercise of inherent jurisdiction under S. 151, C. P. Code.*

Where a party to a suit was present in Court when his witnesses were examined and later on claimed to be examined as a witness in support of a contention put forward by him and it was disallowed it was *held* that there was no doubt a practice to refuse to allow such a person to give evidence, but that there was no rule of the Court to that effect, nor was there any provision of law in the C. P. Code or in any other statute. It was *held* further that S. 135 of the Evidence Act did not authorise a Court of law to refuse the examination of a witness who might have done something which was not very desirable. It was also held that the inherent powers of the Court were very wide and undefinable, but at the same time the exercise of such powers should not be made in an arbitrary and capricious manner. (*Baipai and Dar, JJ.*) SUBHKARAN SINGH *v.* KEDAR NATH. **196 I C. 124 = 1941 O A. (Supp) 586 = 1941 A.W.R. (Rev.) 632 = 1941 A.L W. 662 =**

EVIDENCE ACT (1872), S. 138.

14 R.A. 125 = 1941 A.L J. 345 = 1941 R.D. 571 = A.I.R. 1941 All. 314.

——**S 138**—*Scope—Power of Court to restrict re-examination—Witness cross-examined on two days—Re-examination—If can be limited to matters arising from cross-examination on second day only.*

Where the cross-examination of a witness begins on one day and is completed only the next day, the party calling the witness is entitled to re-examine the witness on the whole field covered by the witness and not merely on the matters arising in the cross examination on the second day. The law does not contemplate the placing of any such restriction on the right of re-examination conferred by S. 138 of the Evidence Act and it is not open to the Court to take it away If the matter elicited in re-examination gives rise to any suspicion that it has been the result of tutoring with regard to any matter covered on the first day of the cross-examination, it would be open to the Judge to draw the attention of the jury to the fact that the lapse of time may have given an opportunity for preparation; but this would not be a ground for refusing to let questions in re-examination being put. (*Rowland, J.*) BAKHORI GOPE *v.* ABDUL HALIM. **195 I.C. 107 = 7 B.R. 875 = 14 R.P 84 = 1941 P.W N 255 = 22 Pat.L.T. 327 = A.I.R. 1941 Pat. 362.**

——**S. 138**—*Scope—Sessions trial—Tendering witness for cross-examination—Propriety of practice—Eye witness—Tendering of for cross examination—Legality.*

To tender a witness for cross-examination in a Sessions trial is a very irregular course. The practice of tendering a witness for cross-examination is inconsistent with S. 138 of the Evidence Act. Such a course should, if at all, be adopted only in the cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court but at the same time do not want to deprive the accused of his right of cross-examining such witness, they tender him for cross-examination. But the witness should, strictly speaking, be asked by the prosecution, with the consent of the accused's pleader and the leave of the Court, whether his evidence in the lower Court is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. In any case the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important witness. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* SADAPPA GIREPPA. **43 Bom.L.R. 946.**

——**S. 145**—Approver going back on confession—Use of such confession—Extent. *See* 1939 Dig., Col. 554. BALIRAMSINGH *v.* EMPEROR. **I.L.R. (1941) Nag. 506.**

——**Ss. 145, 155 and 157**—*Petition of complaint filed before Magistrate by witness after occurrence—Use of.*

A petition of complaint filed before a Magistrate by a witness some days after the occurrence, can be used not only to corroborate him under S. 157 of the Evidence Act but also to contradict him under S. 145 or to impeach his credit under S. 155 of that Act. (*Bartley and Akram, JJ.*) ABDUL LATIF *v.* EMPEROR.

196 I.C. 439 = 42 Cr.L.J. 871 = 45 C.W.N. 763 = A.I.R. 1941 Cal. 533.

——**Ss. 145 and 67**—*Relative applicability—Object to utilise admission to prove the case and not to contradict witness—Mode of proof of admission.*

FAMILY ARRANGEMENT.

Where the object of trying to prove certain documentary admissions is to utilise those admissions to prove a party's case and not to contradict the persons making the admissions. S. 145, Evidence Act, could have no application. The admissions in question could be proved according to the provisions of S. 67 of the Act by the production of other witnesses. (*Harper, S.M. and Sathe, J.M.*) MATHURA *v.* RAMESHWAR. **1941 O.A. (Supp.) 420 = 1941 R.D. 405 = 1941 A.W.R (Rev.) 461 = 1941 A.L J. (Supp.) 89.**

——**S. 154**—Evidence of hostile witness—Value of—Entire evidence, if should be rejected. *See* 1940 Dig., Col. 607. ROMESH CHANDRA DAS *v.* NATIONAL TOBACCO CO. OF INDIA, LTD. **191 I.C. 535 = 13 R.C. 251.**

——**S. 154**—Hostile witness—Evidence of—Value of—"Declared hostile"—Use of—Desirability—Permission to treat witness as hostile—Grant of—Duty of Court. *See* 1940 Dig., Col. 607. NEBTI MANDAL *v.* EMPEROR. **22 Pat.L.T. 98.**

——**S. 154**—*Witness cross-examined as hostile witness in committing Court—If can be similarly cross-examined in Sessions Court without being examined in-chief.*

A prosecution witness who was declared hostile and permitted to be cross-examined by the prosecution in the committing Court, cannot be treated at once as a hostile witness and cross-examined by the prosecution in the Sessions Court without being examined-in chief. (*Bartley and Akram, JJ.*) ABDUL LATIF *v.* EMPEROR. **196 I C. 439 = 42 Cr L.J 871 = 45 C.W.N. 763 = A.I R. 1941 Cal. 533.**

——**Ss 155 and 157**—Petition of complaint filed before Magistrate by witness after occurrence—Use of. *See* EVIDENCE ACT, SS. 145, 155 AND 157 **45 C.W.N. 763.**

——**S. 163**—*Document inspected by adversary—Admissibility* in toto.

Under S. 163 of the Evidence Act, an inspection of documents by the adversary entitles the party producing them to tender them as evidence of both parties. Such documents must be admitted *in toto*. (*Tek Chand and Din Mohammad, JJ.*) BADRI PARSHAD *v.* SHANTI LAL. **195 I.C. 275 = 14 R.L. 43 = 43 P.L.R. 128 = A.I.R. 1941 Lah. 228.**

EXECUTION.

See (1) C. P. CODE, S. 47 AND O. 21.
(2) PRACTICE.

EXECUTOR. *See* WILLS.

FACTORIES ACT (XXV OF 1934), Ss. 2 (j) and 5—*Central Provinces Government Notification No. 202-2644 VII—If* ultra vires.

The Notification of the Central Provinces Government No. 202 2644 VII, dated 17th January 1939, which declares that all places in Central Provinces, wherein manufacturing process is carried on with the aid of power and wherein on any one day of the twelve months preceding the date of the notification ten or more workers were employed, to be factories under the Factories Act is *intra vires* of the power given to the Provincial Government by S. 5 (1) of the Factories Act. The notification is not universal but selective and it does not render S. 5 (*j*) of the Act nugatory inasmuch as the Act applies to the whole of British India while the notification applies only to Central Provinces. (*Grille, J.*) BEJONJI *v.* EMPEROR. **190 I.C. 438 = 14 R.N. 107 = 42 Cr L.J. 867 = 1941 N.L J. 471 = A.I.R. 1941 Nag. 337.**

FAMILY ARRANGEMENT—*Requisites—Validity—Test—Duty of Courts.*

FISHERY.

The essence of a family arrangement lies in an adjustment of conflicting claims *bona fide* made and recognized on both sides with the object of putting an end to the disputes. The true test is whether the parties had laid claim against each other and whether those claims had been settled by virtue of the agreement termed the 'family settlement.' The strength or validity of the claims of the parties has nothing to do with the validity of the settlement. It is not open to the Court to try to ascertain as to whether the claims of the parties to the family settlement were good and well founded and to test the validity of the settlement after having arrived at a finding upon the strength or otherwise of such claims. Where disputes arose between the son, daughter and brother of a deceased person with reference to the right to succeed to his property and the son and daughter with a view to end the disputes came to an agreement and had the property mutated in equal shares as between themselves it was held that the essential elements of a family settlement were fully established. (*Ghulam Hasan, J.*) UMA DATT *v.* RAM JIWAN. **192 I.C. 63 = 13 R.O. 304 = 1941 O.L.R. 52 = 1941 A.W.R (C.C.) 29 = 1940 O.A. 1272 = 1940 O.W.N. 1330 = A.I.R. 1941 Oudh 185.**

FISHERY—Grant of right—Navigable and non-navigable rivers—Crown's right in England and India. *See* 1940 Dig., Col. 617. PRABHA BATI SAHEBA *v.* SECRETARY OF STATE. **I.L.R. (1940) 2 Cal. 529 = 72 C.L.J. 303 = 191 I.C. 854 = 13 R.C. 292.**

——Right to follow shifting river and its adjuncts—Beal in dying bed—When ceases to be part of river. *See* 1940 Dig., Col. 617. RAJNANDINI DEBI *v.* MANMATHA PAL. **197 I.C. 147 = A.I.R. 1941 Cal. 223.**

FOREIGN JUDGMENT. *See* C. P. CODE, S. 13.

FRAUD. *See* PRACTICE—FRAUD.

GENERAL CLAUSES ACT (X OF 1897), S. 3 (25)—Applicability—Bazar dues. *See* 1940 Dig., Col. 620. RAM JIAWAN *v.* HANUMAN PERSHAD. **16 Luck. 191.**

——**S. 6 (e)**—*Applicability—Temporary or expiring statutes.*

The rule laid down in S. 6 (*e*) of the General Clauses Act applies to those cases only, where an Act or Ordinance has been repealed by a subsequent enactment. It has no reference to temporary or expiring statutes which automatically lapse at a certain date, or on the happening of a certain contingency, without fresh legislation. (*Tek Chand and Beckett, JJ.*) KARIM SHAH *v.* MST. ZINAB BIBI. **195 I.C. 304 = 14 R.L. 62 = 43 P.L.R. 103 = A.I.R. 1941 Lah. 175.**

——**S. 24**——Applicability and scope—Rule made Act—If Act or Regulation—Notification to bring into effect new rules on future date expressly superseding old rules—Effect of—Old rules—If in force until coming into force of new rules. *See* ELECTRICITY RULES (1922), R. 40-A. **43 Bom.L.R. 99.**

——**S. 26**—Convictions under S. 352, I. P. Code and S. 3 (12), Madras Town Nuisances Act—Separate sentences—Legality. *See* MADRAS TOWN NUISANCES ACT, S. 3 (12). **1941 M.W.N 765 (1).**

GENERAL CLAUSES ACT (BURMA). *See* BURMA ACTS.

GOVERNMENT OF BURMA ACT (1935), S 5 (3)—*Scope and applicability.*

The correct reading of S. 5 (3) is that if any question arises whether any matter (*a*) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (*b*) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment then the decision of the Governor in his discretion is final. S. 5 (3) only applies as between the Governor and the Ministers in regard to administrative matters. S. 5 (3) has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of Part 4 ("Legislative") of the Government of Burma Act. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91 = 13 R.R. 211 = 4 F.L.J. (H.C.) 8 = A.I.R. 1941 Rang. 5.**

GOVT. OF BURMA ACT (1935), S. 25.

——**Ss. 25 and 27**—*Speaker if can declare seat of member vacant.*

S. 27 (3), Government of Burma Act, expressly prohibits the speaker from deciding whether a member has, since his election, become disqualified for being a member under S. 25 (1) (*a*), with the result that his seat has become vacant under S. 24 (2) (*a*). The punishment of declaring his seat vacant cannot be inflicted on a member of the Legislature until a competent Court has found him to be disqualified under S. 25 (1). (*Dunkley and Sharpe, JJ.*) U AYE *v.* U CHIT HLAING. **1941 Rang.L.R. 321 = 4 F.L.J. (H.C.) 129 = 14 R.R. 78 = 196 I.C. 372 = A.I.R. 1941 Rang. 151.**

——**Ss. 25 and 24**—*Vacation of seat—Who can determine.*

The question whether a seat of a member of the House of Representatives has become vacant or not is not a point of order at all for the Speaker, nor is it a matter for the House to determine. It is a point of law affecting the status of an individual and is for a Court to determine. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang. L.R. 101 = 193 I.C. 114 = 14 R.R. 228 = 4 F.L.J. (H.C.) 114 = A.I.R. 1941 Rang. 49.**

——**Ss. 25 (1) (a) and 42**—*Meaning of S. 25 (1) (a)—Vacancy of seat under Government of Burma Act—Ordinance providing for restoration to former seat—Validity.*

The only meaning which can be assigned to S. 25 (1) (*a*) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. An ordinance the effect of which is to provide that a member whose seat has become vacant under the Government of Burma Act shall nevertheless be restored to his former seat, which is then vacant is beyond the powers of the Governor and is void. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91 = 13 R.R. 211 = 4 F.L.J. (H.C.) 8 = A.I.R. 1941 Rang. 5.**

——**S. 25 (1) (a)**—*Office of profit—Non-receipt of remuneration—If affects question.*

A person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers holds an office of profit under the Crown in Burma even if he has in fact received no remuneration or has not joined any particular unit of the Army in Burma or his appointment is subject to His Majesty's approval. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91 = 13 R.R. 211 = 4 F.L.J. (H.C.) 8 = A.I.R. 1941 Rang. 5.**

——**S. 25 (1) (a)**—*Office of profit—Resignation—Permission to resign not given—Person if still holds office.*

Where a member has resigned his appointment in the Army as Second Lieutenant he is not holding any office of profit under the Crown and is therefore never disqualified for being a member of the House of Representatives even if His Majesty has not yet approved of his being given permission to resign his appointment

GOVT. OF BURMA ACT (1935), S. 27

(*Sharpe, J.*) U BA MAUNG *v.* U CHIT HLAING.
193 I.C. 234=13 R.R. 260=4 F.L.J. (H.C.) 42=A.I.R. 1941 Rang. 27.

——**Ss. 27 (1) and 32 (2)**—*Scope and object of S. 27 (1)—Declaration as to vacancy of a seat by speaker—If protected by S. 27 (1) or 32 (2).*

S. 27 (1) is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. The speaker's declaration that certain member's seat was vacant, although the declaration was made by words spoken in the chamber does not come within the purview of the sub-section. In making such declaration the speaker is doing more than merely giving a ruling on a point of order. He is therefore not protected either by S. 27 (1) or by S. 32 (2). (*Sharpe, J.*) U LUN *v.* U CHIT HLAING.
193 I.C. 91=13 R.R. 211=4 F.L.J. (H.C.) 8=A.I.R. 1941 Rang. 5.

——**S. 27 (3)**—*Speaker—Powers of—Declaration as to vacancy of a seat.*

One must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration. In order, therefore, to appreciate the position of the speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Government of Burma Act. The speaker in Burma has no powers to declare whether a seat has become vacant or not. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91=13 R.R. 211=4 F.L.J. (H.C.) 8=A.I.R. 1941 Rang. 5.**

——**S. 27 (3)**—*Speaker—Powers—Declaration as to vacancy of seat.*

The Speaker is subject to the jurisdiction of the High Court and he has no power to declare whether a member's seat has become vacant or not. (*Sharpe, J.*) U BA MAUNG *v.* U CHIT HLAING. **193 I.C. 234=13 R.R. 260=4 F.L.J. (H.C.) 42=A.I.R. 1941 Rang. 27.**

——**S. 32 (2)**—Speaker's declaration as to vacancy of seat—If protected. *See* GOVERNMENT OF BURMA ACT, SS. 27 (1) AND 32 (2). **A.I.R. 1941 Rang. 5.**

——**Ss. 41 and 42**—*Ordinance—Existence of circumstances necessary for promulgation of—Court, if can decide as to.*

The Court will not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only judge of that. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang.L.R. 101=193 I.C. 114=13 R.R. 228=4 F.L.J. (H.C.) 114=A.I.R. 1941 Rang. 49.**

——**S. 41**—*Ordinance under—Duration—Computation of time—Fractions of a day—If to be ignored.*

An ordinance under S. 41 provided that the ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature if there be no resolution disapproving it passed by the House of Representatives. The Legislature re assembled at 11 A.M. on 15th February.

Held, that the ordinance ceased to operate at midnight on 28th/29th March, as the law takes no notice of the fractions of a day. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91=13 R.R. 211=4 F.L.J. (H.C.) 8=A.I.R. 1941 Rang. 5.**

GOVT. OF BURMA ACT (1935), S. 42.

——**Ss. 41 and 42**—*Ordinance under—If has same force as Act.*

An ordinance promulgated under either S. 41 or S. 42 of the Act has the same force and effect as an Act of the Legislature. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang.L.R. 101=193 I.C. 114=13 R.R. 228=4 F.L.J. (H.C.) 114=A.I.R. 1941 Rang. 49**

——**Ss. 41 and 42**—*Ordinances under—Ordinance No. VII of 1939, Ordinance No. V of 1940 and Act No XII of 1940—If have retrospective effect.*

Ordinance No. VII of 1939, Ordinance No. V of 1940 and Act No. XII of 1940 cannot have any retrospective effect so as to protect a member from a disqualification which he had incurred prior to their coming into force. (*Dunkley and Sharpe, JJ.*) U AYE *v.* U CHIT HLAING. **1941 Rang.L.R. 321=196 I.C. 372=14 R.R. 78=4 F.L.J. (H.C.) 129=A.I.R. 1941 Rang. 151.**

——**Ss. 41 and 42**—*Ordinances—Promulgation—Publication—Relation between.*

Promulgation and publication in the Official Gazette are not synonymous. There is a distinction between the two. Publication in the Official Gazette is not *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. Reading of an ordinance by the speaker to the House of Representatives is sufficient promulgation. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING.
1941 Rang. L.R. 101=193 I.C. 114=13 R.R. 228=4 F.L.J. (H.C) 114=A.I.R. 1941 Rang. 49.

——**S. 41 (2) (a)**—*Ordinance—Duration—Computation of time.*

An ordinance was promulgated under S. 41 of the Act. The Legislature re assembled on 15th February, 1940,

Held, that the ordinance expired the midnight which concluded on 28th March, as six weeks from 15th February, 1940, expired on 28th March, 1940. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING.
1941 Rang.L.R. 101=193 I.C. 114=13 R.R. 228=4 F.L.J. (H.C.) 114=A.I.R. 1941 Rang. 49.

——**S. 42**—*Governor's powers—Scope of—Ordinances—Implication underlying.*

The Governor's functions are capable of being exercised in any of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters in the Government of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second and third group according to the opinion formed by the Governor as to the course which he should take. Where therefore an ordinance issued is expressed to be under the powers conferred by S. 42 it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING.
1941 Rang.L.R. 101=193 I.C. 114=13 R.R. 228=4 F.L.J. (H.C.) 114=A.I.R. 1941 Rang. 49.

——**S. 42**—*High Court, if can go into question as to an ordinance being within or outside the powers of the Governor.*

High Court is not precluded from enquiring whether an ordinance promulgated by the Governor under S. 42 of Government of Burma Act is or is not within hi

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powers. Sub-S. (4) of S. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under S. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature would not have been valid An ordinance providing that members of the House of the Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces is not a matter of defence, but is concerned with something which is a matter entirely for the Ministers. Accordingly the Governor has no power to promulgate such ordinance when the Legislature is then in session. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING.
193 I.C. 91=13 R.R. 211=4 F.L.J. (H.C.) 8=A.I.R. 1941 Rang. 5.

——**S. 42**—*Ordinances—Preamble—Desirability.*

It is not legally necessary that an ordinance should have a Preamble setting out that the Governor is satisfied as required by the terms of S. 42 (1), and also the purpose within S. 42 (1), for which the ordinance is promulgated. Legaliy all that is necessary is that the Governor should declare that he promulgates the ordinance under the provisions of S. 42 of the Act; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an ordinance. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang. L.R. 101=193 I.C. 114=13 R.R. 228=9 F.L.J. (H.C.) 114=A.I.R. 1941 Rang. 49.**

——**S. 42**—*Ordinance—Promulgation—Date.*

Promulgation of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. Promulgation of a new law takes place through the medium of the Official Gazette. It is wrong for the notifications which appear in the Burma Gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; they should say "The Governor hereby promulgates the following ordinance." An ordinance therefore is promulgated on the date on which it is published in the Gazette. (*Sharpe, J.*) U LUN *v.* U CHIT HLAING. **193 I.C. 91=13 R.R. 211=4 F.L.J. (H.C.) 8=A.I.R. 1941 Rang. 5.**

——**S. 42**—Ordinance under—Validity—Provision for restoration to seat vacated under Government of Burma Act. *See* GOVERNMENT OF BURMA ACT-SS. 25 (1) (A) AND 42. **A.I.R. 1941 Rang. 5.**

GOVERNMENT OF INDIA ACT (1915 as amended in 1919), S. 30—*Agreement with Government—Formal deed—Necessity—Agreement evidenced by correspondence—If offends against S. 30—What would amount to sufficient compliance with S. 30.*

Though it may be very desirable to have a formal deed with regard to all the agreements made by Government, it cannot be held as a matter of law, that an agreement evidenced by tenders and acceptance of tenders or an agreement evidenced by correspondence or other documents of informal nature though fully established by evidence, must fail and be said to offend the terms of S. 30 of the Government of India Act, 1918. It is a sufficient compliance with the terms of S. 30 if the agreement is expressed in writing, and this writing may comprise a series of letters or a series of informal documents. (*Bajpai and Dar, JJ.*) DEVI PRASAD SRI KRISHNA PRASAD *v.* SECRETARY OF STATE.
1941 A.L.J. 570=1941 O.A. (Supp.) 776=1941 A.W.R. (Rev.) 891=1941 A.L.W. 983=4 F.L.J. (H.C.) 361=A.I.R. 1941 All 377.

——**(1915) S. 32**—Act of Indian Legislature excluding right of resort to Civil Court—If *ultra vires*. *See* 1940 Dig., Col. 621. SECRETARY OF STATE *v.* MASK & CO **I.L.R. (1940) Kar. (P.C.) 194=(1940) 2 M.L.J. 140 (P.C.).**

GOVT. OF INDIA ACT (1935), S. 100.

——**(1919) S. 65**—Construction and scope—Power to impose tax on income or profit received in British India by person resident outside—Government Trading Taxation Act (III of 1926)—If *ultra vires*. *See* GOVERNMENT TRADING TAXATION ACT. **43 Bom.L.R. 84.**

——**(1935), S. 53 (2)**—*Scope—Non-compliance—Bihar Agricultural Income tax Act, Para. 18 of Instrument of Instructions to Governors not complied with—Act, if invalid.*

There is no provision in the Government of India Act itself requiring a bill such as the one for the passing of the Bihar Agricultural Income-tax Act to be reserved for the consideration of the Governor-General, and that being so, the Act cannot be held to be invalid by reason of the Governor's failure to reserve the bill as directed by para. 18 of the Instrument of Instructions to Governors. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BEHAR. **20 Pat. 573=194 I.C. 663=14 R.P. 17=7 B.R. 818=1941 I.T.R. 386=4 F.L.J. (H.C.) 178=22 P.L.T. 863=A.I.R. 1941 Pat. 306 (S.B.).**

——**Ss. 99 and 100**—*Scope and effect of—Provincial Legislature—Power to affect prerogative rights of His Majesty—Decree or order of Privy Council—If affected by Madras Agriculturists Relief Act.*

It is a well established principle that within the limits of subject and area assigned to a legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself. It is clearly competent for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. The Legislative authority conferred by Ss. 99 and 100 of the Government of India Act of 1935 is subject only to "the provisions of this Act" and there is no provision in the Act which excepts generally the prerogative of the Crown. It is therefore within the competence of the Legislatures of India to make laws derogating from the prerogative rights of the Crown except of course in so far as such prerogatives may be comprised in matters specifically excepted. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law, such as Madras Act IV of 1938, although such rights may have been ascertained and defined by an order of His Majesty in Council. It cannot therefore be held that the Madras Act IV of 1938 is invalid and inoperative so far as decree or orders of the Privy Council are concerned. (*Wadsworth and Patanjali Sastri, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BHUSHANARAO. **54 L.W. 107=1941 M.W.N. 741=4 F.L.J. (H.C.) 280=A.I.R. 1941 Mad. 817=(1941) 2 M.L.J. 125.**

——**S. 100**—*Construction and scope—Powers of Provincial Legislature to enact laws affecting law as to promissory notes—Bihar Money-Lenders Act (VII of 1939), S. 8—Applicability to suits on hand notes—If can override Negotiable Instruments Act.*

S. 100 of the Government of India Act of 1935, when read in conjunction with the list in the seventh schedule, if it gives a Provincial Government power to legislate generally with respect to money-lending, also deprives it of all power with regard to that particular portion of the general subject of money-lending which consists of the law in respect to promissory notes. When a subject falls exclusively within List II, then the Provincial Legislature has full power, and Federal Legislature has none, and the fact that a law passed by the Provincial Legislature upon that subject may conflict with the existing Indian law in regard to that subject will not render

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the legislation *ultra vires* or invalid. On the other hand, if it is found that the Provincial Legislature, while purporting to legislate upon a subject in List II, has trespassed upon a field defined in List I and reserved under S. 100 (1) for the Federal Legislature, then nothing can make that legislation valid. S. 107 cannot apply. S. 107 (2) cannot be employed and the assent of the Governor General or of His Majesty cannot make the Provincial Law prevail even within the area of the Province. The Bihar Money Lenders Act, in view of S. 8 of that Act, does trespass upon the subject of promissory notes, since it modifies and alters the existing Indian law, namely, the Negotiable Instruments Act, which has been expressly enacted upon that very subject. S. 8 of the Bihar Money Lenders Act, when applied to suits upon promissory notes, undoubtedly modifies the existing rights and liabilities upon promissory notes as specified in the Negotiable Instruments Act,and it thereby affects the law with regard to promissory notes, and so while directly dealing with money-lending, trespasses indirectly upon the forbidden field and nullifies rights which exist in that field. Nothing in S. 8 of the Bihar Money Lenders Act can therefore debar the holder or the holder in due course of a promissory note, in a suit upon the note, from recovering the full amount of principal and interest due according to the apparent tenor of the note.

Quaere.—Whether S. 8, is *ultra vires*?

Dhavle, J.—S. 8 of the Bihar Money Lenders Act, whether or not it is intended to apply to suits upon hand-notes, cannot be taken to override the Negotiable Instruments Act. (*Dhavle and Meredeth, JJ.*) SAGAR MAL MARWARI *v.* BHUTHU RAM. **19 Pat. 974 = 190 I.C. 704 = 13 R.P. 239 = 21 Pat.L.T. 740 = 7 B R. 28 = 1940 P.W.N. 719 = A.I.R. 1941 Pat. 99.**

——**S. 100**—Construction—Powers of Federal and Provincial legislature—Conflict—Rule to determine validity of Act—Pith and substance—Test. *See* MADRAS AGRICULTURISTS RELIEF ACT. **(1941) 1 M.L.J. (Supp.) 1 (F.C.).**

——**S. 100 and Sch. VII, List 1, Entry 45 and List II, Entry 48**—Madras General Sales Tax Act—If *ultra vires*. *See* MADRAS GENERAL SALES TAX ACT. **(1941) 2 M.L.J. 607.**

——**S. 100**—*Powers of Provincial Legislature—Legislation taking away jurisdiction of Courts.*

Per *Dalip Singh, J.*—The Provincial Legislatures are statutorily sovereign within the limits of the powers assigned to them. The jurisdiction of the Courts is within the province of the Provincial Legislature. It follows therefore that the Provincial Legislature can take away the right of the Courts to try any dispute which the Legislature considers it inexpedient to be decided by Courts at all. (*Dalip Singh, Monroe and Sale, JJ.*) PUNJAB PROVINCE *v.* DAULAT SINGH. **195 I.C. 17 = 14 R.L. 19 = 4 F.L.J. (H.C.) 83 = 43 P.L.R. 198 = A.I.R 1941 Lah. 182 (F.B.).**

——**S. 100 and Sch. VII, List I, Item 19 and List II, Item 31**—Powers of Provincial Legislature to legislate as to possession of liquor—Prohibition of possession—Legality. *See* 1940 Dig., Col. 622. EMPEROR *v.* SAVER MANUAL DANTES. **I.L.R. (1940) Bom. 777 = 191 I.C. 85 = 42 Cr.L.J. 74.**

——**S. 100, Schedule VII, List I, Item 38 and List II, Item 27**—*Scope—Bihar Money-Lenders Act (VII of* 1939), *S.* 13—*Applicability to banks.*

The Bihar Money-Lenders Act of 1939 is not an enactment relating to the conduct of banking business by a corporation, contemplated by Item 38 of List I of Schedule VII to the Government of India Act, It is enactment relating to money-lending failing under Item 21 of List II of that Schedule. Money-lending is only a part of the business of a bank and therefore it cannot be said that in enacting the Bihar Money-Lenders Act the Legislature trespassed upon item 38 of List I, of Schedule VII, to the Government of India Act. S. 13 of the Bihar Money-Lenders Act does not legislate directly or indirectly with regard to the conduct of banking business and is not inapplicable to cases where the creditor is a bank. The mere fact that a decree under execution might in the ordinary course be obtained by a Bank cannot make the section an enactment relating to the conduct of banking business. (*Varma and Shearer, JJ.*) DEBABRATA BANERJEE *v.* BANK OF BIHAR LTD. **20 Pat. 831 = 195 I.C. 469 = 14 R.P.127 = 7 B.R. 936 = 4 F.L J. (H.C.) 153 = 1941 P.W.N. 466 = 22 Pat L T. 522 = A.I.R. 1941 Pat. 562.**

GOVT. OF INDIA ACT (1935), S. 107.

——**S. 105**—*Scope and operation—Law void* ab initio *—If can be validated under S.* 107.

S. 107 of the Government of India Act relates only to the concurrent list and has no application to subjects reserved exclusively to List I. The section, moreover, deals with repugnancy but not *ultra vires*. No assent of the Governor-General can validate a law which is void apart from any question of repugnancy and which it was never within the competence of the Provincial Legislature to enact, a law which is therefore void *ab initio*. S. 107 (2) provides means for overcoming a repugnancy ; it provides no means of validating a law which is completely *ultra vires—ultra vires ab initio*, and which therefore has no intrinsic force in it which can be validated. (*Dhavle and Meredith, JJ.*) SAGARMAL MARWARI *v.* BHUTHU RAM. **19 Pat. 974 = 21 Pat.L T. 740 = 190 I.C. 704 = 13 R.P. 239 = 7 B.R. 28 = 1940 P.W.N. 719 = A.I.R. 1941 Pat. 99.**

——**S. 107**—*Applicability—Provincial Act falling within Provincial Legislative list.*

If the subject matter of a Provincial enactment falls within the Provincial Legisiative list, the mere fact that it may also be affected by certain provisions in the concurrent Legislative list would not attract the provisions of S 107 of the Government of India Act regarding repugnancy. (*Dalip Singh, Monroe and Sale, JJ.*) MEGH RAJ *v.* ALLAH RAKHIA. **194 I.C. 413 = 13 R.L. 536 = 4 F.L.J. (H.C.) 99 = 43 P.L.R. 226 = A.I.R. 1941 Lah. 177 (F.B.).**

——**S. 107**—Scope—Madras Agriculturists' Relief Act—If invalid as being repugnant to Negotiable Instruments Act. *See* MADRAS AGRICULTURISTS' RELIEF ACT. **(1941) 2 M.L.J. 808.**

——**S. 107**—Scope—Madras Prohibition Act, S. 4 (1) (*a*)—If *ultra vires*. *See* MADRAS PROHIBITION ACT, S. 4 (1) (*a*). **(1941) 2 M.L.J. 41 (F.B.)**

——**S. 107 (1)**—"*Federal law*"—*If includes existing Indian law.*

The expression "Federal law" in S. 107 (1) of the Government of India Act would not include a previously existing Indian law on a subject falling in List I. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **I.L.R. (1941) Kar. (F.C.) 25 = 192 I.C. 225 = 13 R F.C. 47 = 1941 A.W.R. (Rev) 192 = 73 C.L.J. 1 = 1941 O.W.N. 425 = 22 P.L.T. 155 = 1941 P.W.N. 98 = 1941 O.L.R. 157 = 7 B.R. 523 = 3 F.L.J. 157 = 1941 R.D. 205 = 1941 A.L.W. 329 = 53 L.W. 109 = 1941 M.W.N. 100 = 45 C.W.N. (F.R.) 1 = 1941 O.A. 237 = A.I.R. 1941 F.C. 47 = (1941) 1 M.L.J. (Supp.) 1.**

GOVT. OF INDIA ACT (1935), S. 108.

——**S. 108 (2) (a)**—"*Act of Parliament*"—*Regulation I of* 1793—*Bihar Agricultural Income-tax Act—Validity.*

In the ordinary meaning of the expression an "Act of Parliament" is an Act passed by the House of Commons, the House of Lords and assented to by the King. Regulation I of 1793 was an enactment of the Governor-General in Council in India and was never before Parliament in England. This Regulation together with the other Permanent Settlement Regulations were enacted pursuant to the provisions and directions contained in S. 39, Pitt's India Act of 1784. Regulation I of 1793 purports to be an enactment of the Governor-General in Council and was enacted by the Marquis Cornwallis by virtue of the powers of legislation given to or assumed by the Governor-General in Council, and that being so it cannot be said that the Permanent Settlement Regulation, I of 1793 is in any sense an Act of Parliament. Consequently, the Bihar Agricultural Income-tax Act cannot be said to be invalid by reason of S. 108 (2) (*a*) on the ground that it is repugnant to the provisions of Regulation I of 1793. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 194 I.C. 663 = 14 R.P. 17 = 7 B.R. 818 = 1941 I.T.R. 386 = 4 F.L.J (H.C.) 178 = 22 P.L.T. 863 = A.I.R. 1941 Pat. 306 (S.B.).**

——**Ss. 108 (2) (a)**—"*British India*"—*Meaning of.*

Per *Manohar Lall, J.*—Having regard to the provisions of Ss. 311 and 110 (*a*) and (*b*) there is no escape from the conclusion that the Act has deliberately drawn a distinction between British India and a part of British India. Consequently, the term "British India" in S. 108 (2) (*a*) means the whole of British India and does not refer to a part of British India. Therefore, Bengal Regulation, I of 1793, cannot be said to be an Act of Parliament extending to the whole of British India inasmuch as it applies only to Bengal, Bihar, Orissa and other settled estates in some of the provinces. (*Harries, C.J. Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 194 I.C. 663 = 14 R.P. 17 = 7 B.R. 818 = 1941 I.T.R. 386 = 4 F.L.J (H.C.) 178 = 22 P.L.T. 863 = A.I.R. 1941 Pat 306 (S.B.).**

——**S 108 (2) (b)**—"*Governor-General's Act*"—*Bengal Permanent Settlement Regulation.*

The expression 'Governor-General's Act' in S. 108 (2) (*b*) refers to Acts contemplated in S. 44, Government of India Act, that is, to Acts enacted by the Governor-General after the Government of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. Consequently, S. 108 (2) (*b*) can in no way render the Bihar Agricultural Income-tax Act invalid because it is repugnant to Regulation I of 1793. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 194 IC. 663 = 14 R P. 17 = 7 B R. 818 = 1941 I.T.R. 386 = 4 F.L J. (H.C.) 178 = 22 P.L.T. 863 = A.I R. 1941 Pat. 306 (S.B.).**

——**S. 124 and Official Trustees Act (1913). Ss. 6 and 7**—Applicability of S. 124 of the Government of Burma Act—Suit against Official trustee. *See* 1940 Dig., Col. 621. OFFICIAL TRUSTEE *v.* RAEBURN. **193 I.C. 61 = 13 R R. 199.**

——**S. 143**—"Were being lawfully levied"—Interpretation. *See* 1940 Dig., Col. 623. DAULAT RAM *v.* MUNICIPAL COMMITTEE, LAHORE. **193 I.C 72 = 13 R.L, 426 = 4 F.L J (H.C) 47 = A.I.R. 1941 Lah. 40.**

GOVT. OF INDIA ACT (1935), S. 205.

——**S. 153** - *Meaning of.*

The true meaning of S. 153 is that in regard to being chosen as and thereby becoming members of the Legislature at the first elections, persons who would, but for S. 153, be disqualified under S. 25 (1) (*a*) by reason of their holding an office of profit under the Crown should not be disqualified if the office which they hold falls within cl. (*b*) of S. 153. Hence a person who at the time of the first elections, in November, 1936, held an office of profit under the Crown, which was of the class mentioned in Cl. (*b*) of S. 153, was by reason of the provisions of that section not disqualified for being elected as a member of the Legislature at those first elections or from subsequently sitting as a member of either chamber of the Legislature, as elected at those first elections, so long as he continued to hold that same office. (*Dunkley and Sharpe, JJ.*) U AYE *v.* U CHIT HLAING. **1941 Rang.L R. 321 = 196 I.C. 372 = 14 R.R. 78 = 4 F L J. (H C) 129 = A.I R. 1941 Rang 151.**

——**S. 179**—Suit against Secretary of State—Description of defendant as "Government, Punjab Province through Deputy Commissioner"—If affects institution of suit *See* 1940 Dig.. Col 623. MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY. **192 I.C. 729 = 13 R.L 401.**

——**S 205**—Absence of certificate—Board's right to entertain direct appeal—Proper procedure. *See* 1940 Dig.. Col. 626. PUNJAB CO-OPERATIVE BANK, LTD. *v.* COMMISSIONER OF INCOME TAX. LAHORE. **67 I.A 464 = I L R (1940) Lah. 685 = I L R (1940) Kar. P.C. 447 = 1940 M.W N 1275 = 22 Pat.L.T. 1 = 45 C,W.N 232 = 1941 P.W.N. 54 = 1941 O L R. 42 = 191 I C. 548 = 13 R P C. 130 = 7 B R. 309 = 43 P.L.R 168 = 43 Bom L.R. 372 = 73 C.L.J. 302 = (1941) 1 M.L.J 130 (P C.).**

——**S. 205**—Appeal to Federal Court—Discretion of High Court—Interference—Practice. *See* 1940 Dig., Col. 623. JAIGOBIND SINGH *v.* LACHMI NARAIN RAM. **21 P L T. 1109 = (1940) 1 M.L.J. (Supp.) 14.**

——**S. 205**—Certificate, when can be given. *See* 1940 D.g.. Col. 623. MAQBOOL HUSAIN *v.* EMPEROR. **15 Luck. 740.**

——**S. 205**—Certification—Duty of High Court—Nature of. *See* 1940 Dig., Col. 624. PUNJAB CO-OPERATIVE BANK. LTD. *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **67 I.A. 464 = I.L.R. (1940) Lah. 685 = 1940 M.W.N. 1275 = I.L.R. (1940) Kar. P.C. 447 = 22 Pat L.T. 1 = 45 C W N. 232 = 1941 P.W.N. 54 = 1941 O.L R. 42 = 191 I.C. 548 = 13 R P C. 130 = 7 B.R. 309 = 43 P.L R 168 = 43 Bom.L R. 372 = 73 C.L.J. 302 = (1941) 1 M L.J. 130.**

——**S. 205**—*Construction*—"*Involves a substantial question of law, etc.*"—*Meaning of*—*Substantial question of law—It must arise directly.*

It cannot be said that a case involves a substantial question of law as to the interpretation of the Act under S. 205 of the Government of India Act when the actual decision does not determine any such question, but in certain events, such a question might arise in the Federal Court. The mere possibility of some such question of law arising in a remote contingency cannot be enough to justify the granting of a certificate. When a man has been acquitted by two Courts in a criminal case, the High Court, before giving leave to appeal against his acquittal to a third Court, must find a clear indication in the statute that it is its duty to give such leave. (*Beaumont, C.J., Wadia Wassoodew and Sen, JJ.*) EMPEROR *v.* SAVER MANUEL DANTES. **I.L.R. (1941) Bom. 401 = 195 I.C. 263 = 14 R.B. 31 = 42 Cr.L.J. 713 = 4 FL.J. (H.C.) 344 = 43 Bom,L.R. 496 = A,I.R. 1941 Bom. 245 (F.B.).**

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——**S. 205**—*"Final order"—Order answering reference on point of law under S. 432, Cr. P. Code—Right to claim certificate of appeal to Federal Court.*

An order made by the High Court under S. 433, Cr.P. Code, merely answering a question raised by a presidency magistrate in a reference under S. 432, Cr. P. Code, and expressing opinion on a point of law, is not a final order within the meaning of S. 205 of the Government of India Act, against which a right of appeal to the Federal Court can be claimed. (*Beaumont, C.J., Wadia, Wassoodew and Sen, JJ.*) EMPEROR *v.* SAVER MANUEL DANTES. **I.L.R (1941) Bom. 401 = 195 I.C. 263 = 14 R.B. 31 = 42 Cr.L.J. 713 = 4 F.L.J. (H.C.) 344 = 43 Bom.L.R. 496 = A.I.R. 1941 Bom. 245 (F.B.).**

——**S. 205 (1)**—Certificate under—Effect of—Civil Revision Petition—Order of dismissal by single Judge—Certificate that substantial question as to interpretation of Act is involved—Appeal to Federal Court—Competency—C. P. Code, O. 45, Rr. 2 and 17—Petition under—Procedure. *See* 1940 Dig., Col., 626. SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN **I.L.R. (1941) Mad 43 = 193 I.C. 865 = 13 R.M. 729 = (1940) 2 M.L.J. 170.**

——**S. 205 (2)**—Advocate General added in appeal in the High Court—Dispute between private parties—Advocate-General, if entitled to appeal to Federal Court. *See* C. P. CODE, O. 1, R. 10 AND GOVERNMENT OF INDIA ACT, S. 205 (2). **45 C.W.N. (F.R.) 27 = A.I.R. 1941 F.C. 16.**

——**S. 205 (2)**—*Construction—Right of appeal under.*

The wording of sub-section (2) of S. 205 of the Government of India Act, 1935, must be taken to indicate that the legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act. (*Beaumont, C.J., Wadia, Wassoodew and Sen, JJ.*) EMPEROR *v.* SAVER MANUEL DANTES. **I.L.R. (1941) Bom 401 = 195 I.C. 263 = 14 R.B. 31 = 42 Cr.L.J. 713 = 4 F.L.J. (H.C.) 344 = 43 Bom.L.R. 496 = A.I.R. 1941 Bom. 245 (F.B.).**

——**S. 207 (1)**—Charge of cheating against Deputy Inspector of Schools inducing District Educational Council by false information to admit school to aid—Prosecution—Sanction of Governor—Necessity. *See* 1940 Dig., Col. 627. KOCHU SAHEB *v.* EMPEROR. **13 R.M. 494 = 42 Cr.L.J. 99.**

——**S. 208 (b)**—*Leave to appeal to Privy Council—Granting—Principle.*

When dealing with an application for leave to appeal to the Privy Council, the Federal Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined. The Federal Court held that it was unable to hold that there was room for such serious doubt on the point as to whether S. 292 of the Constitution Act deprived the Legislatures in India of the power to legislate with retrospective effect as to justify it in holding that that was a substantial question on which leave to appeal to Privy Council was to be granted. The Court further held that it could not be said that any decision to be obtained from their Lordships of the Privy Council if this appeal was to be permitted to go to them, was likely to have a material bearing upon future litigation. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) ATIQA BEGUM *v.* UNITED PROVINCES. **I.L.R. (1941) Kar. (F.C.) 143 = 194 I.C. 246 = 13 R.F.C. 68 = 73 C.L.J. 431 = 7 B.R. 765 = 1941 M.W.N. 618 = 1941 A.W.R. (Rev.) 608 = 1941 P.W.N. 398 = 941 O.A. 608 = 1941 O.L.R. 451 = 22 P.L.T. 659 = 1941 A.L.W. 637 = 4 F.L.J. 18 = 45 C.W.N. (F.R.) 90 = 1941 R.D. 447 = 1940 O.W.N. 799 = A.I.R. 1941 F.C. 70.**

GOVT. OF INDIA ACT (1935), S. 224.

——**S. 208 (b)**—*Leave to appeal to Privy Council—Granting of—Principle.*

The Federal Court will not be disposed to grant leave to appeal to the Privy Council, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved. Leave to appeal was refused in a case where the decision of the Court dealt only with the scaling down of decrees obtained before the Madras Agricultural Relief Act came into force, on the ground that the number of such decrees must necessarily be small and that there could be no addition to their number. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) SUBRAHMANYAM CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **I.L.R. (1941) Kar. (F.C.) 141 = 194 I.C. 225 = 13 R.F.C. 77 = 194 O.L.R. 454 = 73 C.L.J. 429 = 1941 M.W.N. 566 = 7 B.R. 764 = 43 P.L.R. 434 = 1941 A.W.R. (Rev.) 607 = 54 L.W. 61 = 45 C.W.N. (F.R.) 96 = 1941 O.A. 607 = 1941 A.L.W. 636 = 22 P.L.T. 697 = 4 F.L.J. 16 = 1941 P.W.N. 371 = 1941 R.D. 446 = 1941 O.W.N. 798 = A.I.R. 1941 F.C. 69 = (1941) 2 M.L.J. 33.**

——**Ss. 223 and 224**—*Jurisdiction of High Court—Order of Deputy Collector under Bengal Rent Act.*

The High Court has no jurisdiction under the Government of India Act, 1935, to interfere with an order passed by a Deputy Collector in execution proceedings under the Bengal Rent Act. (*Henderson, J.*) SAKKAL SARDAR *v.* ISWAR DAS THIRANI. **I.L.R (1941) 2 Cal. 366 = 4 F.L.J. (H.C.) 405.**

——**S. 224**—*High Court's power under—Expunging of remarks from judgment of acquittal when judgment not under appeal or revision—Application by witness against whom remarks are made—Competency—Cr. P. Code, Ss. 439 and 561 A.*

The superintendence given to the High Court under S. 224 (1) of the Government of India Act cannot be construed as giving to the High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. Neither S. 224 nor S. 439, Cr. P. Code, will enable the High Court to expunge passages or remarks made by the trial Court against a witness in a judgment of acquittal at the instance of the witness concerned when the judgment is not under appeal or revision, nor has the High Court such power under S. 561-A, Cr. P. Code. All that S. 561-A does is to preserve the inherent powers of the High Court without conferring any additional power and no Court can claim inherent power to alter the judgment of another Court. (*Dhavle, J.*) BHUTNATH KHAWAS *v.* DASRATHI DAS. **194 I.C. 248 = 13 R.P. 706 = 7 B.R. 736 = 42 Cr.L.J. 546 = 1941 P.W.N. 534 = A.I.R. 941 Pat. 544.**

——**S. 224**—Power of superintendence—Scope and extent of. *See* 1940 Dig., Col. 627. EMPEROR *v.* P. C. TARAPORE. **I.L.R. (1941) Kar. 3 = 191 I.C. 519 = 13 R.S. 143 = 42 Cr.L.J. 1.**

——**Ss. 224 (1) (d) and 231 (2)**—*Rules framed and tables settled by Lahore High Court—When come into force in Punjab and Delhi.*

The combined effect of Ss. 224 (1) (*d*) and 231 (2) is that so far as the Punjab is concerned, rules framed and tables settled by the Lahore High Court come into force on the date when they are approved by the Governor of the Punjab, but in Delhi they receive their validity on the date on which they are approved by the Governor-

GOVT. OF INDIA ACT (1935), S. 224.

General. (*Tek Chand, J.*) LALA HARDWARI MAL *v.* LALA GANGA RAM. **4 F.L.J. (H.C.) 394 = A.I.R. 1941 Lah. 450**

——**S. 224 (2)**—*Power of Nagpur High Court to issue writ of* certiorari.

The High Courts in India other than the chartered High Courts have not the power to issue the prerogative writ of *certiorari* either under the Letters Patent or the Government of India Act. S. 224 (2) of the Government of India Act denies the Nagpur High Court jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. This would preclude that Court from issuing a writ of *certiorari* in respect of the acts of any public authority even though they are judicial as opposed to merely administrative acts. (*Niyogi, J.*) DATTATRAYA VISHNU BAPAT *v.* REGISTRAR, CO-OPERATIVE SOCIETIES, C. P. AND BERAR.

I L R. (1941) Nag. 397 = 197 I C. 36 = 1941 N.L.J. 426 = 4 F.L.J. (H C.) 350 = A.I.R. 1941 Nag. 282.

——**S. 226 (1)**—Imposition of penalty under S. 167 (17), Sea Customs Act—Suit to recover back penalty—Jurisdiction of High Court—Penalty upheld by special Tribunal and confirmed by Central Government—Civil suit—Maintainability. *See* 1940 Dig., Col. 628. BRUUSGAARD KIOSTERUDS DAMPSKIBS AKTIESELSKAB *v.* SECRETARY OF STATE. **191 I.C 867 = 13 R.B. 211 = 4 F.L.J. (H.C.) 60.**

——**S. 270 (1)**—*Applicability*—"*Act done or purporting to be done in the exercise of his duty as a servant of the Crown*"—*Meaning of*—*Test to determine nature of act.*

Per *Rowland, J.* (*Obiter*).—If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have. The applicability of the statute [S. 270 (1)] depends on what the act purports to be and is not affected by any allegations that the apparent state of things is not the real one. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character, and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less where the same malice is attributed to him jointly with others. The taking of cognizance of an offence on complaint, by a sub-divisional officer, whether done in good or bad faith, is clearly an official act of that officer, purporting to be done in the execution of his duty as a Magistrate. It is an act which he cannot do in any other capacity and one without which there can be no institution of a criminal proceeding and it can form no foundation for a suit against him. (*Fazl Ali and Rowland, JJ.*) NAND KUMAR SINHA *v.* PASUPATI GHOSE. **20 Pat. 417 = 193 I.C 276 = 13 R.P. 576 = 7 B.R. 506 = 42 Cr.L.J. 375 = 22 P.L.T. 779 = 4 F.L.J. (H.C.) 161 = (1941) P.W.N. 25 = A.I.R. 941 Pat. 385.**

——**S. 270 (1)**—Applicability—Acts of a public servant done after April 1937. *See* 1940 Dig., Col., 628 MAQBOOL HUSAIN *v.* EMPEROR. **15 Luck 740.**

——**S. 270 (1)**—Applicability—Postman misappropriating amount of money by forging thumb impression of payee and returning form to Post Office—Charge under Ss. 409, 467 and 471, I. P. Code—Sanction of Governor-General—Necessity. *See* 1940 Dig., Col. 629. SANNAYA, *In re.* **I.L R. (1941) Mad. 258 = 192 I.C. 263 = 13 R.M. 549 = 42 Cr.L.J. 263 (1) = 4 F.L.J. (H.C.) 177 = A.I R. 1941 Mad. 38 = (1940) 2 M.L.J. 564.**

GOVT. OF INDIA ACT (1935), S. 292.

——**S. 270 (1)**—"*Purporting to be done*"—*Meaning of*—*Test to find out.*

The words "purporting to be done" in S. 270 (1) of the Government of India Act of 1935, must be given their full meaning. Clearly, used in their context, they mean something more than "done". There must be something in the nature of the act complained of that attaches it to the official capacity of the person doing it. The accused, as head clerk to the Conservator of Forests, Sind, was alleged to have drawn a sum of Rs. 206-12-0 from the cash in his keeping and misappropriated it, making false entries in the cash book showing sums totalling this amount as paid to certain forest guards. It was the duty of the accused as head clerk to pay the forest guards and to make entries of the appropriate payments in the cash book. He was charged with offences under Ss. 409 and 477-A, I. P. Code, the accused pleaded that since sanction of the Governor had not been obtained for his prosecution under S. 270 (1) of the Government of India Act, the proceedings must be quashed.

Held, that the official capacity of the accused attached to him only so far as the entrustment was concerned, but did not attach to him so far as the wrongful withholding of the pay of the forest guards and the misappropriation. Hence sanction under S. 270 (1) of the Government of India Act was necessary only for his prosecution under S. 477 A and not for the offence under S. 409, I.P. Code, the proceedings should therefore be quashed so far as they related to the charge under S. 477-A, I. P. Code. (*Davis, C.J. and Weston, J.*) EMPEROR *v.* MANGHARAM GHUMANMAL.

I.L.R. (1941) Kar. 328 = 4 F.L J. (H.C.) 383 = A.I.R. 1941 Sind 204.

——**S. 292**—Construction and scope—If curtails power of Indian and Provincial Legislature to alter existing law—Retrospective operation of S. 48-A, Bihar Tenancy Act (as amended in 1938)—If prohibited. *See* BIHAR TENANCY ACT (AS AMENDED IN 1938), S. 48-A. **1941 P.W.N. 216.**

——**S. 292**—*Scope of*—*If prohibits retrospective legislation.*

Per *Gwyer, C.J.*—The purpose of S. 292 was to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorised its enactment: and it is a safeguard usually inserted by draftsmen in similar circumstances. Within their own sphere the powers of the Indian legislatures are as large and ample as those of Parliament itself: and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. There is nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor is there any explanation why Parliament should have desired to do so.

Per *Sulaiman, J.*—Although the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the language of the section is more emphatic than would have been ordinarily necessary. There is nothing in S. 292 which debars Central or a Provincial Legislature which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

Per *Varadachariar, J.*—A provision like S. 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. That being the reason, it is not necessary or proper to lay undue stress on the word 'until' used in S. 292 and hold

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that the policy of this provision is different from that underlying similar provisions in other constitution Acts. There is no justification for drawing a distinction between the statement that the previous law shall continue in force *subject* to repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislature the power of retrospective legislation with reference to pre-existing law seems to rest on mere speculation and is not a fair inference from the language used in the section. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM.

45 C.W.N. (F.R.) 27 = 1941 A.W.R. (Rev.) 109 = 1941 O.A. 159 = 1941 O.W.N. 297 = 72 C.L.J. 550 = 1941 A.L.J. 170 = 1941 R.D. 121 = 192 I.C. 138 = 1941 O.L.R. 121 = 3 F.L.J. 97 = 7 B.R. 433 = 53 L.W. 397 = 13 R.F.C. 15 = 1941 A.L.W. 201 = 1941 M.W.N. 581 = 22 P.L.T. 578 = I.L.R. (1941) Kar. (F.C.) 72 = 1941 A.W.R. (F.C.) 3 = A.I.R. 1941 F.C. 16 = (1941) 1 M.L.J. (Supp.) 65.

——**S. 293**—*Scope and effect.*

Per *Dalip Singh, J.*—All that S. 293 of the Government of India Act enacts is a power given to His Majesty in Council to adapt Acts already in force to bring them into accord with the provisions of the Government of India Act and what is contemplated is formal or consequential amendment arising in the Act due to the passing of the Government of India Act. S. 293 does not mean that if His Majesty has made any Act the subject of an Adaptation order, then that Act *ipso facto* becomes valid even though its provisions conflict with the provisions of the Government of India Act. (*Dalip Singh, Monroe and Sale, JJ.*) PUNJAB PROVINCE *v.* DAULAT SINCH. **195 I.C. 17 = 4 F.L.J. (H.C.) 83 = 14 R.L. 19 = 43 P.L.R. 198 = A.I.R. 1941 Lah. 182 (F.B.).**

——**S. 298 (2) (a)**—"*Agricultural Land*"—*Meaning of—Punjab Alienation of Land Act, S. 2 (3).*

Per *Dalip Singh, J.*—The words "agricultural land" in S. 298 (2) (*a*) of the Government of India Act must in the absence of any indication to the contrary in the Act, be taken in their natural meaning. Agricultural land is obviously land which is either actually used for purposes of agriculture or for purposes subservient to agriculture, that is, it may include buildings necessary to carry out the process of agriculture but by no stretch of language can it be held to include pastural land or other rights in land which are included in the definition of land in the Punjab Alienatien of Land Act. (*Dalip Singh, Monroe and Sale, JJ.*) PUNJAB PROVINCE *v.* DAULAT SINGH. **195 I.C. 17 = 4 F.L.J. (H.C.) 83 = 14 R.L. 19 = 43 P.L.R. 198 = A.I.R. 1941 Lah. 182 (F.B.).**

——**S. 299 (3)**—*Scope—Bihar Agricultural Income-tax Act—Governor's previous sanction under S. 299 (3) not obtained—Bill assented to by Governor—Effect—Validity of Act.*

Although the Governor's previous sanction under S. 299 (3) was not obtained before enacting the Bihar Agricultural Income-tax Act, the Governor having assented to the bill, having regard to the provisions of S. 109 (2) (*a*), the Bihar Act cannot be said to be invalid by reason of S. 299 (3). (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573 = 194 I.C. 663 = 941 I.T.R. 386 = 7 B.R. 818 = 4 F.L.J. (H.C.) 78 = 14 R.P. 17 = 22 P.L.T. 863 = A.I.R. 1941 Pat. 306 (S.B.).**

GOVT. OF INDIA ACT (1935), Sch. VII.

——**S. 306**—*Scope — Madras Hindu Religious Endowments Act—Notification of temple under—If act of Governor—Jurisdiction of Court to quash by writ of certiorari—Arbitrary and illegal orders—Quashing of.*

Where the Hindu Religious Endowments Board has abused its powers in notifying a temple under Chapter VI-A of the Madras Hindu Religious Endowments Act, the High Court has power to quash the Board's orders on which the notification is based, and if the basis of the notification is illegal, the notification is illegal. Even if the notification in such circumstances remained a lawful notification, the Court would still be in a position to take effective action. The provisions of S. 306 read with S. 109 of the Government of India Act, 1935, do not make the notification under the Madras Hindu Religious Endowments Act an act of the Governor which cannot be challenged in Courts. Where on the facts it is found that the Board's action in notifying a temple was arbitrary and an abuse of its powers, the order of the Committee of the Board and that of the full Board on appeal under S. 65 A of the Madras Hindu Religious Endowments Act should be quashed. (*Leach, C. J. and Krishnaswami Aiyangar, J.*) DEIVASIKAMANI PONNAMBALA DESIKAR *v.* BOARD OF COMMISSIONERS FOR H. R. E. MADRAS.

I.L.R. (1941) Mad. 807 = 4 F.L.J. (H.C.) 321 = 54 L.W. 147 = 1941 M.W.N. 720 = A.I.R. 1941 Mad. 878 = (1941) 2 M.L.J. 175.

——**S. 317**—Construction and scope — Hindu Women's Right to Property Act—Validity of. *See* HINDU WOMEN'S RIGHT TO PROPERTY ACT.

A.I.R. 1941 Sind 114.

——**Sch. VII**—*Lists and items therein—Construction—Rules as to.*

Per *Gwyer, C.J.*—The subjects dealt with in the three Legislative Lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the provincial list in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad general import. None of the items in the list is to be read in a narrow or restricted sense and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

Per *Sulaiman, J.*—The lists even if taken together may not prove to be exhaustive. It is quite possible to conceive of cases which are not comprised in any of the lists. But they are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them at all. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGUM.

45 C.W.N. (F.R.) 27 = 1941 A.W.R. (Rev.) 109 = 1941 O.A. 159 = 1941 O.W.N. 297 = 72 C.L.J. 550 = 1941 A.L.W. 201 = 1941 A.L.J. 170 = 1941 M.W.N. 581 = 1941 R.D. 121 = 22 P.L.T. 578 = I.L.R. (1941) Kar. (F.C.) 72 = 192 I.C. 138 = 1941 O.L.R. 121 = 3 F.L.J. 97 = 7 B.R. 433 = 53 L.W. 397 = 13 R.F.C. 15 = 1941 A.W.R. (F.C.) 3 = A.I.R. 1941 F.C. 16 = (1941) 1 M.L.J. (Supp.) 65.

——**Sch. VII, List I, Cl. 19 and List II, Cl. 31**—Scope—Madras Prohibition Act, S. 4 (1) (*a*)—If *ultra vires*—Possession of arrack in contravention of S. 4 (1) (*a*)—Conviction—Legality. *See* MADRAS PROHIBITION ACT, S. 4 (1) (*a*). **(1941) 1 M.L.J. 715.**

GOVT. OF INDIA ACT (1935), Sch. VII.

——**Sch. VII, List II, Entry No. 21**—'*Devolution*' —*If includes principle of survivorship.*

The term "devolution" in Entry No. 21 of List II includes the operation of the principle of survivorship. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, *In the matter of.* **194 I.C. 357=73 C.L.J. 415=54 L.W. 22=13 R.F.C. 70=1941 P.W.N. 0=7 B.R. 788=1941 O.W.N. 880=941 O A. 661=I.L.R. (1941) Kar (F.C.) 148=1941 A.W.R. (Rev.) 648=941 A.L.W. 774=1941 M.W.N. 556=45 C.W.N. (F R.) 81=22 Pat.L.T. 469=4 F.L J. 1=A.I.R. 1941 F C. 72=(1941) 2 M.L.J. 12.**

——**Sch. VII, List III, Entry No. 7**—'*Succession*' —*If includes principle of survivorship.*

The word "succession" in Entry No. 7 of List III includes the principle of survivorship. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, *In the matter of.* **194 I.C. 357=73 C.L J. 415=54 L.W. 22=13 R.F.C. 70=1941 P.W.N. 401=7 B.R. 788=1941 O.W.N. 880=1941 O.A. 661=I.L.R. (1941) Kar. (F.C.) 148=1941 A.W.R. (Rev.) 648=1941 A.L.W. 774=45 C.W.N. (F.R.) 81=22 Pat L.T. 469=4 F.L.J. 1=1941 M.W.N. 556=A.I.R. 1941 F.C. 72=(1941) 2 M.L J. 12.**

GOVERNMENT SECURITIES ACT (X OF 1920), S. 5—Scope and effect of—Beneficial ownership in securities—If affected. *See* 1940 Dig., Col. 630. SAMPATHIRAYUDU *v.* VENKATARATNAM.

193 I.C. 597=13 R.M. 699=(1940) 2 M.L.J. 278.

GOVERNMENT TRADING TAXATION ACT (III OF 1926)—*Applicability—If confined to business carried on in British India.*

The Government Trading Taxation Act applies wherever a Government specified in the Act, *i.e.*, a Dominion Government, including the Government of a Native Indian State, carries on a business anywhere. There is no justification for holding that the Act is confined to business carried on in British India. The title, preamble and the operative part of S. 2 of the Act make it perfectly clear that it applies to every case in which a Dominion Government is carrying on a business, and when that happens, the Dominion Government is liable to Indian income-tax as though it were a company. (*Beaumont C.J. and Kania J.*) PATIALA STATE BANK, *In re.* **I.L.R. (1941) Bom. 391=4 F.L.J. (H.C.) 1=194 I.C. 712=14 R.B. 5=1941 I.T.R. 95=43 Bom L R. 84=A.I.R. 1941 Bom. 93.**

——*Scope—If* ultra vires—*Government of India Act* (1919), *S.* 65—*Tax on income accrued or received in British India by person resident outside—If competent.*

Broadly speaking it is accurate to say that income-tax is a tax imposed upon a person in relation to his income. But that does not mean that legislation as to income-tax can never be regarded as legislation as to a thing in British India within the meaning of S. 65 of the Government of India Act of 1919. A tax on income accruing or arising or received in British India by a person resident ouside British India, is legislation relating to something, *i.e.*, certain income, in British India, and therefore falls within the very wide and general words of S. 65 of the Government of India Act. The Government Trading Taxation Act of 1926 falls within the legislative powers, conferred by S. 65 of the Government of India Act, and is therefore *intra vires* the Government of India. (*Beaumont, C.J. and Kania, J.*) PATIALA STATE BANK, *In re.* **I.L.R. (1941) Bom. 391=**

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4 F.L.J. (H.C.) 1=194 I.C. 712=14 R.B. 5=1941 I.T R. 95=43 Bom L.R. 84=A.I.R. 1941 Bom. 93.

——**S. 2**—*Native State Bank — Investments in Government of India Securities of surplus funds—Income from—Profits made by sale of investments—Assessability to tax under Indian Income-tax Act—Property in British India taken over by Bank in satisfaction of debt due from Native State—Income from —Taxability.*

The income from the investments made by a Native State Bank of a part of its surplus funds in the Government of India Securities must be held to be profits from the business of the bank received in British India and as such taxable under the Indian Income-tax Act by reason of the Government Trading Taxation Act. A property situate in British India, taken over by such a Native State Bank from a debtor who is a subject of that State, in part satisfaction of a loan advanced to him is not property occupied in British India for purposes of the business, but the income derived from such property is income arising in connection with such business and in that sense falls to be taxed under the Indian Income-tax Act. Profits made by such a bank on the sale of its investments in Government of India Securities, being the surplus realised by it over the cost price of such investments, which are not appropriated as accretions to capital but treated as profits, are assessable to income tax under the Income-tax Act. (*Beaumont, C.J. and Kania, J.*) PATIALA STATE BANK, *In re* I.L.R. (1941) **Bom. 391=194 I.C. 712=14 R.B. 5=4 F.L.J. (H C.) 1=1941 I.T R. 95=43 Bom.L.R. 84=A.I.R. 1941 Bom. 93.**

——**S. 2**—*Scope and effect of—Income-tax Act, S. 2 (6)—Company—Government of Native State carrying on business elsewhere—Profits earned in British India —Liability to income tax in British India.*

The effect of the Government Trading Taxation Act of 1926 is to add to the definition of "company" in S. 2 (6) of the Indian Income-tax Act, so as to include a Dominion Government deemed to be a company under Act III of 1926 and where a Dominion Government is carrying on a business anywhere, it is liable to British Indian Income-tax Act in respect of the income, profits and gains of that business which accrue or arise or are received in British India, as if it were a company working under like circumstances under the Income-tax Act. (*Beaumont, C.J. and Kania, J.*) PATIALA STATE BANK, *In re.* **I.L.R. (1941) Bom. 391=194 I.C. 712=14 R.B. 5=4 F.L.J (H.C.) 1=1941 I.T.R. 95=43 Bom.L.R. 84=A.I.R. 1941 Bom. 93.**

GRANT—Construction—Inam grant of 1611 for doing Acharya Purusha service in temple—Grant described as shrotriem—Confirmation in 1805 in favour of descendant subject to performance of service—Nature of grant —If endowment for temple—Mortgage with possession —Validity—Suit to declare void—Limitation—Limitation Act, Art. 144. *See* 1940 Dig., Col. 632. ADINARAYANA CHETTY *v.* SRIRANGACHARIAR.

A I.R. 1941 Mad. 217.

——*Construction — Jagir grant in settlement of disputes—If new root of title or merely confirms old status—Suit for possession of villages granted in* jagir *since resumed—Defendants setting up ancestral* khunt kati jungle tarasi *title—Absence of document to prove plea—Compromise—New grant—Effect of.*

Where pending a suit to recover possession of certain villages which had been granted in jagir and resumed, in which the defendants set up the plea that the villages were their ancestral *khunt kati jungle tarasi* property,

but had no document to prove the nature of the grant under which they were holding, the parties adopt a wise course and taking the result of the litigation in their own hands by avoiding a protracted litigation which would have proved ruinous, enter into a *bona fide* settlement which is obviously for the benefit of all concerned, as a result of which the plaintiff makes a *jagir* grant of the villages to the defendants *putra pautradik*, and the defendants execute a *kabuliat* to the plaintiff, it must be held that the rights of the parties are governed thereafter by the terms of the *jagir patta* and *kabuliat*, whatever might be the previous history of the lands, and it cannot be held that this amicable settlement is no more than an arrangement confirming the defendants in the possession of the lands and that the rights of the parties are not altered by the new *patta* and *kabuliat*. The new documents grant a new root of title under which the defendants-grantees are to hold the lands in future. (*Harries, C. J. and Manohar Lall, J.*) HARAKHNATH OHDAR *v.* GANPAT RAI.

22 Pat.L.T. 829 = A.I.R. 1941 Pat. 625.

———*Construction—Land bounded by river—Right to soil of river—Presumption—River flowing within estates of different owners—Right to soil.*

In the case of a grant of land bounded by a non-navigable river the presumption is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and the onus of showing the contrary is on the grantor. The right to the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners up to the middle thread. (*Wadia and Divatia, JJ.*) NARHARSINGJI ISHVARSINGJI *v.* SECRETARY OF STATE. **I.L.R. (1941) Bom. 226 = 195 I.C. 640 = 14 R.B. 49 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161.**

———*Construction — Proprietary interest—Lands resumed from zemindar under Bengal Reg. II of* 1819 *and Reg. III of* 1828*—Resettlement with Howladars—Malikhana paid to zemindar—Howladars treating settlement as one in Taluki right—Settlement, if proprietary settlement.*

Lands included in Touzis belonging to a zemindar were resumed under Bengal Regulation II of 1819 and Regulation III of 1828. As the zemindar refused to accept resettlement, an independent and separate estate was created and settled permanently with certain persons who were already in possession of these lands under the zemindar in Howla right. Malikhana was paid in respect of these lands to the zemindar by a misinterpretation of the Amalnama. The Howladars treated the settlement to them as one in Taluki right.

Held, that the settlement was a proprietary settlement, the fact that the Malikhana was paid all along either rightly or wrongly, did not affect the question and that the subsequent conduct of the Howladars could not alter the real nature of the settlement. (*Mukherjea and Roxburgh, JJ.*) PARESH LAL ROY CHOWDHURY *v.* THE PROVINCE OF BENGAL. **73 C.L.J. 587.**

———Jagir—Cis-Sutlej Jagirs and Conquest Jagirs—Punjab. *See* 1940 Dig., Col. 633. DHANWANT SINGH *v.* SANT LAL. **I.L.R. (1941) Lah. 564 = 13 R.L 369 = 192 I.C. 288.**

———Jagir—Conquest Jagir—Indication—Punjab. *See* 1940 Dig., Col. 633. DHANWANT SINGH *v.* SANT LAL. **I.L.R. (1941) Lah. 564 = 13 R.L. 369 = 192 I.C. 288.**

———*Jagir—Grant of villages in Chota Nagpur by Maharaja of Chota Nagpur to three brothers—Grantees not Hindus—Incidents of grant—Tenancy—Tenancy-in-common—Rule of primogeniture—If applies.*

Where certain villages are granted in *jagir* to three brothers of a non-Hindu family, who are incapable of

forming a Hindu joint family, they take the property only as tenants-in-common and not as joint tenants. The fact that the grantor is the Maharaja of Chota Nagpur, in whose family the rule of primogeniture prevails, or that there is a custom of primogeniture prevalent in Chota Nagpur cannot be taken as a ground for holding that the rule of primogeniture should be applied to the grant or for holding that the grantor, Maharaja, has no power to grant a *jagir* in law to more than one person even when the grantees are members of the aboriginal tribe of *kurmi ohdars* in Chota Nagpur. The Court in each case has to decide on the facts whether the grantees family is governed by custom, or by the rule of primogeniture, or the rule of agnatic succession or whether the rule of Hindu Law applies. It has to be shown by sufficient evidence that the particular family has adopted the custom of primogeniture when they are not of the same family as the grantor. (*Harries, C.J. and Manohar Lall, J.*) HARAKHNATH OHDAR *v.* GANPAT RAI. **22 Pat L.T. 829 = A.I.R. 1941 Pat. 625.**

———*Joshi inam—Alienability of land.*

Joshi service inam land granted under a sanad by the Government in the ordinary form used for grants of land given in return for services to be rendered to a village community is normally inalienable and is not liable to be sold in execution of a decree against the holder. (*Beaumont, C.J. and Sen, J.*) KRISHNAJI DATTAMBHAT *v.* PARAPPA DATTO. **196 I.C. 632 = 43 Bom.L.R. 539 = A.I.R. 1941 Bom. 328.**

———*Rent free grant—Presumption from circumstances.*

Where the facts found were that the lands in suit lay within the estate of the plaintiff that the ancestors of the defendants and the defendants had been in possession for a considerable time, that no rent had ever been demanded from them until recently, that no rent had ever been paid by them and that no attempt was made to resume possession of the land on the death of the predecessors of the defendants.

Held, that the existence of these circumstances afforded a basis for the presumption that the lands were granted to the ancestors of the defendants and that the grant was rent-free, and that the entry in the record-of-rights that the lands were *belagan* was not inconsistent with that view, as that entry merely denoted that no rent was then being paid. (*Agarwala, J.*) KIRPA SANKAR WARRAH *v.* JANKI PRASAD I ALLU.

196 I.C. 650 = 8 B.R. 77.

———*Resumption—Grant of office and grant of land burdened with service—Distinction between.*

In the case of a grant of an office which is to be remunerated by enjoyment of land, *prima facie* the land would be resumable on refusal to perform the services. On the other hand, in the case of a grant of land burdened with service, the land can be resumed if only the grantor proves it affirmatively that it was one of the terms of the grant that the continued performance of the service would be a condition in the continuance of the tenure. (*Mukherjea, J.*) NARENDRA CHANDRA DE *v.* RAJENDRA CHANDRA CHANDA. **197 I.C. 45 = 45 C.W.N. 654 = 73 C L.J. 159 = A I.R. 1941 Cal. 506.**

GROVE—Planted by Zamindar—Rights in—Grove, if can be exempted on a sale of a portion of zamindari. *See* 1940 Dig., Col. 633. RAJ NARAIN DUBE *v.* IMAM RAZA. **I.L.R (1940) All. 667 = 191 I.C. 163 = 13 R.A. 282.**

———*Sale of proprietary rights—Effect—Groves, if sold—Test.*

GROVE.

In the case of a sale of proprietary rights in a *khewat khata*, if the groves are not to be sold they should be specifically excluded. With the sale of proprietary rights a proprietary grove will not emerge as the land of a grove holder. (*Harper, S.M.*) BAHORAN SINGH *v.* BED RAM. **1941 R D. 4=1941 A.W R. (Rev.) 102=1941 O.A. (Supp.) 90.**

———*Trees—If also passes on sale of proprietary rights—Construction of sale deed.*

Where a sale deed states that all the vendor's rights including those of groves were sold, it can only mean that the trees standing in the plot in question were also sold. The right in the trees passes to the vendee. As a result no ex-proprietary rent could be fixed on that plot which the vendor will not be able to cultivate. (*Harper, S.M. and Sathe, J.M.*) KAMTA RAM SHARMA *v.* ATIMULLAH. **1941 R.D. 259=1941 A.W.R. (Rev.) 354=1941 O A. (Supp.) 268.**

GUARDIAN AND WARD—Parsis—Power of guardian to alienate ward's property—Law applicable. *See* CUSTOM—PARSIS IN MOFUSSIL.

43 Bom.L.R. 981.

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 7—*Duty of Court under—Order for custody in advance—Competency.*

It is clear that before making an order on an application under S. 7 of the Guardians and Wards Act the Court ought to insist on evidence showing that the order is in the best interests of the ward or child. It is not competent for the Court to make an order in advance, but the Court is bound to consider whether the applicant is the proper person to have the custody of the child. (*Beaumont, C.J. and Macklin, J.*) SHIVAWWA BALAPPA *v.* CHANBASAPPA GOWDA SANGANGOWDA.

I.L R. (1941) Bom. 488=43 Bom.L.R. 615=A.I R. 1941 Bom. 344.

———**S. 12**—*Order for temporary possession being taken—Determination as to what is minor's property—Competency of person appointed.*

The person appointed to take temporary possession of the property of the minor under S. 12 of the Guardians and Wards Act, is the person who should be held responsible for making enquiries and deciding whether *prima facie* the property concerned belongs to the minor or to some other person laying claim thereto. (*Davies.*) RAM DEVI *v.* JAGDISH. **1941 A.M.L.J. 53**

———**Ss. 17 and 25**—*Child of tender years—Right to custody—Consideration for Court—Mother's right as against father.*

In proceedings for custody of a minor child under the Guardians and Wards Act the paramount consideration is the interest of the child rather than the rights of the parents. In the case of a child of tender years, the natural mother of the child is the proper person to have the custody of the child, though the father is the natural guardian of her child. It is impossible to find an adequate substitute for the mother for the custody of a child of tender years, and in the absence of any evidence to show that she is not a proper person to have the custody of the child, she must be given custody of the child in preference to the father. (*Beaumont, C. J. and Wadia, J.*) SARASWATI BAI SHRIPAD VED *v.* SHRIPAD VASANJI. **I.L.R. (1941) Bom. 455=194 I.C. 48=13 R.B. 353=43 Bom.L.R. 79=A.I.R. 1941 Bom. 103.**

———**S. 17**—*Mahomedan minor—Female relation having preferential right to custody marrying stranger—If thereby disqualified from being appointed guardian—Considerations for Court.*

A female relation of a Mahomedan minor who has under the Mahomedan Law a preferential right to the custody of the minor, can be appointed guardian of the person of the minor under S. 17 of the Guardians and Wards Act if the welfare of the minor would be better served thereby, although she has married a person who is not related to the minor in the prohibited degrees. Under the section, the welfare of the minor is the primary consideration and even a stranger may be appointed a guardian in preference to a relation if the Court considers that the welfare of the minor demands it. The section, no doubt, also enjoins that the Court should wherever possible, make an appointment which is consistent with the personal law to which the minor is subject; and that when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. The Mahomedan Law, however, does not lay down that a woman who has married a stranger to the minor is "disqualified" from being appointed a guardian under any circumstances. It merely lays down that such a woman loses any preferential right which she had by virtue of her relationship to the minor. Neither the fact that such a woman is only 21 years of age and has children of her own, nor the fact that the application for guardianship is made on her behalf by her father, is an adequate reason for refusing to appoint her as guardian. (*Biswas and Sen, JJ.*) TUMINA KHATUN *v.* GAHARJAN BIBI.

I.L R (1941) 1 Cal 419=45 C.W.N. 515.

———**Ss. 19 and 25**—*Applicability—Mahomedan minor girls—Maternal grandmother—Application against father for appointment of guardian and for custody—Maintainability.*

S. 19 of the Guardians and Wards Act bars an application by the maternal grandmother of Mahomedan minor girls against their father for the appointment of a fit and proper person as their guardian and for custody of the minor girls unless the father is shown to be unfit. Though the maternal grandmother under the Mahomedan Law is entitled to the custody of minor girls who have not attained puberty, failing their mother, in preference to the father, the latter is their legal guardian, and S. 25 cannot apply so as to entitle the maternal grandmother to the custody of the minor girls in the absence of proof that the minors had ever been in the custody of the grandmother and had left or been removed from such custody. There can be no question in such a case of the Court arriving at the conclusion that "it will be for the welfare of the wards to return to the custody" of the grandmother. (*Burn and Happell, JJ.*) FATIMA BIBI *v.* SHAIK PEDA PENTU SAHIB. **54 L W. 395=1941 M.W.N. 1049=A.I.R. 1941 Mad. 944=(1941) 2 M.L.J. 548**

———**S. 25**—Applicability—Minor Mahomedan girls—Maternal grandfather—Right of to apply for custody as against father. *See* GUARDIANS AND WARDS ACT, SS. 19 AND 25. **(1941) 2 M.L.J. 548.**

———**S. 25**—*Custody—Meaning of—Father never having custody of child—Application for custody—Jurisdiction to order custody to father.*

S. 25 of the Guardians and Wards Act does not apply if the ward has never been in the custody of the guardian. Custody means actual custody and not constructive custody. When the father of a minor has never had actual custody of the child, there is no jurisdiction in the Court to direct the custody of the minor child to be handed over to the father in proceedings under the Act. (*Beaumont, C.J. and Macklin, J.*) SHIVAWWA BALAPPA *v* CHANBASAPPA GOWDA SANGANGOWDA.

I.L.R. (1941) Bom. 488=43 Bom.L R. 615=A.I.R. 1941 Bom. 344.

———**S. 25**—*Father's right to custody of child—Power of Court to impose limits.*

GUARDIANS AND WARDS ACT (1890), S. 25.

The father, as the natural guardian, has the legal right to the custody of his child and the Court will not interfere with his right except when the safety or the welfare of the child requires such interference. The Court will be perfectly justified in imposing limits upon the father's right of custody, if the exercise of such rights will materially interfere with the health and happiness of the minor. (*Mukherjea and Biswas, JJ.*) JWALA PROSAD SAHA *v.* BACHU LAL GUPTA.

74 C.L.J. 196.

——S. 25—*Minor never in custody of father—Application by father for his custody—If maintainable.*

A father can make an application under S. 25 of the Guardians and Wards Act for the custody of his minor son although the minor was never in his custody and lived all along with his maternal grandparents. The word "custody" as used in that section refers not only to actual but also to constructive or legal custody. When the father of a child is alive and has not abandoned his right, the maternal grandfather or for the matter of that any other relation who has the actual custody of the boy must be deemed to have that custody with the knowledge and consent of the father. Legally it is the father who has the custody of the child in such circumstances, and the child can be deemed within the meaning of the section, to be removed from such legal custody, when the person in whose actual possession he is, repudiates to the guardian's knowledge the right of the latter to the actual or legal custody of the minor. (*Mukherjea and Biswas, JJ.*) JWALA PROSAD SAHA *v* BACHU LAL GUPTA. **74 C.L.J. 196.**

——S. 25—*Order under—Nature of—Right to apply for modification or alteration.*

Orders as to the custody of a child under the Guardians and Wards Act are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court for modification or alteration of such order whenever necessity arises. (*Beaumont, C.J. and Wadia J.*) SARASWATI BAI SHRIPAD VED *v.* SHRIPAD VASANJI. **I.L.R. (1941) Bom. 455 = 194 I.C. 48 = 13 R.B. 353 = 43 Bom L.R. 79 = A.I.R 1941 Bom. 103**

——S. 27—Debt by guardian—"Benefit of estate"—Money borrowed to improve business inherited by minor. *See* 1940 Dig., Col. 635. ANIL KUMAR DAS *v.* PROBABATI MITRA. **72 C.L.J. 542 = 191 I.C. 577 = 13 R.C. 255.**

——Ss. 27, 29 and 30—Powers of guardian—Simple loan—Lender making enquiries as to necessity—Application of money for minor's benefit—If necessary—True necessity not mentioned in recitals—Effect of. *See* 1940 Dig., Col. 635. ANIL KUMAR DAS *v.* PROBHABATI MITRA. **191 I.C. 577 = 13 R.C. 255 = 72 C.L.J 542.**

——Ss. 29, 30 and 31—*Sanction of Court—Extent of protection—Policy of Court—Transaction different from that sanctioned—Avoiding—Restoration of benefit.*

Courts should be slow to hold that when a Court has granted sanction to create a mortgage that sanction does not protect a subsequent lender of money who lends on the faith of that sanction and who is in no way a party to any slackness or fraud in obtaining that sanction. Where the transaction is not the same as the sanctioned transactions, it is not covered by the sanction and one is thrown back to the position of a mortgage by a guardian without the sanction of Court (*i.e.*) it could be avoided and when the minors or principals avoid such transaction they can be held liable to restore what they have gained as a consequence of it. (*Stone, C. J. and Bose, J.*) ABBAS HUSSAIN *v.* KIRAN SHASHI DEVI.

1941 N.L.J. 447.

HIGHWAY.

——S. 30—*Scope—Court guardian — Alienation without leave of Court—If void or voidable—Limitation for suit to set aside—Limitation Act, Art.* 44.

Where a person has been appointed under the Guardians and Wards Act to be the guardian of the property of certain Mahomedan minors, an alienation by him of the minors' properties without obtaining the Court's permission, would be only voidable and not void. It would operate as a valid transfer unless set aside at the instance of the minors concerned. Art. 44 of the Limitation Act gives the minors three years from the date of their attaining majority to set aside the alienation. Where a transfer is made by a *de facto* guardian, the position may be different. (*Leach, C.J., Mockett and Krishnaswami Ayyangar, JJ.*) MIR GHULAM SAHIB *v.* AYESHA BIBI **I.L.R (1941) Mad. 775 = 196 I C. 87 = 14 R M. 248 = 1941 M W.N. 456 = 53 L.W. 650 = A.I.R. 1941 Mad. 481 = (1941) 1 M.L J. 800 (F.B.).**

——S. 48—*Scope and effect—Judgment appointing guardian for minor—If can be attacked collaterally—Evidence Act, Ss.* 43 *and* 44.

It is not open to a plaintiff in order to enforce a debt contracted by a minor to show that a judgment which has the effect of making him a minor (*i.e.*, an order appointing a guardian for the minor and thereby extending the period of minority) was obtained by collusion. S. 48 of the Guardians and Wards Act bars any contest regarding the validity of the judgment appointing a guardian except by the procedure of appeal or revision. Since the judgment falls under S. 43 of the Evidence Act, there is no power to attack that judgment under S. 44 of the Evidence Act. (*Wadsworth, J.*) VENKATA RANGACHARYULU *v.* AKKAPPA RAO.

53 L W. 352 = 1941 M.W N. 237 = A.I.R. 1941 Mad. 569 = (1941) 1 M.L.J. 492.

HABITUAL OFFENDERS RESTRICTION ACT, S. 18 (2), BURMA ACT (I OF 1936) AND BURMA GENERAL CLAUSES ACT, S. 5—*Repeal by Burma Act (I of* 1936) *of Habitual Offenders Restriction Act—Effect—Violation of an Act after repeal and conviction thereafter—Legality.*

It is idle to speculate on what the legislature probably intended by the unqualified and unexplained repeal of a particular Act, since the effect of such a repeal is laid down in S. 5 of the General Clauses Act. Where no words of qualification or explanation appear in a Repealing Act it is idle to pretend that a 'contrary intention appears', so as to oust that section, unless the result of applying it would be to produce an absurdity. Where an order restricting a person's movement is passed under the Habitual Offenders Restriction Act, it remains unaffected by the repeal of the Habitual Offenders Restriction Act by Burma Act I of 1936. Any violation of the restriction order, even if it takes place after the repeal of the Act under which the order was passed is punishable under S. 18 of that Act by virtue of S. 5 of the Burma General Clauses Act. (*Dunkley and Blagden JJ.*) THE KING *v.* BASU MEAH.

195 I.C. 487 = 14 R.R. 47 = 42 Cr.L.J. 739 = 1941 Rang L R. 239 = A I.R. 1941 Rang. 206.

HIGHWAY—*Obstruction—Right of action — Suit for removal by persons residing in the vicinity—Maintainability—Special damage—If to be proved when suit not framed as representative suit—Principles.*

It would be a very dangerous thing to hold that persons are entitled to encroach upon roadways in every case where the encroachment still leaves a width equal to the narrowest portion of the roadway. Where a public thoroughfare is encroached upon, persons living in the vicinity and using the roadway constantly have a cause

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of action to maintain a suit for removal of encroachment without proof of special damage. It is not necessary that the plaintiffs should prove some pecuniary and particular loss over and above what has been suffered by the public generally, even when the suit is not framed under S. 91 or O. 1, R. 8, C. P. Code. A person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not; the real principle is that a person of an immediate community or section of the public who is deprived of an amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. As long as the obstruction remains, there is a continuing wrong. (*Harries, C.J. and Fazl Ali, J.*) DASRATH MAHTO *v.* NARAIN MAHTO. **192 I.C. 760 = 13 R.P. 517 = 7 B.R. 413 = 22 Pat L.T. 111 = A.I.R. 1941 Pat 249.**

———*Obstruction—Wall across public road interfering with enjoyment of property by owner—Suit by latter for mandatory injunction to remove wall—Allegation and proof of special damage—Necessity.*

The respondents brought a suit for a mandatory injunction against the appellants requiring them to remove a wall which they had built close to the respondent's house. It was about six feet high and was built across a public road, and the respondents stated that as a result of this obstruction to the road they were unable to approach their house from that side (left) and that the enjoyment of their property had been seriously interfered with. All this was not, however, specifically stated in the plaint.

Held, that if the respondents' allegations were true, the appellants' action in erecting the wall must constitute a nuisance to the respondents and would seriously affect the respondents as the owners of the house and therefore they had suffered special damage. But they were in error in not averring in the plaint that they had suffered special damage and making this the basis of their claim. They should, however, be allowed to amend their plaint and to incorporate suitable averments for the purpose of remedying the defect. (*Leach, C.J. and Somayya, J.*) BHULOGANATHAM PILLAI *v.* RAJAGOPALA PILLAI. **53 L.W. 728 = 1941 M.W.N. 637 = A.I.R. 1941 Mad. 669 = (1941) 2 M.L.J. 105.**

———*Public road—Ownership to soil—Presumption—Right of adjoining landowners—User by public—If ground for holding that it is Government property—Bombay Land Revenue Code, S. 37—Effect of.*

The existence of a highway or a public road is consistent with the ownership of a private person in the soil both according to the English law and the Indian Law. Under the Indian law, as under the English law, there is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land. The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary even if given as the road or the river, is the middle of the road or the river, as the case may be. Therefore, the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of the road, and, therefore, a road cannot be said to be the property of the Government because it is used by the public. S. 37 of the Bombay Land Revenue Code is not a bar to a claim by a private individual to the soil of a public road or a highway. The section has not the effect of taking away any rights which existed when it became law. It deals only with what is not the property of individuals.

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(*Wadia and Divatia, JJ.*) NARHARSINGJI ISHVARSINGJI *v.* SECRETARY OF STATE. **I.L.R. (1941) Bom. 226 = 195 I.C. 640 = 14 R.B. 49 = 43 Bom.L.R. 167 = A.I.R. 1941 Bom. 161.**

———*Right to go in procession with music—Worshippers in temple or mosque abutting on high road—Right to insist on stoppage of music.*

The right to go in procession in streets or a highway with music is a natural right inherent in every subject of the state. Mere non-user of it for any length of time will not take away such a right, and it lies on the party who opposes the exercise of such right to prove some law or custom having the force of law overriding the natural right. User is not necessary to the creation of the right, and it must be given effect to unless it is shown that it has been taken away by some order or custom or unless the exercise of such right would obstruct the use of the street by others. But worshippers in a mosque or temple which abuts on the highways have no right to compel the members of the procession to stop the music completely while passing the temple or mosque on the ground that there is continuous worship inside it or that the music offends against the religious sentiments of a community other than the one to which the members of the procession belong. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) IMAM SAB *v.* SHAMA JOIS. **19 Mys.L.J. 363.**

———Village pathway—If public highway or private way—Test—Dedication—Inference from user. *See* 1940 Dig., Col. 636. BIBHUTI NARAYAN SINGH *v.* GURU MAHADEV ASRAM PRASAD SAHI. **22 Pat.L.T. 46.**

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Adoption.
Alienation.
Applicability.
Conversion.
Debts.
Divorce.
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Impartible estate.
Joint family.
Limited owner.
Lingayats.
Maintenance.
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Schools of law.
Stridhanam. *See* HINDU LAW—SUCCESSION—STRIDHANAM.
Succession.
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———**Adoption**

ANTE-ADOPTION AGREEMENT.
AUTHORITY TO GIVE IN ADOPTION.
EFFECT ON PRIOR PARTITION.
GIVING AND TAKING.
ILLATTOM.
JAINS.
KAYASTHAS OF AJMER.
LINGAYATS.
POWERS OF.
VALIDITY.
WIDOW.

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———*Adoption—Ante adoption agreement regulating rights of adoptive mother* vis-a-vis *adopted sons—If binding on subsequently born or adopted coparceners.*

An arrangement sanctioned by custom which regulates the rights of the adoptive mother *vis-a-vis* the adopted son, cannot affect the other coparceners in the joint family acquiring that status by subsequent birth or adoption and not parties to the arrangement. (*Broomfield and Wassoodew, JJ.*) LAXMIBAI VENKATRAO *v.* KESHAVRAO LINGANGOUDA.

I.L.R (1941) Bom. 306=197 I.C. 142= 43 Bom.L.R. 214=A.I.R. 1941 Bom. 193.

———*Adoption—Authority to give in adoption — Illegitimate son—Mother's power to give in adoption—Adoption of illegitimate son—Validity*

Ordinarily a mother is capable of giving her son in adoption according to the Hindu Law, but her capacity to give in adoption is restricted to her legitimate son and does not extend to a son of an adulterous or incestuous intercourse. Even among Sudras, the adoption of an illegitimate son is therefore invalid. (*Beaumont, C.J. and Wassoodew, J.*) APYA SHETTYA *v.* RAMMAKKA APYA. **I.L.R. (1941) Bom. 350= 196 I C. 42=14 R.B. 87=43 Bom.L.R 314= A.I.R. 1941 Bom. 222.**

———Adoption—Effect on prior partition. *See* HINDU LAW—JOINT FAMILY—WHO GO TO CONSTITUTE IT. **1941 N.L.J. 576.**

———*Adoption—Giving and taking—Necessity.*

The ceremony of giving and taking it a necessity for a valid adoption. (*Davies.*) BHANWAR LAL *v.* BALU RAM. **1940 A.M.L J. 93**

———Adoption—Illatom affiliation—Incidents of—Agreement of illatom affiliation—If to be embodied in regular detailed contract—Inference from facts. *See* 1940 Dig., Col. 638. NAGI REDDI *v.* NANJUNDAPPA. **193 I.C. 298=13 R.M. 641.**

———Adoption — Jains—Law applicable— Widow—Powers of adoption—Consent of husband's coparceners—Necessity—Adoption of daughter's son by widow—Validity without censent of coparceners. *See* 1940 Dig., Col. 638. YAMASHETTI BHAUSHETTI *v.* ASHOK BHOMSHETTI. **I.L.R. (1940) Bom. 819= 191 I.C. 488=13 R.B. 166.**

———*Adoption—Kayasthas of Ajmer—Adoption of brother's daughter's son—Validity.*

The Ajmer Kayasthas are Kshatriyas and belonging to one of the regenerate classes, a person of that class cannot adopt his own brother's daughter's son. (*Davies.*) CHANCHLAL BAI *v.* GORJA. **1941 A.M.L.J. 25.**

———Adoption — Lingayats—Applicability of Hindu Law—Theory of spiritual benefit conferred by adoption—If prevails. *See* 1940 Dig., Col. 639. LINGAPPA RAYAPPA *v.* KADAPPA BAPURAO. **191 I.C. 504=13 R.B. 169.**

———*Adoption—Powers of—Sole surviving coparcener—Adoption by—Subsequent adoption by widow of another deceased coparcener — Validity — If binds previous adopted coparcener.*

There is no question that the adoption to her husband by a widow of a deceased "Gotraja Sapinda," who was a member of a Mitakshara joint family, is valid and binding on the other members of the family so far as the creation and vesting of a coparcenary interest in the joint family is conferred immediately upon adoption, the interest being co-extensive with that of his adoptive father. It makes no difference to the vesting of that interest where only one member of the joint family survives at the time of the adoption for the family continues joint so long as any widow remains in it with

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a power to adopt. (*Broomfield and Wassoodew, JJ.*) LAXMIBAI VENKATRAO *v.* KESHAVRAO LINGANGOUDA. **I.L.R. (1941) Bom. 306=197 I C. 142= 43 Bom.L.R. 214=A.I.R. 1941 Bom. 193.**

———*Adoption—Validity—Adoption of daughter's son by a* sonar*—Conflicting evidence—Presumption.*

When there is conflicting evidence as to the validity of ceremony the correct principle to follow is to decide in favour of the validity of a ceremony duly performed rather than to hold on inadequate evidence that the ceremony was illegal. A certain amount of presumption should attach in favour of the validity of acts which are performed in a religious function. Where the validity of an adoption of a daughter's son by a *sonar* was in question and the evidence was conflicting as to whether a *sonar* was a twice-born or not it was *held* that the adoption properly made should be held to be valid. (*Harper, S.M. and Sathe, J.M.*) SITARAM *v.* SATPAL. **1941 R.D. 594=1941 O.A. (Supp.) 585 (2)= 194 A.W.R. (Rev.) 626 (2).**

———*Adoption—Validity—Married person.*

An adoption of a person who had not only his sacred thread ceremony performed before the alleged adoption but was also married before that time, is invalid among Brahmans. (*Baipai and Dar, JJ.*) BHARAT BASI NAIK *v.* GOPI NATH NAIK. **1941 A.L J. 560= 1941 A.W.R. (H.C.) 295=1941 A L.W 971= A.I.R. 1941 All. 385**

———Adoption— Widow—Adoption by — Death of adopted son unmarried—Second adoption by widow subsequently— Validity— If divests estate vested in widow. *See* 1940 Dig., Col. 639. PATTU ACHI *v.* RAJAGOPALA PILLAI. **193 I.C. 630=13 R.M. 703**

———*Adoption—Widow—Adoption by with authority of nearest* sapinda*—Motive in adopting—Relevancy—Widow actuated by improper motive—If renders adoption invalid.*

The adoption by a Hindu widow of a son to her deceased husband, after having received authority to adopt from the nearest *sapinda*, is not invalid on the ground that she is actuated, not by a sense of religious duty, but by an improper motive, namely to defeat her co-widow. However spiteful her action may be towards others, the benefit conferred upon her deceased husband by her adoption is in no way affected. When she has received valid authority to adopt, her motive in doing so can be ignored. (*Leach, C.J., Krishnaswami Aiyangar and Chandrasekhara Ayyar, JJ.*) KANAKARATNAM *v.* NARASIMHA RAO. **1941 M.W.N. 1009= 54 L.W. 587=A.I.R. 1941 Mad. 937= (1941) 2 M.L.J. 803 (F.B.).**

———Adoption—Widow—Authority to adopt—Construction—Direction to adopt a son of one of husband's nephews except two named specifically—Death of all eligible nephews leaving sons—Adoption by widow of grandson of a nephew—Validity—Direction in will—If mere recommendation or mandatory. *See* 1940 Dig., Col. 640. DAMODAR VISHNU *v.* SHRIRAM LAKSHMAN. **I.L.R. (1941) Bom. 170=193 I.C. 413= 13 R.B. 315=A.I.R. 1941 Bom 56.**

———*Adoption—Widow—Authority to adopt given by* sapinda*—If to be to adopt particular person—Authority expressed in general terms—Adoption in pursuance of—Validity.*

An authority to adopt given to a Hindu widow by the nearest *sapinda* is not invalid merely because it is expressed in general terms. Where in pursuance of an authority worded, "you shall, therefore, whenever you like, bring and adopt duly a boy whom you like according to shastras," a widow adopts a boy within five months of the conferment of the authority, and there has been no

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change in the circumstances of the family, such adoption is valid. It is not necessary that the *sapinda* should consent to the adoption of a particular person in order to make the adoption valid. (*Leach, C.J., Krishnaswami Aiyangar and Chandrasekhara Ayyar, JJ.*) VENKAYYA *v.* SREERAMULU. **1941 M.W.N. 1007 = 54 L.W. 583 = A.I.R 1941 Mad. 935 = (1941) 2 M.L.J. 798 (F.B.).**

——Adoption — Widow—Powers of— Absence of authority of husband—Refusal of consent by sapinda—Adoption in spite of—Validity—Burden of proof that refusal was improper. *See* 1940 Dig., Col. 641. VAJJALU *v.* GOPALAKRISHNAMMA. **194 I.C. 845 = 14 R.M. 102 = (1940) 1 M.L.J. 779.**

——*Adoption — Widow — Power of — Prohibition against adoption—What amounts to—Will by husband in respect of property—Implied prohibition of adoption—When to be inferred—Testator emphasising rights of brother as sole surviving coparcener—If amounts to prohibition of adoption.*

A disposition of property by a Hindu husband inconsistent with his wife's right of adoption may justify an inference that an adoption was impliedly prohibited. Whether an implied prohibition is to be inferred or not depends not upon whether the will would be valid or invalid under Hindu Law, but upon the intention of the testator as to the way in which the property is to devolve. Whether it devolves by his own volition or independently of it is not important if the course of devolution would be altered by an adoption which he could prohibit. Where the husband has said nothing about an adoption one way or the other, and the prohibition of adoption is sought to be inferred from statements about other matters or from conduct, the inference suggested, if it is to be acted upon, must be a necessary inference. The Court must be able to say with confidence that what the husband had said or done shows that he would have prohibited an adoption, either in any circumstances or in the circumstances existing at the material time, if he could have foreseen them. If the Court can say no more than that he might have, or even that he probably would have, prohibited an adoption in any circumstances or in those particular circumstances, that is not enough. For in that case it cannot be said that his statements or his actions are equivalent to a prohibition, and in the absence of prohibition there is an inherent right to adopt. One of two undivided brothers who formed a joint Hindu family died in 1907, leaving a will dated 29th August, 1907, addressed to his brother *B*. The deceased left two widows *K* and *P*. The will after reciting that the testator had no male issue and that *B* was his elder brother and both were undivided *inter alia* stated: "All the estate, pots, clothes, cattle also the entire property are joint. You are the only heir of the property and the said property is in your possession . . . . . If my two wives do not live with you, Rs. 50 should be given to each for their maintenance. Ornaments worth Rs. 1,000 are on the person of each of them. Let them remain on their persons during their lifetime. After their death, they are yours only. Excepting maintenances they have no other right whatsoever. . . . . In order that my name should remain after my death, Rs 100 per annum should be spent on religious acts, etc. You should do this, and you and your descendants, heirs and legatees should enjoy the ownership of the entire estate from generation to generation. On the strength of this will you should get the *Khata* transferred to your name in respect of the above lands. In regard to that my wives and anybody else whatever have no sort of right at all . . . . . All the rights go to you only and are with you . . . . " Soon after the testator's death his senior widow *K* adopted a boy who died unmarried in or about the year 1911. On 29th April, 1931, *K* adopted the plaintiff who was a son in-law of *B*, the surviving brother. *B* died in 1936, and afterwards the plaintiff filed a suit to set aside two deeds of gift executed by *B* in favour of two of his daughters. The latter pleaded, *inter alia*, that the adoption of the plaintiff was invalid on the ground that an adoption was prohibited by the terms of the will executed by the deceased.

Held, that the deceased was only anxious that the family should continue to be regarded as what it was in fact, a joint family, and that there should be no trouble after his death. The fact that he emphasised the rights of his brother *B* as the sole surviving coparcener did not necessarily lead to the conclusion that he was opposed to one of the ordinary incidents of a joint family or that he would have objected to an adoption by his widow if his brother himself did not object to it. It could not be said with any confidence that the deceased would have prohibited the adoption of the plaintiff who was *B's* son-in-law if he had foreseen it, and that at any rate the Court could not spell out any prohibition from the terms of the will. (*Broomfield and Macklin, JJ.*) KRISHNAWA YELAGOUDA *v.* RAMAGOUDA KADAGOUDA. **43 Bom.L.R. 483 = A.I.R. 1941 Bom. 350.**

——*Adoption—Widow—Power of—Widow of gotraja sapindas—Adoption—If divests reversioner or alters order of inheritance—Right of adopted son to sue for possession of immovable property.*

The widow of a gotraja sapinda, enjoying a widow's estate, cannot by adoption divest the estate of a reversioner and thereby alter the order of inheritance of the property inherited by her as widow of a gotraja sapinda. This principle applies not only to immovable property, but to a chose in action, *i.e.*, a right to sue for possession of immovable property. (*Beaumont, C. J. and Wadia, J.*) SUBRAO BAJI *v.* DADA BHIWA. **196 I.C. 576 = 14 R.B. 132 = 43 Bom.L.R. 492 = A.I.R. 1941 Bom. 323.**

——*Adoption — Widow—Successive adoptions—Unauthorised alienation after death of first adopted son and before second adoption—Right of second adopted son to sue for possession of property alienated—If arises on adoption or is postponed until death of widow.*

The rights of a Hindu widow in the property which she holds as the heir of her son are co-extensive with the rights which she possessed when she held it as the heir of her husband. In both cases she possesses the right of alienating for the period of her life, but not beyond, except in the case of necessity. In other words the quality of the estate is the same. An alienee will be defeated not only by a first adoption, but also by a second adoption, the widow's powers of alienation being the same when she holds the property as a mother as when she holds it as widow. A person contracting with a childless widow does so subject to the knowledge that she may possess, or may be given, a right to adopt. The second adopted son is just as much the son of his adoptive father as the first adopted son, and must be given the same rights in the property which are found to be his father's estate as to the first adopted son. The second adopted son must be put on the same footing as his deceased brother. That is in accordance with Hindu conceptions of what is right and proper. On 9th February, 1891, a Hindu widow having her husband's authority adopted a boy who, after becoming a major, died unmarried in February, 1907. In 1922 the widow entered into agreement of partition with *M* who was then the nearest male reversioner to the estate, under which the estate was divided between them, the

intention being that each should have an absolute interest in the allotted portion. This transaction was regarded as one which did not operate as a surrender of the estate to *M* and did not bind the reversion. In 1926, the widow adopted *R* (the plaintiff) in exercise of the power of adoption conferred upon her by her husband and with the consent of the nearest sapinda. On attaining majority, *R* filed a suit to recover the property which was delivered to *M* as the result of the partition in 1922. The widow was alive and was made a defendant to the suit.

Held, that the adoption of *R* gave him an immediate right to sue to recover the property and his right of action was not postponed until the death or re-marriage of the widow. (*Leach, C.J. and Mockett, J.*) PATTU ACHI *v.* RAJAGOPALA PILLAI. **54 L.W. 36= 1941 M.W.N. 692 = A.I.R. 1941 Mad. 699 = (1941) 2 M.L.J. 134.**

——Adoption—Widow—Suspension and revival of power to adopt. *See* 1940 Dig., Col. 642. BAPUJI RAMJI *v.* GANGARAM. **I.L.R. (1941) Nag. 178 = 195 I.C. 282 = 14 R.N. 42 = A.I.R. 1941 Nag. 116.**

——*Adoption—Widow—Unchaste widow—Adoption by—Validity.*

An unchaste widow is not incompetent to make an adoption to her deceased husband by reason only of her unchastity. Where an unchaste widow of one of regenerate caste takes a boy of the same gotra as her husband in adoption, and delegates the performance of the religious ceremonies including the datta homam to others, the adoption is not invalid. (*Broomfield and Macklin, JJ.*) RAMU BALA SANKPAL *v.* JANA DALA PATIL. **43 Bom.L.R. 920.**

——**Alienation.**

AFTER-BORN SON OR COPARCENER—RIGHTS.
ALIENEE FROM COPARCENER.
COPARCENER.
DAUGHTER INHERITING MOTHER'S PROPERTY.
FATHER.
JOINT FAMILY.
LIMITED OWNER.
MANAGER.
NECESSITY.
RELIGIOUS ENDOWMENTS. *See* HINDU LAW—RELIGIOUS ENDOWMENT.
WIDOW.

——*Alienation—After-born son or coparcener—Right to challenge—Alienation without necessity—Absence of consent of sons or coparceners then living—Son born before ratification of alienation—Right of to challenge.*

Where an alienation of joint family property is made by a father or manager without necessity and without the consent of the sons or other coparceners then living, it would not only be invalid against them but also against any son or coparcener born subsequently but before they had ratified the transaction. (*Fazl Ali and Varma, JJ.*) BHAGWAT PRASAD *v.* DEBI CHAND. **20 Pat. 727.**

——*Alienation—Alienee from coparcener—Right of—Determination—If subject to fluctuation due to subsequent births in family—Ascertainment of share—If to be as on date of alienation or on date of suit—Alienated property less than share of alienor on date of alienation—If to be allotted to vendor—Equities.*

Under the Hindu law an alienee of the interest of a coparcener is entitled to enforce his claim against the family estate on the basis of the vendor's right at the time of the alienation, and not at the date of the suit by the alienee. There is no fluctuation in the share to which the alienee is entitled as a result of additions to

the family by subsequent births. A Hindu father alienated an item of joint family property by way of sale on 10—9—1921. The family then consisted of the father (alienor) and his two sons, who were both minors. Subsequently three other sons were born to the alienor between 1921 and 1931. In a suit by one of the sons for a partition and to set aside the alienation, it was held that the alienation was not binding on the sons' interests, but as the property alienated represented less than one-third of the family property to which the father would be entitled on the date of the alienation, the Court did not set aside the alienation. On appeal,

Held, (1) that the alienee's right should be ascertained with reference to the state of the family as on the date of the alienation and not as on the date of the suit, and the father would be entitled to one-third of the family estate; (2) that since the property sold represented less than one-third, namely, what the father was entitled to as his share of the family property at the date of the alienation, the Court was justified in allocating the alienated property to the vendor's share so that the alienee need not be disturbed. (*Leach, C. J. and Horwill, J.*) DHARMARAO *v.* BAPANAYYA. **52 L.W. 915 = 1941 M.W.N. 26 = (1941) 1 M.L.J. 15.**

——*Alienation — Coparcener—Mortgage by coparcener—Subsequent partition — Purchaser of separate interest of coparcener—If can question validity of mortgage.*

A mortgage executed by a coparcener in respect of his undivided interest in joint family property cannot be questioned by a purchaser of the coparcener's separate interest after the coparcenary has ceased to exist as a result of a partition. (*Harries, C.J. and Chatterji, J.*) PANKAJINI DEBI *v.* PRAMATHA NATH GHOSH. **14 R.P. 194 = 196 I.C. 383 = 8 B.R. 20.**

——*Alienation—Daughter inheriting mother's property—Alienation of part for meeting marriage expenses of her daughter's daughter—Validity.*

A daughter inheriting her mother's property on her death has power under the Hindu Law to alienate a reasonable portion of such property for defraying the expenses of the marriage of her daughter's daughter (the mother of the girl being dead and her father being poor); such an alienation is valid as the purpose is a pious and meritorious purpose which would conduce to the spiritual benefit of the parents of the alienating daughter. (*Venkataramana Rao, J.*) SRINIVASA RAO *v.* SESHACHARLU. **54 L.W. 250 = (1941) 2 M.L.J. 406.**

——Alienation—Father—Alienation of ancestral property in Oudh—Legality. *See* 1940 Dig., Col. 642. BIJLESHARI BAKHSH SINGH *v.* GAJADHAR. **16 Luck. 484 = 191 I.C. 195 = A.I.R. 1941 Oudh 123.**

——Alienation—Father—Alienation without legal necessity—Position in Bengal and Central Provinces. *See* 1940 Dig., Col. 643. KASHINATH *v.* BAPURAO. **191 I.C. 241 = 13 R.N. 168.**

——Alienation—Father—Power—Rate of interest—Consideration. *See* 1940 Dig., Col. 644. GANGA SAGAR *v.* REOTI PRASAD. **I.L.R. (1940) All. 771 = 191 I.C. 365 = 13 R.A. 226 = 1941 A.L.W. 7.**

——*Alienation—Father's alienation not supported by necessity—Right of after-born son to challenge.*

It is undisputed that a sale or other alienation of joint family property which was binding upon the whole joint family as existing at its date cannot be affected by other coparceners arriving in the family at a later date, as it had become completely effective against the whole family before they arrived. Where a Hindu father, where

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he and his eldest son are the only members of the joint family, alienates joint family property, that alienation binds the father's half-share in the property concerned, and no later addition to the coparcenary can affect that; nor can any coparcener who comes into existence afterwards question it. But if the alienee wishes to enforce his alienation against any interest in the joint family property beyond the father's share, he must prove family justification for the alienation or that he made reasonable inquiries before he took the alienation, which showed that there was joint family justification for it. If by the time the alienee tries to prove that there was joint family justification for his alienation or that he after reasonable inquiries was reasonably led to think that was so and to enforce his alienation on something beyond the father's share in the family property alienated, the father has had another son, that son who has acquired an interest in the family property by birth, is entitled to challenge the effectiveness of the alienation against any thing except the father's share. The alienee has to make out his case and to make it out against every coparcener interested in the result. While that question is open, the after-born son can resist the alienee's claim and can himself challenge it. If, however, the eldest son, though not taking part in the alienation at its date, later on joins in the alienation or adopts it before another coparcener comes into existence, or ratifies it, the alienation becomes complete against the whole of the existing joint family before any other coparcener in any way comes upon the scene. If that happens, no after-born son can challenge the alienation. (*Reilly C.J. and Venkataranga Iyengar, J.*) GURUMURTHIAH *v.* SEETHARAMAIYA. **19 Mys.L.J. 310.**

———*Alienation—Joint family—Alienation—Binding nature—Proof of—Duty of alienee.*

An alienee who wishes to bind the shares of persons not a party to his mortgage has to allege and prove necessity or benefit or antecedent debt or something of that kind. Necessity depends upon pressure on the estate. (*Bose, J.*) RAMBHAOO *v.* GURUDAVAL, **196 I.C. 367=14 R.N. 103=1941 N.L.J. 277= A.I.R. 1941 Nag. 255.**

———*Alienation—Joint family—Alienation by father—Sons' liability and extent.*

Where in the case of a mortgage by a father of a joint Hindu family the debt is found to be not incurred for legal necessity but also not tainted with any immorality, the liability of the sons to pay the debts of their father extends to a personal decree against them but only in so far as any property may have devolved on them from their father. (*Davis.*) BHAG CHAND *v.* BISHESHAR LAL SETH. **1940 A.M.L.J. 107.**

———*Alienation—Joint family—Alienation—Father—Antecedent debts—Sons, when, and when not, entitled to question—Question as to legal necessity—Relevancy.*

Where a father of a joint Hindu family mortgages family property in order to pay antecedent debts of his own, at a time when the joint family consisted of himself and his sons, it is a valid mortgage binding on the estate. It is not necessary in such a case to consider the items of the mortgage consideration with meticulous care and find out if they are supported by legal necessity, because that doctrine does not apply and is subordinated to the other doctrine of Hindu Law, namely that the father can validly alienate for antecedent debt. At the same time, it is clear that if the antecedent debts are tainted with immorality or if the debts have no existence whatsoever the father would be committing a fraud on the family and the sons would be entitled to question that alienation. (*Baipai and Dar, JJ.*) GAINDA KUER *v.* SARDU RAM.

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———*Alienation—Joint family—Alienation—Father or manager—New business—Necessity—Tests to be applied.*

In every case of a father or manager borrowing money to finance a new business by alienating joint family property, the transaction has to be justified by legal necessity or by family benefit and benefit of the estate. In this respect there is no difference between the powers of a father and of any other coparcener and before any transaction can be said to be for the benefit of the family and of the estate, it must pass through certain tests and these are, that the transaction must be such as a prudent manager and not a prudent owner would enter into in the interest of the family and for the benefit of the estate and is either necessary for its good management or is necessary in the general interest of the family. It cannot be said as a matter of Hindu Law that it is not open to a manager of a joint Hindu family to start a new trade for the purpose of augmenting or supplementing the family income, nor can it be said that he cannot borrow money by alienating family property to start such a business. There may be compelling necessity to take such a course and even when there is no compelling necessity circumstances may exist which may render it prudent to adopt such a course and the adoption of such a course may be for the benefit of the estate or of the family. But in the latter case benefit must be practically certain and the proposed business free from any real risk or danger. The prudence of a transaction ought not to be judged by the results. (*Baipai and Dar, JJ.*) BABU LAL *v.* BABU LAL. **I.L.R. (1941) All. 343=195 I C. 571=14 R.A. 59=1941 A.W.R (H.C) 140=1941 A L.J. 217=1941 A L.W. 294=1941 O.A. (Supp.) 306=1941 O.W.N. 464=A.I.R. 1941 All. 194.**

———*Alienation—Joint family—Alienation—Father—Will by—Validity.*

It is settled law that, according to the Mitakshara, no coparcener, not even a father, can dispose of by will his undivided interest in the coparcenary. (*Tek Chand and Din Mohammad, JJ.*) BADRI PARSHAD *v.* SHANTI LAL. **195 I.C. 275=14 R.L. 43=43 P.L.R. 128=A.I.R, 1941 Lah. 228.**

———*Alienation—Joint family—Alienation—Legal necessity—Proof—Old transaction—Presumptions to fill in gaps.*

Where an alienation is impeached for want of legal necessity long after its date it is not possible to obtain evidence in as full a measure as would be the case, if the matter had arisen soon after the alienation. In cases of such kind presumptions can be availed of to fill in gaps and lacunae which have been left by the passage of time. (*Stone, C.J. and Bose, J.*) JAILALSAO *v.* GOPALDAS. **1941 N.L.J. 639.**

———*Alienation—Joint family—Alienation—Manager—Liability of minor members.*

Where a mortgage by the manager of a joint Hindu family is upheld, a minor member, who stands to gain by any advantage that may accrue to the family out of the transaction, must also be made liable, if any loss occurs. (*Davis.*) RAM NARAIN *v.* MADAN LAL. **1940 A.M.L.J. 101.**

———*Alienation—Joint family—Alienation—Manager—Necessity—Considerations before the Court.*

Where the sale by a manager of a joint Hindu family is attacked subsequently by other members, what Courts ought to consider is to see that with the existence of

certain pressure what action a prudent manager ought to take. If that pressure can be averted by other methods, those other methods ought to be availed of, but if the pressure cannot be averted except by sale of the property the manager would be entitled to sell the property and Courts should not look with meticulous care whether the bulk of the consideration was utilised for legal necessity and whether if some portion of the consideration is found to be not applied for legal necessity certain conditions ought to be imposed, but the Courts should take a broad view of the situation and find out whether under the situation the sale of the family property was the proper procedure and if it comes to the conclusion that the sale was the proper course, then if a portion of the sale consideration has not been applied for legal necessity the sale will be upheld unconditionally. The reason for this is that there would be a presumption that the balance of the sale consideration was applied for proper purposes and the transferee would be entitled to take advantage of this presumption. (*Bajpai and Dar, JJ.*) GAINDA KUER *v.* SARDU RAM. **195 I C. 541 = 14 R.A 54 = 1941 A.L.W. 361 = 1941 A.L.J. 129 = 1941 A.W.R. (H.C.) 70 = A.I.R. 1941 All 174**

——*Alienation—Joint family—Alienation—Manager—Power—Case of proprietary rights.*

In the case of proprietary rights where shares are separately shown in the names of different persons it cannot be contended that the senior member of a joint Hindu family acts on behalf of the other members of the family when he executes a *khaikari* deed in favour of a third person. (*Harper, S.M.*) DAULI *v.* BHOLA DATT. **1940 R.D. 603 = 1941 A.W.R. (Rev.) 93 (1) = 1941 O.A. (Supp.) 81.**

——*Alienation—Joint family—Alienation—Necessity—Marriage of minor—Effect of Child Marriage Restraint Act.*

The Child Marriage Restraint Act is intended to prohibit marriage of a Hindu male during his minority and it overrides to that extent the Hindu Law. Such a marriage prohibited by law, though not declared void, cannot be regarded as a necessary purpose. The first marriage of a Hindu is no doubt enjoined by the shastra but when the bridegroom is a minor whose marriage is restrained by statute, the Hindu Law cannot prevail. Hence such a marriage does not constitute a necessity to justify the mortgage of joint family property. (*Niyogi, J.*) BENISAO *v.* FAJITYA. **1941 N.L.J 282.**

——*Alienation—Joint family—Alienation—Necessity—Proof — Mortgage by manager—Liability of minor's share—Proof required of mortgagee.*

Where a mortgage of a property belonging to a joint Hindu family consisting of two brothers was executed by the elder brother for himself and as manager and guardian of his minor younger brother alleging the discharge of certain debts due by the family business as the reason for the loan, the mortgagee filing a suit to enforce the mortgage, in order to bind the minor's share in the property, is required either to show that there was necessity for the loan, or that he made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan. (*Lord Thankerton.*) RAMANATHAN CHETTIAR *v.* VISWANATHAN CHETTIAR. **I.L.R. (1941) Kar. (P.C.) 63 = 193 I.C. 657 = 13 R P.C. 177 = 7 B.R. 694 = 1941 O.L.R. 381 = 54 L.W. 1 = 22 Pat.L.T. 566 = 1941 M W.N. 654 = A.I R. 1941 P.C. 43 (P.C.).**

——*Alienation—Joint family—Alienation—Setting aside by after-born coparcener—Date of cause of action—Challenging by way of defence if open, when remedy by suit is not available—Right of redemption, if affected.*

The cause of action to challenge a mortgage of joint Hindu family property accrues at the date of the mortgage. If the challenging coparcener is born (or to be more accurate conceived) after the cause of action arises, then he cannot challenge the alienation. The cause of action referred to here is the cause of action which accrues to the after-born son to challenge the alienation and not to the cause of action which accrues to the alienee to enforce his transfer. In the case of a mortgage, if an after-born coparcener has no cause of action to bring a declaratory suit, he cannot create a cause of action for himself by waiting until he is dispossessed and then sue for possession. If he cannot sue for a declaration, he cannot set up rights which he could not urge in a suit of his own by way of defence when the mortgagee sues. Though an after-born coparcener cannot challenge a mortgage executed before he was conceived, that cannot affect his right to redeem. (*Stone, C.J. and Bose, J.*) KASHINATH *v.* BAPURAO. **I.L.R. (1940) Nag. 707 = 194 I.C. 189 = 13 R.N. 358 = 1941 N.L.J 156 = A.I.R. 194 Nag 122.**

——*Alienation—Joint family—Alienation—Transaction ancient—Presumption of legal necessity—Rule as to.*

In the case of an ancient transaction, it must be presumed that the alienation was lawful, *i.e.*, justified by legal necessity. The difficulty no doubt lies in fixing the length of time (intervening between the transaction and its challenge in a suit) that would be necessary to justify the application of that presumption. It is impossible to lay down any hard and fast rule. But on the principle underlying S. 89, Evidence Act, relating to documents 30 years old, the presumption in favour of the existence of necessity may well be applied to transfers more than 30 years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded. The presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the lifetime of the alienor. In such a case it would not be unreasonable to assume that the failure to sue for declaration was due to the existence of evidence proving necessity and the Courts would be justified in placing the onus on the reversioner of proving absence of legal necessity. (*Stone, C J. and Niyogi, J.*) BABULAL NANDRAM *v.* MANIKLAL BEHARILAL. **I.L R. (1941) Nag. 124 = 192 I.C. 826 = 13 R.N. 280 = 1941 N L.J 142 = A.I.R. 1941 Nag. 79.**

——Alienation—Joint family—Alienation by coparcener without legal necessity—Date of cause of action—After born coparcener, if can question—Test. *See* 1940 Dig., Col. 645. KASHINATH *v.* BAPURAO **191 I.C. 241 = 13 R.N. 168.**

——Alienation—Joint family—Alienation without legal necessity—Who can question. *See* 1940 Dig., Col. 645. KASHINATH *v.* BAPURAO. **191 I.C. 241 = 13 R N. 168.**

——*Alienation—Limited owner—Daughter's alienation—Benefit or necessity—Burden of proof—Next reversioner's consent—Effect of—Inquiry proved as to part of consideration only—If sufficient.*

An alienee from a woman who has only a life-interest in the property alienated, such as a daughter, if he does not rely upon reasonable inquiries made by himself convincing him reasonably that there was proper necessity or benefit to support the alienation, has to make out by sufficient proof, the burden being upon him, that there was such necessity or benefit. Where the alienee shows that the next reversioner, especially the next reversioner

who, if surviving, would be the absolute owner, consented to the alienation by joining in it, that only means that the alienee has gone as far as reasonably he could be required to go in pursuing his inquiries. That is not by itself sufficient to raise a presumption of necessity so as to validate the alienation. Even where a lender can show that he made reasonable inquiries, which assured him reasonably that part of his advance was for necessity or benefit, it may be shown against him or by his own story that his inquiry did not provide him with justification for the whole of the amount that he advanced. (*Reilly, C.J. and Singaravelu Mudaliar, J.*) MUNI VENKATAMMA *v.* CHIKRANGANNA. **19 Mys.L.J. 271.**

———*Alienation—Manager—Alienation of inalienable land for legal necessity—If binds other coparceners.*

There is no authority for holding that a manager of a Hindu joint family can bind the other members of the family by an alienation of coparcenary land which is inalienable, even though the alienation is for legal necessity. (*Beaumont, C.J and Sen, J.*) KRISHNAJI DATTAMBHAT *v.* PARAPPA DATTO. **196 I.C. 632= 43 Bom L.R. 539= A I.R. 1941 Bom. 328**

———*Alienation—Manager—Mortgage not for family necessity—Validity as against family property—Undivided share of executant—If liable.*

A mortgage by the karta of a joint family which is not for family necessity is void and cannot bind the family property. It does not even bind the undivided share of the coparcener who actually executes it. Unless subsequent events happen to make the share of the executant liable, no mortgage decree can be passed even as against his share. (*Harries, C.J. and Manohar Lall, J.*) BHULAN PRASAD SINGH *v.* KUP NARAIN SINGH. **195 I C. 664=14 R.P. 142=7 B.R. 955= 22 Pat.L.T. 12=A.I.R. 1941 Pat. 233.**

———*Alienation—Manager or father—Debts incurred by father or manager as sole coparcener—Subsequent alienation to pay off such debts after birth or conception of son—If binds son—Duty of alienee.*

Under the *Mitakshara*, a son born into Hindu joint family has an interest in the joint family property not only from the date of his birth but while he is in his mother's womb, and the other members of the joint family cannot dispose of his interest except for joint family necessity or benefit so as to bind his interest not only after his birth but while he is in his mother's womb. The law in this matter is not different in Mysore from what it is in the Madras Presidency for those governed by the *Mitakshara*. The fact that a sole coparcener of a joint Hindu family could, when he was such sole coparcener, alienate any part of the joint family property to pay off debts which he had personally incurred and that an after-born son could not contest the alienation, does not lead to the conclusion that an alienation made by a coparcener after a son was conceived and had an interest in the joint family property would be effective against such after-born son's interest, if it was incurred to pay off debts incurred before the son was born or conceived but not incurred for any family purpose. When an alienee from the manager of a joint family wishes to enforce his alienation not only against the interest of the manager or any other member of the family who has taken part in the alienation, but also against the interests of junior members of the family in existence at the time of the alienation who have not taken part in it, if he is to succeed in making the interests of those junior members liable, he must prove that the alienation was for joint family necessity or benefit or that he was led by reasonable inquiries to infer that that was so. It is not enough for him to say that the debt was incurred by the manager or father of the joint

family when he was sole surviving coparcener and so escape the duty of proving family necessity or benefit or reasonable inquiry on his own part. To pay a manager's or a father's private debts is not a family necessity. (*Reilly, C.J. and Singaravelu Mudaliar, J.*) VENKATAPATHIAH *v.* K. RAMANNA SETTY.

19 Mys L.J. 290.

———Alienation—Necessity—Marriage expenses. *See* 1940 Dig., Col. 646. JAGARNATH PRASAD *v.* CHUNILAL **191 I.C. 647 = 13 R.A 260.**

———Alienation — Widow —Alienation — Alienation in excess of powers—Right of reversioner to affirm and take benefit of. *See* 1940 Dig., Col. 647. SURAYYA *v.* MANGAYYA. **A.I.R. 1941 Mad. 345.**

———*Alienation —Widow— Alienation—Burden of proof—Justification for transaction—Position of transferee from alienee.*

An alienee in order to justify a transaction by a Hindu widow has to prove a legal necessity in fact for the transaction or a representation of legal necessity which the transferee after a *bona fide* enquiry believed and he advanced money on its basis. The alienee from a Hindu widow and a transferee from the alienee stand in the same position in the matter of burden of proof and both have to discharge the same burden as against a reversioner though presumptions of fact may arise in either case when by lapse of time evidence has disappeared. (*Baipai and Dar, JJ.*) RAMANAND LAL *v.* DAMODAR DAS. **1941 A.W R. (H C) 310= 1941 A.L.W. 1003.**

———*Alienation—Widow—Alienation — Challenging after long lapse of time—Considerations.*

In all transactions of Hindu widows which are challenged by reversioners after a great lapse of time and in which presumptions are raised to fill in the gaps of evidence there is some risk of speculation. In the absence of any evidence of waste and extravagance on the part of the widow and unfairness on the part of the transferee and inadequacy of price of sale consideration, where the reversioners had allowed the transactions to stand for a long time and the transferees had made improvements upon the property transferred in good faith it was held that the transfers need not be disturbed. (*Baipai and Dar, JJ.*) RAMANAND LAL *v.* DAMODAR DAS

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———*Alienation — Widow — Alienation— Challenge after long lapse of time—Presumptions as to necessity—Recitals and absence of recitals.*

In transfers made by Hindu widows which are challenged after a long lapse of time there is no hard and fast rule about presumptions which are to be made either with regard to recitals in the deed of transfer or with regard to the question whether necessity existed in fact or whether a representation of necessity was made and a *bona fide* enquiry was believed. Each case will have to be considered on its merits and presumptions may be made which are consistent with the evidence, the probabilities and the surrounding circumstances. When the recital in the deed is silent as to the necessity, in a proper case having regard to probabilities, circumstances and evidence in the case a presumption may be raised either with regard to the factum of the necessity or with regard to representation of the necessity which the circumstances of the case warrant. (*Baipai and Dar, JJ.*) RAMANAND LAL *v.* DAMODAR DAS.

1941 A.W.R (H.C.) 310=1941 A.L W. 1003.

———*Alienation—Widow— Alienation — Compromise —Binding nature—Test.*

If the compromise is fair, reasonable and prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind

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the reversioner. The alienation cannot be considered apart from the compromise. (*Stone, C.J. and Niyogi, J.*) BABULAL NANDRAM *v.* MANIKLAL BEHARILAL.
I.L.R (1941) Nag. 124=192 I.C 826=13 R.N. 280=1941 N.L.J. 142=A.I.R. 1941 Nag. 79.

———*Alienation—Widow—Alienation — Consent of presumptive reversioners—Effect of.*

The consent of the presumptive reversioners does not by itself validate an act of alienation by the widow. It simply gives rise to a presumption as to the existence of legal necessity a presumption which the actual reversioner is always entitled to rebut. But, if the actual reversioner is the same person as the one who has given consent as presumptive reversioner, a different consideration arises and he is precluded from disputing the validity of the alienation. This is on the ground that a presumptive reversioner is competent to elect to treat the alienation as operative against his *spes successionis* even during the lifetime of the widow, and, if he himself is the reversioner at the time of her death, the consent already expressed by him is binding on him. (*Mukherjea, J.*) HARE KRISHNA *v.* UPENDRA KUMAR.
45 C.W.N. 398=A.I.R. 1941 Cal. 383.

———Alienation—Widow—Alienation— Legal necessity proved as regards major portion of the purchase-money—Absence of legal necessity for balance—Onus. *See* 1940 Dig., Col. 647. BALARAM *v.* KEWAL RAM
191 I.C. 881=13 R.N. 221.

———Alienation—Widow—Alienation—Mortgage for raising money to build house—Validity — Legal necessity—Widow residing with relations and allowing husband's house to fall into disrepair—Effect of. *See* 1940 Dig., Col. 648. SURADHANI DEBI *v.* PROLHAD MAHI.
A.I.R. 1941 Pat. 11.

———*Alienation—Widow—Alienation—Partial necessity—Decree and sale—Rights of reversioners.*

If a mortgage is made by a Hindu widow for a consideration part of which is not justified by legal necessity, that portion of the mortgage is not binding upon the reversioner; and if a decree has been passed on such a mortgage, a part of the decree will be binding on the reversioner, and a part will not be binding on him and if in execution of such a decree property is sold, the sale is liable to be set aside at the instance of the reversioner on payment of the consideration which was binding on the reversioner. (*Baipai and Dar, JJ.*) RAMANAND LAL *v.* DAMODAR DAS.
1941 A.W.R. (H.C.) 310=1941 A.L.W. 1003.

———*Alienation—Widow—Alienation — Payment of Government revenue—Maintenance expenses—When justifying circumstances.*

Payment of Government revenue and borrowing money for maintenance are legitimate purposes for which a Hindu widow is entitled to alienate the husband's estate, provided the maintenance and revenue could not be met out of the income of the estate or out of the available funds of the estate; but where there is an income or husband's funds the widow keeps the income and funds to herself, which might enable her to pay the Government revenue, it is not open to her to pay the revenue by borrowing. (*Baipai and Dar, JJ.*) RAMANAND LAL *v.* DAMODAR DAS.
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———Alienation—Widow—Alienation—Power of co-widow. *See* 1940 Dig., Col. 647. KHANTA MANDALANI *v.* HEM KUMARI DEBI.
A.I.R. 1941 Pat. 29.

———Alienation—Widow—Alienation—Raiyati holding inherited by widow—Surrender to landlord—Validity—Legal necessity—Reversioners—If bound. *See*

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———Alienation—Widow—Alienation—Reversioner—Suit by, to declare alienation void during widow's lifetime—Subsequent suit after widow's death—If barred. *See* 1940 Dig., Col. 647. TEJ SINGH *v.* HANNU PRASAD.
191 I.C. 786=13 R.A. 272.

———*Alienation—Widow—Alienation— Right to avoid—Remote reversioner.*

As a general rule, a suit to set aside an alienation by a widow must be brought by the nearest reversioner. But if such reversioner refuses to sue or colludes with the widow, then the next presumable reversioner would become entitled to sue and the Court would exercise its discretion in his favour and allow him to sue. But where a remote reversioner deliberately suppressed the existence of the nearer reversioner and set himself up as the nearest reversioner, when it was found that there was in fact a nearer reversioner the Court refused to exercise its discretion in favour of the remote reversioner and held that the suit was not maintainable. (*Collister and Allsop, JJ.*) LALTA PRASAD *v* DWARKA PRASAD.
I.L.R. (1941) All. 598=195 I.C. 492=14 R.A 38=1941 O.A. (Supp.) 529=1941 A.L.J. 392=1941 A.L.W. 800=1941 A.W.R (H.C.) 234=A.I.R. 1941 All. 313.

———Applicability—Kurmi Ohdars of Chota Nagpur—If Hindus. *See* CUSTOM—CHOTA NAGPUR.
22 Pat L.T. 829.

———*Conversion—Conversion of father and minor son to Christianity—Effect on status—Subsequent reconversion—If* ipso facto *brings about coparcenary—Debts incurred and alienation made after conversion—If binds son.*

Where a Hindu coparcener becomes a convert to Christianity there is a dissolution of the family tie and a severance of the coparcenary, and this position is in no way altered by his subsequent re-conversion to Hinduism. The coparcenary having once been severed cannot be revived except by a re-union, but a re-union can result only from an agreement amongst the parties. A Hindu father became a convert to Christianity in 1917 when the appellant, his minor son, was only three years old. The appellant was also baptised in the same year. In 1930, while the appellant was still a minor, the father executed a mortgage, and also incurred other debts. It was found that some time before 1928, both the father and his son the appellant were re-converted, and reverted to their old faith and were Hindus for all purposes. No case of re-union was specifically pleaded and no issue was framed on the point.

Held, that the re-conversion of the appellant and his father did not *ipso facto* bring about a coparcenary relationship between them, and in the absence of evidence to show that the appellant became re-united with his father after he became a major, his share of the properties of the family were not liable for the debts incurred and the mortgage executed by the father. (*Patanjali Sastri, J.*) VENKATARAMAYYA *v.* SESHAYYA
1941 M.W.N. 1003=54 L.W. 563=(1941) 2 M.L.J. 877.

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———Debts—Acknowledgment of debts—Power of—Promissory note by manager—Subsequent partition—Payment and indorsement by one member—If operates to save limitation against other divided

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members. *See* LIMITATION ACT, SS. 20 AND 21.
(1941) 2 M.L.J. 883 (F.B.).

———Debts—Father—Decree against father personally in suit against father and sons after exonerating sons—Execution against son's share in family property—Right of decree-hol er—C. P. Code, S. 11. *See* 1940 Dig., Col. 650. KRISHNAN NAIDU *v.* SOMI NAIDU.
193 I.C. 825 = 13 R.M. 722 = (1940) 1 M.L.J. 363.

———*Debts—Father—Decree against — Property not attached during father's lifetime—Execution against joint family property.*

Sons who are joint with their father are liable to pay the debts of the father, though contracted for his own benefit, provided they were not incurred for an illegal or immoral purpose. The liability exists irrespective of the fact that the joint family includes persons other than the father and sons. Therefore, a creditor who had obtained a de ree against the father but had not attached his interest in the coparcenary properties in his lifetime, can, after his death, proceed against those properties, or any of them, in the hands of the surviving coparceners. (*Tek Chand, J.*) PREM DAS *v.* BRIJ MOHAN LAL.
43 P.L.R. 576 = A.I.R. 1941 Lah. 447

———Debts—Father—Extent of son's liability. *See* 1940 Dig., Col. 650. RAM KIRPAL *v.* BHURA MAL.
A.I.R. 1941 Oudh 62.

———Debts—Father—Partition—Creditor's right to proceed against sons' shares in execution of decree against father alone — Creditor obtaining attachment before judgment before partition—If in better position. *See* 1940 Dig., Col. 652. OFFICIAL RECEIVER, GUNTUR *v.* SESHAYYA. A.I.R. 1941 Mad. 262 = (1940) 2 M.L.J. 860.

———*Debts—Father—Pre-partition debts—Maintenance decree against father prior to partition—Execution against son's share for arrears after partition.*

Where prior to partition a decree for maintenance has been passed against a Hindu father, in respect of arrears due under the decree arising after partition, the son's share can be proceeded against in execution. The liability for arrears is not incurred freshly after partition when the decree is put in execution and hence the son's separated share cannot escape liability. (*Ghulam Hasan, J.*) KAMALA PRASAD *v.* RAM PYARI.
196 I.C. 720 = 1941 O.L.R. 760 = 1941 A.W.R. (C.C.) 331 = 1941 A.L.W. 973 = 1941 O.A. 864 = 1941 O.W.N. 1149.

———Debts—Father—Son's pious obligation. *See* 1940 Dig., Col. 652. JAGARNATH PRASAD *v.* CHUNILAL.
191 I.C. 647 = 13 R.A. 260.

———Debts—Father—Son's pious obligation—Money lawfully received by father subsequently misappropriated by him—Liability of sons. *See* 1940 Dig., Col. 652. ANANDA RAO *v.* PRESIDENT, CO-OPERATIVE CREDIT SOCIETY PEDATADEPALLI.
I.L.R. (1941) Mad. 27 = 13 R.M. 505 = 191 I.C. 755 = (1940) 2 M.L.J. 179.

———*Debts—Father—Suit on mortgage by—Addition of sons as parties—Money decree against father alone—Dismissal of suit against sons—Execution—Interests of sons—If can be proceeded against.*

Where in a suit on a mortgage executed by two brothers of a joint Hindu family, their sons are also impleaded as defendants, but only a money decree under S. 65 of Contract Act is passed against the executants of the mortgage alone and the claim against the sons is dismissed, the decree holder cannot in execution enforce the decree against the interests of the sons in the joint family property by reason of the rule of constructive *res judicata* and the provisions of O. 2, R. 2, C. P. Code. (*Thomas,*

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C.J. and Ghulam Hasan, J.) KESHO RAM *v.* RAM DULARI. 196 I.C. 680 = 14 R.O. 200 = 1941 R.D. 923 = 1941 O.L.R. 749 = 1941 A.W.R. (Rev.) 1028 = 1941 O.A. 840 = 1941 O.W.N. 1126.

———Debts—Joint family—Business—Debts incurred by manager under promissory notes—Liability of other members—Minors—If bound. *See* 1940 Dig., Col. 654. JAGJIVAN *v.* DHANJI SAKAR CHAND.
191 I.C. 617 = 13 R.S. 154.

———Debts—Joint family—Business—Manager—Borrowings—Binding nature. *See* 1940 Dig., Col. 654. LACHMI PRASAD *v.* BAHRAICH RAM.
193 I.C. 571 = 13 R.A. 422 = A.I.R. 1941 All. 31.

———*Debts—Joint family — Coparcener — Decree against—Execution—Creditor's remedy—If bound to attach and sell interest in whole joint family property—Sale of share in part of joint family property—Legality.*

It cannot be held that the holder of a money decree against one of several coparceners of a Hindu joint family is not at liberty to attach and bring to sale that coparcener's interest in a portion of the joint family property but must proceed against his interest in the whole of the joint family property. On the other hand it is possible for a creditor to attach his judgment-debtors interest in a part only of the joint family property. (*Burn and Mockett, JJ.*) SHANMUGHAM CHETTIAR *v.* NAGASAMI AYYAR & CO. 54 L.W. 365 = 1941 M.W.N. 985 = (1941) 2 M.L.J. 550.

———Debts—Joint family—Coparcener—Mortgage by undivided coparcener of share—Rights of mortgagee and non-mortgaging coparcener. *See* 1940 Dig., Col. 664. ATMARAMSAO *v.* BHUPENDRA NATH.
I.L.R. (1941) Nag. 677 = 13 R.N. 374 = 194 I.C. 537.

———Debts—Joint family—Coparcener—Personal debt of—Remedy of creditor—Liability of other coparceners. *See* 1939 Dig., Col. 610. BAPU SAHIB *v.* BHAGIRATHI SAO. I.L.R. (1941) Nag. 334 = 194 I.C. 895 = 14 R.N. 27.

———*Debts—Joint family—Father's debts—Son's liability to pay—If affected by gift by father to son.*

Under Hindu Law, a son is under a pious obligation to pay his father's debts unless they are tainted by illegality or immorality. A transfer of property to the son by means of a gift would not absolve him from the liability to pay such debts. (*Bennett and Ghulam Hasan, JJ.*) AVADH RAJ SINGH *v.* MANGREY.
194 I.C. 600 = 14 R.O. 16 = 1941 A.W.R. (C.C.) 186 = 1941 A.L.W. 590 = 1941 O.L.R. 508 = 941 O.A. 481 = 1941 O.W.N. 752 = A.I.R. 1941 Oudh 403 =

———*Debts—Joint family—Manager—Debts of—Legal necessity—Benefit to estate—Onus—Inference of payment of Government revenue.*

The question whether money borrowed by a manager of a joint Hindu family in any particular case was for legal necessity or for family benefit is one to be decided on the facts of each case and the onus in each case is upon the creditor to satisfy the Court that the money advanced by him was in fact borrowed for legal necessity or for family benefit. It is not sufficient, simply to show that the money borrowed was spent for a family purpose which is ordinarily met by family income. It would have to be further shown that circumstances existed at the time which justified the borrowing. Where Government revenue is usually paid out of the income, the question of family benefit cannot be decided as an abstract proposition of law on the basis that the family revenue was in fact paid from the borrowed money. A loan incurred by a manager for such a purpose when

justifying circumstances do not exist for the borrowing, cannot be regarded as benefit to the family. (*Baipai and Dar, JJ.*) BABU LAL *v.* SATYA NARAIN PRASAD.

1941 A.L.J. 501 = 1941 A.W.R. (H.C.) 264 = 1941 O.A. (Supp.) 722 = 1941 A.L.W. 840 = A.I.R. 1941 All. 372.

———*Debts—Joint family—Manager—Decree against in respect of family debts—Manager not described as such—Sale of family property—If passes entire interest of whole family—Presumption.*

It is beyond dispute that a decree against the manager of a joint Hindu family, representing the family in respect of a debt contracted for family purposes, is binding on all the members and may be executed against the whole coparcenary property. But a decree against the manager personally, even though in respect of a family debt, cannot be executed against the whole coparcenary property but only affects the manager's own interests. What has to be seen is whether the decree has been passed against him in his representative capacity or not. He need not be described as manager in the suit or decree. In order that a decree against the manager should bind coparceners not parties to the litigation, it is not essential that the pleadings should expressly state that he was being sued as manager. The question is whether in fact he represented the family in the proceedings in question. Where the manager has contracted debts for family purposes and is sued in respect of those debts, the presumption is that he is sued in his representative capacity as manager, so that a decree against him will bind all the coparceners, and if in execution of that decree any joint family property is sold, the interest of the whole family will pass by the sale. (*Broomfield and Divatia, JJ.*) MULGUND CO-OPERATIVE CREDIT SOCIETY *v.* SHIDLINGAPPA ISHWARAPPA.

43 Bom.L.R. 807 = A.I.R. 1941 Bom. 385.

———*Debts—Joint family—Manager—Decree against on promissory note—Debt incurred for family necessity—Execution against entire family properties—Question of liability of other members not parties to suit—If can be gone into.*

If a decree is passed against the manager of a Hindu joint family in respect of a liability contracted for the necessities of the family a sale in execution of that decree conveys the entire joint family property. The binding character of the decree upon the other members of the family depends not upon their having or not having been parties to the suit but on the authority of the manager to contract the liability. In a case where it can be made out that the person against whom a decree was passed occupied a representative capacity at the time and that the date in respect of which the decree was passed was one for family necessity, the entire family property will be liable to be sold in execution, even though the other members were not *eo nomine* parties to the suit resulting in the decree. Therefore questions in regard to the binding character of the debt and the liability of the other members should not be disallowed in execution proceedings, on the ground that the debt in question was one under a promissory note executed by the manager alone. The liability of the other members has to be decided under the Hindu Law and not by the reason that the manager had executed a negotiable instrument or a mortgage bond. (*Abdur Rahman, J.*) SOMAPPA *v.* NAGI REDDI.

1941 M.W.N. 819 = (1941) 2 M.L.J. 1050.

———*Debts—Joint family—Manager—Legal necessity—Test—Duty of lender.*

The legal necessity for incurring debt varies to a certain extent in joint Hindu families. As regards an ancestral firm where the proceeds of the firm constitute the sole earnings of the family, the most important object which must be kept in view by the family is the maintaining of that firm as a going concern. When dealing with any financial transaction entered into by the manager of an ancestral joint firm, it is only necessary for any one advancing money on the strength of property to be mortgaged by the firm, to make enquiries firstly as to whether the firm is in fact a Hindu ancestral joint family firm and secondly whether there are *prima facie* grounds for believing that the money is *bona fide* required for the purposes of the firm. (*Davies.*) RAM NARAIN *v.* MADAN LAL.

1940 A.M.L.J. 101.

———Debts—Joint family—Manager—Nature of debt—Presumption—Mortgagee procuring necessary evidence—Other side withholding documentary evidence. *See* 1940 Dig., Col. 655. NANKI DEVI *v.* MADHO RAM.

I.L.R. (1941) Lah. 632 = 192 I.C. 8 4 = 13 R.L. 416.

———*Debts—Joint family—Manager—Promissory note for amount borrowed for family business—Endorsement to third party—Suit by endorsee on note against maker alone—Decree—Executability against other members of the family.*

The payee of a promissory note executed by the manager of a joint Hindu family may either lease his suit on the note, in which case only the maker of the note can be made liable, or base his suit on the debt, in which event he may seek to make the sons, or the other members of the family, of the maker liable as well. When, however, the payee of such a note indorses the note to a third party, without formally assigning the debt also to the indorsee, the latter can sue only on the note and not on the debt where such an endorsee sues the maker of the note only, basing his cause of action purely on the promissory note, and obtains a decree against the maker alone, such a decree cannot be executed against the other undivided member of the family of the maker, when the element of pious obligation of a son to discharge his father's debts is absent, although the promissory note was in respect of a debt incurred for purposes binding on the joint family, such as a business carried on by the family. (*Mockett and Kunhi Raman, JJ.*) RAMANATHAN CHETTIAR *v.* MUTHURAMAN NAIDU.

(1941) 2 M.L.J. 816.

——Debts—Joint family—Recital in deed—Value—Binding nature on minors—Onus. *See* 1940 Dig., Col. 655. KISHORI LAL *v.* BHAWANI SHANKAR.

I.L.R. (1940) Kar. (P.C.) 282.

———*Debts—Pre-partition debts—Acknowledgment by father after partition—If can keep the debts alive against divided sons.*

X, a Hindu father executed in favour of *Y* four promissory notes on the 10th May, 12th June and 18th August, 1929 and 31st May, 1930, respectively. On the 16th November, 1931, a preliminary decree for partition of *X's* family properties was passed and a final decree followed on the 6th May, 1935. On a creditor's petition dated the 13th March, 1931, *X* was adjudicated insolvent on the 13th November, 1931 and on the 21st December, 1931, he filed his schedule and therein acknowledged his indebtedness in respect of the four promissory notes. *X* died on the 17th January, 1934. In a suit filed on the 21st December, 1934, on the promissory notes against the sons of *X*,

Held [*The Chief Justice and Mockett, J. (Krishnaswami Aiyangar, J., dissenting)*].—The acknowledgment by the father extends the period of limitation against him, and as at the date of the suit his pre-partition debts are still enforceable against him or his estate by virtue of such acknowledgment, his divided

sons are by reason of the pious obligation rule in Hindu Law also liable. 56 Mad. 833=65 M.L.J. 311, Appr. The father has always the power to give an acknowledgment within the meaning of S. 19 of the Limitation Act; and if he gives one in respect of a pre-partition debt that debt continues to be enforceable against the family property in the hands of his son for another three years.

Per *Krishnaswami Aiyangar, J.*—The power to acknowledge a debt is incidental to the father's power to contract the debt and to alienate his son's share. The power comes to an end at partition and with it the power to acknowledge also comes to an end even in case of pre-partition debts. (*Leach, C.J., Mockett and Krishnaswami Aiyangar, JJ.*) MOHANA REDDI *v.* GANGARAJU. **197 I C. 199 = 1941 M.W N. 704 = 54 L.W. 186 = A.I.R. 1941 Mad. 772 = (1941) 2 M.L.J 311 (F.B.).**

———*Debts—Joint family—Trade debts—Subsequent partition—Liability of members—Extent.*

Where a joint Hindu family incurs trade debts and is subsequently dissolved (by a partition) the liability for the debts continues against the former coparceners severally unless there is a discharge either by payment or novation. The members who seek to escape liability by alleging a novation must show that the creditor has by his conduct released them from liability. (*Roberts, C. J. and Mosely, J.*) CHOCKALINGAM CHETTIAR *v.* KARUPPAN CHETTIAR. **195 I.C. 737 = 14 R R. 57 = A.I.R. 1941 Rang. 129.**

———Debts— Widow—Debts due under promissory note incurred for legal necessity—Suit by creditor on promissory note—Personal decree against widow—Execution against husband's estate—Sale of estate—If binds subsequently adopted son. *See* 1940 Dig., Col. 656. MALLIKARJUNAGOWDA RUDRAGOWDA *v.* VENKAWA RAMCHANDRAPPA. **191 I.C. 286 = 13 R.B. 154.**

———*Divorce—Custom as to—Pakhali caste of Ahmedabad—Custom of divorce—If exists—Validity.*

Although divorce is not contemplated by the Hindu Law, it is not repugnant to its principles, and if there is well-established custom in its support, it may override the general provisions of that law. Among the Hindus belonging to the Pakhali caste of Ahmedabad, the custom of granting divorce exists, and if the consent of the spouse who is divorced is given, it is valid and is not against the spirit of Hindu Law. (*Divatia, J.*) JINA MAGAN *v.* BAI JETHI. **195 I.C. 841 = 14 R.B. 79 = 43 Bom.L.R. 651 = A.I R. 1941 Bom. 298.**

———*Family settlement—Binding nature—Compromise of litigation affecting rights of different branches of the family—Registration—Necessity—Registration Act, S. 17, Cl. (2) (vi).*

Where the question as to whether a particular member of a family died a separated member or as a joint family undivided member is in controversy and a compromise is arrived at in that litigation to which all the adult male members of the family including the two widows of the branch of the deceased member are parties and the dispute that threatened the peace and harmony of the family is set at rest and the shares of each of the members of the different branches of the family are specified, such a compromise is in the nature of a family settlement and is binding on all the members as well as their descendants in later litigation when the question of the right to the deceased member's property is once again raised. As such a compromise is with reference to the property in dispute in the suit, when it is embodied in the decree, it is exempt from registration in view of S. 17 (2) (vi) of the Registration Act. (*Iqbal Ahmad, C.J. and Collister, J.*)

BINDESHRI TEWARI *v.* RAM LAKHAN TEWARI. **1941 A.W.R. (H C) 297 = 1941 O.A. (Supp.) 842 = 1941 A L.W. 1078 = 1941 A.L.J. 587.**

——— Guardianship—Father alive—Power of Court to appoint guardian for minor members. *See* 1940 Dig., Col. 657. JAGARNATH PRASAD *v.* CHUNILAL. **191 I.C. 647 = 13 R.A. 260.**

———Impartible estate— Acquisitions by holder—If part of estate or separate property of holder—Presumption—Intention. *See* 1940 Dig., Col. 657. ZAMINDAR OF SATHUR *v.* VIRALAKSHMI AMMAL. **192 I.C. 785 = 13 R M. 611.**

———Impartible estate—Income of estate—How chargeable under the Income-tax Act. *See* INCOME-TAX ACT (1922), SS. 9 (1) AND 14. **1941 O.W.N. 1151.**

———Impartible estate—Joint status—Separation—What constitutes—Mere separation in food and worship and separate dealings with partible property—Effect—Adoption by widow of last holder after estate vests in member of junior branch—Effect of—Divesting of estate. *See* 1940 Dig., Col 659. LINGAPPA RAYAPPA *v.* KADAPPA BAPURAO. **191 I.C. 504 = 13 R B. 169.**

———Impartible estate—Mitakshara — Succession — Rule as to. *See* 1940 Dig., Col. 659. RAO BHIM SINGH *v.* GANGA RAM. **I.L.R. (1941) Nag. 632 = 13 R.N. 334 = 193 I.C. 598.**

———Impartible estate—Nature of—If joint family property—Rule of survivorship. *See* 1940 Dig., Col. 659. LINGAPPA RAYAPPA *v.* KADAPPA BAPURAO. **191 I.C. 504 = 13 R.B. 169.**

———**Joint family.**

ALIENATION. *See* HINDU LAW—ALIENATION.
ANCESTRAL OR SELF-ACQUIRED PROPERTY. *See* JOINT FAMILY PROPERTY.
ANTECEDENT DEBTS.
BIRAT JIGAMI.
BUSINESS.
DEBTS. *See* HINDU LAW—DEBTS.
INSOLVENCY OF FATHER.
JOINT FAMILY PROPERTY.
MANAGER.
MEMBER.
NOMINAL SALE BY ONE BROTHER TO ANOTHER.
NUCLEUS. *See* HINDU LAW—JOINT FAMILY—JOINT FAMILY PROPERTY.
POWER TO GIVE VALID DISCHARGE.
PRESUMPTION. *See also* HINDU LAW—JOINT FAMILY—JOINT FAMILY PROPERTY.
SUIT ON BEHALF OF.
WHO CONSTITUTE.

———*Joint family — Antecedent debts — Who can alienate for—Difference in the powers of father and non-father managers.*

There is a wide difference between the father's power and the powers of a manager who is not the father. A non-father manager can alienate a son's share for the purpose of payment of their father's antecedent debt. But the father manager stands on a higher footing *vis a vis* his sons and he can alienate for his own antecedent debts whether it is necessary or not. (*Bose, J.*) RAMBHAOO *v.* GURUDAYAL. **196 I.C. 367 = 14 R N. 103 = 1941 N.L.J. 277 = A.I R. 1941 Nag. 255.**

———*Joint family—Antecedent debt—What constitutes—Considerations.*

A debt borrowed by a father on the security of joint property would be an antecedent debt to justify subsequent alienation for its satisfaction provided that the previous debt is proved to be independent, that is not a part of the subsequent alienation (*i.e.*)

the transaction impeached. There must be dissociation in time as well as in fact. If at the time of the earlier mortgage, the later one was not in contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee. Where wide intervals of time separated the different mortgages and the rates of interest were also different, the transactions were *held* to be independent transactions. (*Stone, C.J. and Niyogi, J.*) BAJIRAO v. BAPU LINGAPPA. **1941 N L.J. 630.**

———*Joint family—Birat Jigmani—Rights of members.*

Birat Jigmani is the customary dues paid to the Brahmin priests by pligrims to Pushkar. It is heritable and partible. The property that is to be regarded as heritable is chiefly the good will of certain families who are habituated to repair year by year to the same priest, for the performance of the religious ceremonies. (*Davies, J.*) SHEO NARAIN v. MST. PHAGNI. **1940 A.M.L.J. 109.**

———Joint family—Business—Ancestral business—Minor becoming sole owner by inheritance—Manager appointed by guardian carrying on business in the usual course—Liabilities—Minor, if bound—Rights of third parties. *See* 1940 Dig., Col. 661. SUGANCHAND & CO. v. LADURAM BALKISANDAS **196 I.C. 34 = 14 R N. 73 = A.I.R. 1941 Nag. 105.**

———*Joint family—Business—Ancestral or new business—Business of same line as ancestral business started in new centres with stranger partners.*

Whether a business started by a *karta* of a joint family is a new business or is a branch of an ancestral business is a question of fact. If he starts business of the same line as the ancestral business in new centres with strangers as partners who are the sole controlling authority, this business is a new business and is not a branch of the ancestral business. (*Mitter and Khundkar, JJ.*) SHEWKISSEN v. MANGALCHAND. **195 I.C. 885 = 14 R.C. 148 = 45 C.W.N. 478 = A.I.R. 1941 Cal. 341.**

———*Joint family—Business—Ancestral or new business—Manager carrying on ancestral business newly entering into forward contracts.*

A manager of a joint family who carries on an ancestral business cannot be held to start a new business simply because he begins to make forward contracts, although such contracts were not entered into previously. (*Mitter and Khundkar, JJ.*) SHEWKISSEN v. MANGALCHAND. **195 I.C. 885 = 14 R.C. 148 = 45 C.W.N. 478 = A.I.R. 1941 Cal. 341.**

———*Joint family—Business carried on by members without aid of family funds—Property acquired out of such business—Nature of—Presumption—Devolution of such property—Survivorship or inheritance.*

When property has been acquired by members of a joint Hindu family governed by the Mitakshara Law out of a business carried on by them jointly without the aid of family property or family funds, such property would be joint property of the acquirers. At least the presumption would be so, and this presumption can only be rebutted by proof, the onus being on the person so asserting, that the persons constituting the joint family did not carry on the business as members of a joint family but as members of an ordinary trade partnership resting on contract. In such joint property the sons of the joint acquirers do not acquire rights by birth, but on the death of one of such joint acquirers his rights would pass by survivorship. If he left no male descendants but either a widow or a daughter, and a joint brother, the latter would take by survivorship to the exclusion of his widow or daughter as the case may be. (*Mitter and Khundkar, JJ.*) JASODA BAI v. MANGAL CHAND. **45 C.W N. 470.**

———Joint family—Business—Coparcener participating in management—Personal liability of—Extent and nature of—Test to determine—Inference of partnership relation—When justified. *See* 1940 Dig., Col. 662. ALAGAMAI ACHI v. PALANIAPPA CHETTIAR. **194 I.C. 514 = 14 R.M 4 = (1940) 1 M.L.J. 469.**

———*Joint family—Business—Dissolution of firm—Previous accounts of business—It can be gone into.*

The previous accounts of a joint family business cannot be gone into at the time of the dissolution of the joint family firm. Consequently the income of a member from his professional skill prior to the dissolution whether it acquired the nature of joint family property or not cannot be accounted for. (*Almond, J C. and Sooft, J.*) GURDIT SINGH v. SIRI RAM. **A.I R. 1941 Pesh. 89.**

———Joint family — Business — Money-lending—If trading business. *See* 1940 Dig., Col. 662. ATMA RAM v. UMAR ALI. **I.L.R. (1941) Lah. 39.**

———*Joint family—Business — Origin—Descent—Incidents.*

In Hindu Law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In their hands it becomes joint family business and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a contract but a family partnership created by operation of law. (*Thomas, C.J. and Ghulam Hasan, J.*) GULAB CHAND v. MANNI LAL **16 Luck. 302 = 192 I.C 643 = 13 R.C. 381 = 1941 O.L.R. 194 = 1941 O.W.N. 214 = 1941 A.W.R. (C C.) 58 = 1941 A.L.W. 319 (1) = 1941 O.A. 43 = A.I R. 1941 Oudh 230.**

———Joint family—Debts. *See* HINDU LAW—DEBTS.

———Joint family—Insolvency of father—Power to sell son's share—If vests in receiver—Attachment of son's share prior to exercise of power of sale—Effect. *See* 1940 Dig., Col. 664. SUBRAMANIAM CHETTIAR v. ANNAMALAI CHETTIAR. **194 I.C. 803 = 14 R.M. 89 = (1940) 1 M.L.J. 553.**

———*Joint family—Joint family property—Acquisition by joint labours—Absence of nucleus.*

Property acquired by joint labours of the members of a joint family is joint family property even in the absence of proof of nucleus. (*Bennett and Madeley, JJ.*) LACHMI NARAIN v. MUSADDI LAL **1941 O.W.N. 1195 = 1941 A.W.R. (Rev.) 1010 = 1941 O.A. 891.**

———*Joint family—Joint family property—Acquisition by members out of capital or income.*

Where the members of a joint Hindu family acquire property out of money representing either capital or income of the joint family property the resulting acquisitions go to increase the joint family property. (*Stone, C.J. and Bose, J.*) BAJIRAO TUKARAM v. RAMKRISHNA. **I.L.R. (1941) Nag. 707 = 1941 N.L.J. 576.**

———*Joint family—Joint family property—Ancestral or self-acquired property—Bequest by father to sons—Limited interest conferred—Character of property—Presumption as to—Joint tenancy or tenancy-in-common.*

Where a Hindu father bequeaths property to his undivided sons, he can determine whether the property so bequeathed shall be ancestral or self-acquired in the hands of the sons; in the absence of any such declaration by the father or of any circumstances which would

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point to a contrary intention, it would be presumed to be ancestral property. In such a case the facts that the sons got only a limited interest in the property bequeathed to them would be sufficient to rebut the presumption of joint tenancy. (*Abdur Rahman, J.*) RAMACHANDRA AIYAR *v.* RANGANAYAKI AMMAL. **53 L.W. 483= 1941 M.W.N. 529=A.I.R. 1941 Mad, 612= (1941) 1 M.L.J. 557.**

——*Joint family—Joint family property—Ancestral or self-acquired property—Owner by will conferring absolute estate on his widow—Widow adopting son and by will devising her property to adopted son—Property in hands of adopted son—Nature of.*

An owner of property by will conferred an absolute estate in the property on his widow. The widow after the death of the testator adopted a son and made a will devising the property to her adopted son.

Held, that the absolute devise to the widow would not be avoided by the adoption. The property was self-acquired in the hands of the widow as it came to her by will from her husband. Similarly the property was self-acquired in the hands of her adopted son as it came to him by will from her adoptive mother. (*Dalip Singh and Sale, JJ.*) NARINJAN DAS *v.* KRISHAN LAL.

193 I.C. 160=13 R.L. 434=A.I.R. 1941 Lah. 31.

——*Joint family—Joint family property—Ancestral property—Property inherited from maternal grandmother.*

Where two brothers inherit property from their maternal grandmother, the property is not ancestral property under Hindu Law. The brothers get it as tenants in common and not as joint tenants. (*Yorke and Agarwal, JJ.*) MOHAN LAL *v.* RAM DAYAL.

194 I.C. 61=13 R O. 525=1941 A L.W. 525= 1941 O.L.R. 384=1941 O.A. 370= 1941 A.W.R. (C.C.) 139=1941 O W N. 577= A.I.R. 1941 Oudh 331.

——*Joint family—Joint family property—Creation in the absence of nucleus.*

It is possible under Hindu Law to create a joint property with all the incidents of coparcenary in the absence of any ancestral nucleus, as for example where brothers living together acquire property by joint labour or with the aid of the funds thrown by them out of their separate acquisitions into the common stock. (*Niyogi, J.*) SHAMRAO *v.* KRISHNARAO.

I L.R. (1941) Nag. 598=1941 N. L. J. 421= A.I.R. 1941 Nag. 297.

——*Joint family—Joint family property—Earnings by brothers by joint trade—Nature of—Partition between brothers—Share taken by brothers—Ancestral or self-acquired.*

Joint earnings by brothers who are members of a joint family by joint trade or business would constitute joint family property in which their sons would take a right by birth ; when they divide the share what each brother takes would be in his hands legally ancestral property in which his sons would have a right by birth. (*Reilly, C.J. and Venkataranga Iyengar, J.*) NARASIMHA SETTY *v.* NANJAMMA. **45 Mys.H.C.R. 460.**

——*Joint family—Joint family property—House built out of contributions by brothers earning and living separate.*

Where two Hindu brothers earning and living separately contributed to the building of a house for the family both thinking it to be a family house without regard to the amount contributed by each, it was *held* that the house so built was joint family property and the brothers were not merely sharers in it according to their contributions. (*Yorke and Agarwal, JJ.*) MOHAN LAL *v.* RAM DAYAL. **194 I.C. 61=13 R.O. 525=**

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1941 A L.W. 525=1941 O.L.R. 384= 1941 O.A. 370=1941 A.W.R (C.C.) 139= 1941 O.W.N. 577=A.I.R. 1941 Oudh 331.

——*Joint family — Joint family property—Incidents.*

It is one of the incidents of joint family property that every member born into the family after the property has acquired that character and before it is divested by partition, obtains an interest in it. It is not competent to any one of the members, not even the karta, to make a disposition which has the effect of depriving another coparcener of his interest in the coparcenary properties. (*Tek Chand, J.*) PREM DAS *v.* BRIJ MOHAN LAL.

43 P.L.R 576=A.I.R. 1941 Lah. 447.

——*Joint family—Joint family property—Nucleus—Proof of existence—Effect on subsequent acquisitions.*

Where it is proved that the original ancestor had left ancestral nucleus, the subsequent acquisitions made by the members of the family must be deemed in law to be joint family property in the absence of any proof to the contrary. (*Thomas, C.J. and Ghulam Hasan, J.*) GULAB CHAND *v.* MANNI LAL. **16 Luck. 302= 192 I C. 643=13 R.O, 331=1941 O.L.R. 194= 1941 O.W.N. 214=1941 A.W.R. (C C.) 58= 1941 A.L.W. 319 (1)=1941 O.A 43= AI.R. 1941 Oudh 230.**

——*Joint family—Joint family property—Nucleus proved to exist—Presumption.*

Where a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including all acquisitions by a member of the joint family and the onus lies in the first instance on the member who claims the property to be his separate property to prove that the acquisition thereof was not made out of the income from the joint family property. But where, income from the joint family property is not sufficient even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired. (*Almond, J C. and Sooft, J.*) GURDIT SINGH *v.* SIRI RAM.

A.I.R. 1941 Pesh. 89.

——Joint family—Joint family property—Presumption—Advance on mortgage by one member. *See* 1940 Dig., Col. 665. NISAR AHMAD KHAN *v.* MOHAN MANUCHA. **67 I.A 431= I.L.R. (1940) Kar. (P.C) 419=191 I C. 94= 13 R.P.C. 117=1941 O.W.N. 513=73 C.L J 121= 43 Bom.L R. 465=1941 A.L J. 316= 1941 M.W N. 1=7 B.R. 218 (P.C.).**

——*Joint family—Joint family property—Presumption from nucleus—When justified.*

The mere existence of a nucleus of ancestral property, howsoever small and insignificant, will not raise a presumption that all subsequently acquired properties of a member are joint family properties; it must be proved or admitted that the nucleus was of such a character as, taking into consideration the surrounding circumstances, could lead to the acquisitions in question. (*Tek Chand and Beckett, JJ.*) GAURI PARSHAD SHARMA *v.* RAJ RANI. **196 I.C. 177=14 R.L. 138=43 P.L.R. 357= A I.R. 1941 Lah. 286.**

——*Joint family—Joint family property—Property acquired by joint exertions without ancestral nucleus.*

It is not the law that only that property can be held to be joint family property which had either devolved on the members from their common ancestor or which has been acquired by them with the aid and assistance of a sub-

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stantial ancestral nucleus. Even where there is no nucleus or ancestral property, if members of the family are found to be joint in worship and live in commensality and carry on a business jointly, treating that business as joint family business and acquiring property with the proceeds of that business, such property would be deemed to be the joint Hindu family property. It depends in each case on the evidence whether the members of the family have lived separately or together and if the latter, whether they have dealt with the property acquired by their joint exertions as joint family property. (*Tek Chand, J.*) PREM DAS *v.* BRIJ MOHAN LAL.

43 P.L.R. 576 = A.I.R. 1941 Lah. 447.

——— *Joint family—Joint family property—Property jointly acquired by members—Presumption.*

In the absence of any proof of partnership, property jointly acquired by the members of a joint Hindu family without the aid of joint family property must be presumed to be joint family property, unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property. (*Almond, J.C. and Sooft, J.*) GURDIT SINGH *v.* SIRI RAM. **A.I.R. 1941 Pesh. 89.**

——— *Joint family—Joint family property—Separate property thrown into common stock.*

Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself. Separate property thrown into the common stock is subject to all the incidents of joint family property. (*Almond, J.C. and Sooft, J.*) GURDIT SINGH *v.* SIRI RAM. **A.I.R. 1941 Pesh. 89.**

———Joint family—Manager— Debts. *See* HINDU LAW—DEBTS.

——— *Joint family—Manager—Liability to account—Nature and extent of—Right of coparcener suing for partition—Manager suppressing account books—Liability of.*

In a suit for partition of joint family property by a Hindu coparcener, the karta or manager of the joint family cannot be called upon to render a general account of his dealings with the joint family property. But he is bound to satisfy the Court what property is available for partition. In the absence of proof of misappropriation or fraudulent and improper conversion by the manager, he is liable to account only for assets which he has received, not for what he might or ought to have received if the family money had been profitably dealt with In the absence of such proof, the manager cannot be required to account for his past dealings with the family property. The manager cannot, however, refuse to render any account whatever of his management or require the other members to accept his *ipse dixit* as to the property subject to partition. Where it is found that the manager has suppressed books of account, and that he has for a period of over 30 years been in sole management of a vast estate and of a thriving business, he must be made liable to file a regular and complete account from the date of the severance in status. For the period prior to such severance, he must file an account showing the income of the immovable property and business, and how he has disposed of the same. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM.

I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.

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———Joint family—Manager—Powers—Settlement of maintenance claims—Family, if bound. *See* 1939 Dig., Col. 620. TRIMBAK *v.* BHAGU BAI.

I.L.R. (1941) Nag. 437.

———Joint family—Manager — Power to represent other members in suits—Extent of. *See* 1940 Dig., Col. 667. SITA RAM *v.* MUNSHI RAM.

192 I.C. 105 = 13 R.L. 358.

———Joint family—Manager—Third party dealing with—Defect in manager's *de jure* title—Third party, if affected with notice of. *See* 1940 Dig., Col. 667. LACHMI PRASAD *v.* BAHRAICH RAM.

193 I.C. 571 = 13 R.A. 422 = A.I.R. 1941 All. 31.

———Joint family—Member—Widow of a coparcener, if a. *See* INCOME-TAX ACT, S. 14 (1).

1940 A.L.J. 848.

——— *Joint family—Nominal sale by one brother to another—If effects a division in status and affects the right of survivorship.*

Where a member in a joint Hindu family sold 'his share' to his brother and the sale was found to be a sham one, their Lordships refused to accept the contention that the sale though a sham one would in law divide the interests of the parties thereto so as to put an end to the *jus accrescendi* or right of survivorship between coparceners. (*Sir George Rankin.*) RAMANNA *v.* JAGANNADHA RAO. **195 I.C. 1 = 14 R.P.C. 1 = 1941 A.W.R. (P.C.) 39 = 1941 O.A. 591 = 54 L.W. 57 = 1941 P.W.N. 484 = 45 C.W.N. 964 = 43 P.L.R. 515 = 7 B.R. 892 = 1941 O.L.R. 548 = 43 Bom.L.R. 850 = 1941 A.L.J. 673 = 1941 O.W.N. 1347 = A.I.R. 1941 P.C. 48 = (1941) 2 M.L.J. 58 (P.C.)**

——— *Joint family—Power to give valid discharge of debt—Mortgage in favour of manager—Manager absent—Payment to younger brother acting as agent—Receipt granted by latter—If valid.*

In the case of a mortgage bond executed in favour of the karta of a Hindu joint family, a payment of the debt to the younger brother of the karta, who is acting as agent of the karta during the latter's absence, would be a valid payment and a receipt granted by the younger brother would constitute a valid discharge for the debt. (*Agarwala, J.*) RAM KIRPAL CHOUDHURY *v.* BALESWAR CHOUDHURY.

192 I.C. 861 = 13 R.P. 524 = 1941 P.W.N. 680 (2) = 7 B.R. 423 = A.I.R. 1941 Pat. 246.

——— *Joint family—Presumption—Absence of joint family property.*

There can be a joint family under Hindu Law, without any joint family property and there is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. Hence the burden of proving the termination of a joint family is on those who allege it. (*Yorke and Agarwal, JJ.*) MOHAN LAL *v.* RAM DAYAL. **194 I.C. 61 = 13 R.O. 525 = 1941 A.L.W. 525 = 1941 O.L.R. 384 = 1941 O.A. 370 = 1941 A.W.R. (C.C.) 139 = 1941 O.W.N. 577 = A.I.R. 1941 Oudh 331.**

——— *Joint family—Suit on behalf of—Right to institute—Suit by junior member for family property without impleading manager and other members—Maintainability.*

A junior member of a Hindu joint family who is not the manager thereof cannot maintain a suit for recovery of family property which has gone out of the family by dispossession, without impleading the manager and the other members of the family. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) ABDUL RAHIM SAB *v.* ERAPPA. **19 Mys.L.J. 246 = 46 Mys.H.C.R. 44.**

HINDU LAW—Joint Family.

——*Joint family—Who go to constitute it—Effect of adoption—Continuity of family — Termination, if possible.*

A joint Hindu family is not necessarily composed of persons who are coparceners and persons who are mere maintenance holders. It can and frequently does, consist of persons who, while not entitled to share and while their property rights are merely those of maintenance holders, have other rights, rights which are vital that is to say, the right of adding a 'coparcener' to the family. While such a family exists, it is impossible for the male coparceners to partition the properties and thereby destroy the power of another member. the widow of a coparcener to adopt a person who will be in the place of a natural born son to her husband and entitled to all the rights of a coparcener and the rights of an adopted son to a share, on adoption in the joint family property. The essential conception in adoption is that there is no break in the chain which links the adopted son to his ancestors. He does not start a new family, he is a son of the adopting joint Hindu family even if no single 'coparcener' exists (*i.e.*) even if at the time of adoption it has been reduced to a female, the adopting mother. Though an adoption may take place 'long after the death of a member, there is no hiatus, any more than in the case of the natural son, in the eye of the law, between the death of the father and the birth of the son. The line is continuous. The old joint family lives on reduced, it may be, by members separating from it added to, it may be, by births or by adoptions. A Hindu joint family cannot be finally brought to an end while it is possible in nature or law to add a new member to it. The family cannot be at an end while there is a potential mother if that mother in the way of nature or in the way of law bring in a new male member. The existing male members can separate off; they can take away their shares. They cannot prejudice the rights of the after-born male member whether the birth is natural or legal. If there has been a partition before his arrival, he can obtain a reopening of the partition and thereby get his share. (*Stone, C.J. and Bose, J.*) BAJIRAO TUKARAM *v.* RAMKRISHNA.

I.L.R. (1941) Nag. 707 = 1941 N.L.J. 576

——Limited owner—Daughter succeeding to stridhan of mother—Injunction restraining her from alienating property—Power of Court to grant. *See* 1940 Dig., Col. 668. MITTULAL SINGHANIA *v.* PURSOTOME DEBI. **193 I.C. 193 = 13 R.C. 377.**

——Limited owner—Power to alienate—Agreement to alienate to defray cost of litigation to recover family property—Validity—Test. *See* 1940 Dig., Col. 668. MANAKLAL BEHARILAL *v.* MST. KISNI.

I.L.R (1941) Nag. 135 = 13 R.N. 295 = 192 I.C 798 = A.I.R. 1941 Nag. 78.

——*Lingayats*—Sivachar-Vysyas *of Mysore—If Sudras—Illegitimate son by dasi—Right to inherit as against sister.*

It cannot be laid down that Lingayats of Mysore are as a class Sudras. Where it is admitted that a specified person is *Sivachar-Vysya*, it must be held that he is one of the regenerate classes and not a Sudra. Hence his illegitimate sons, though born of a continuously kept concubine cannot claim to inherit to him so as to exclude his sister. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) MUNIAMMA *v* AKKANNAMMA.

45 Mys H C R. 311 = 19 Mys.L.J. 39.

——Maintenance—Coparcener and daughter of coparcener—Right to sue manager for maintenance. *See* 1940 Dig., Col. 669. CHERUTTY *v* NAGAMPARAMBIL RAVU. **194 I.C. 834 = 14 R.M. 104 = (1940) 2 M.L.J. 358.**

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——Maintenance — Daughter—Widowed daughter who is destitute—Father's moral obligation to maintain—Legal obligation of his widow to maintain his daughter out of his estate. *See* 1940 Dig., Col. 669. AMBU BAI AMMAL *v.* SONI BAI AMMAL.

I.L.R (1941) Mad. 13 = 192 I C. 627 = 13 R.M. 577 = (1940) 2 M.L.J. 298 (F B.).

——*Maintenance — Female — Nature of right—Arrears due to female claimant if her stridhan.*

The position of a female including a widow who becomes entitled to receive maintenance out of the joint family property in the hands of her male relations is wholly different from that of a female who by right of inheritance becomes for the time being the representative of the family estate. In the former case the female has a personal right as distinct from the right which she would have as representative of the estate and as such any property movable or immovable, which she obtains in her personal right, becomes her exclusive and absolute property. Hence arrears of maintenance constitute the absolute property of the female claimant and as such they must on her death devolve on her daughter as her stridhan. (*Niyogi, J.*) JANARDAN *v.* SONABAI.

1941 N.L J. 609.

——Maintenance — Permanently kept concubine—Right of when she is childless. *See* 1940 Dig., Col. 669. BHAGAVAT SASTRULU *v.* LAKSHMIKANTAM.

191 I.C. 383 = 13 R.M. 484 = (1940) 1 M.L J. 60.

——Maintenance—Rate fixed by decree—Variation—Necessity for a suit. *See* 1940 Dig., Col. 889, GHASIRAM *v.* KUNDANBAI.

I.L.R. (1941) Nag. 513 = 194 I.C. 861 = 14 R.N. 17.

——*Maintenance—What is included in*—Avaruddhastri—*Right to residence.*

Maintenance is not confined to food and raiment but includes also residence. It was held that an *Avaruddhastri* should be allowed to continue to reside in her lord's house even after his death and could not be ejected by purchaser with notice. (*Niyogi, J.*) PARWATIBAI *v.* SADOO.

1941 N.L.J. 571.

——Maintenance—Widow—Default in payment—Right to borrow on reasonable terms—Change in family circumstances—Onus. *See* 1939 Dig., Col. 622 TRIMBAK *v.* BHAGU BAI. **I.L.R. (1941) Nag. 437.**

——Maintenance—Widow—Directions and conditions in husband's will—Value. *See* 1940 Dig., Col. 670. JAMUNA KUNWAR *v.* ARJUN SINGH.

I.L.R. (1940) All. 739 = 193 I C. 27 = 13 R.A. 375 = A.I.R. 1941 All. 43.

——*Maintenance—Widow—Maintenance and residence—Claim for—Limitation.*

A claim by the widow of a deceased coparcener in a Hindu joint family for maintenance and residence is one which arises from day to day and there can be no question of limitation, especially when no past maintenance is claimed. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM. **I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind. 50.**

——*Maintenance—Widow—Rate of maintenance fixed by decree—Variation—Grounds for—Personal income obtained by personal exertion of widow—If ground for reduction of rate.*

There is no authority for holding that any personal income obtained by a Hindu widow by her own exertions is a justifying cause for reduction of the amount of her maintenance already fixed under a decree. Once the amount of maintenance for a widow is fixed, it is only the permanent reduction of the income of the family property which would afford a valid reason for reducing the amount fixed, and it should not be affected by her income from personal sources. (*Divatia, J.*) BAI

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JAYA *v.* GANPATRAM KALIDAS.
I.L.R (1941) Bom. 483=196 I.C. 607=
43 Bom L.R. 618=A.I.R. 1941 Bom. 305.

———*Maintenance widow—Right of to maintenance—Nature and extent of—Claim for arrears of maintenance accrued due during husband's lifetime—Enforceability against property in the hands of surviving coparcener.*

It is clear that under the Hindu Law the right of a wife or a widow to maintenance against her husband as well as the members of her husband's joint family is not the right of a mere creditor against the estate arising out of a contract, but is a right which attaches to her status as a member of the joint Hindu family. Although she is not a coparcener taking interest by birth, she is a member of the joint family and continues as such even after her husband's death. The right of maintenance of the widow attaches to the undivided share in the property which her husband would have got by partition had he been alive, and the widow is entitled to follow such property in the hands of the surviving coparcener who takes it. The right extends not only to future maintenance but also to arrears if accrued due even during the lifetime of her husband; the right exists whether against the husband, or against the surviving coparcener or any person who has inherited even the separate property of her husband. That being so the rule that a creditor cannot follow the property in the hands of a surviving coparcener unless it has been previously attached during the lifetime of the deceased coparcener, cannot apply to the case of a Hindu widow in respect of both arrears of maintenance and future maintenance. Although the husband's liability to maintain his wife is personal in its nature the liability is one which attaches to the property. The claim of a widow for arrears accrued due during the lifetime of her husband is therefore not a personal claim which would die with his death, but is one which can be enforced against the property in the hands of either the heir or the surviving coparcener. To entitle her to claim arrears from the date of her leaving her husband's residence it is not necessary that she should prove that she had incurred debts in maintaining herself. (*Divatia, J.*) RAGHUNATH AMBAIDAS *v.* DWARKABAI JAGANNATH.
43 Bom.L.R. 772=A.I.R. 1941 Bom 357.

———Maintenance—Widow—Right of—If absolute or conditional on her being in need—Possession of separate property—Income from—If to be taken into account. *See* 1940 Dig., Col. 670. ANNAPOORNAMMA *v.* VEERARAGHAVA REDDI. 194 I.C 569=14 R.M 7=
(1940) 1 M.L.J. 608.

———Maintenance—Widow—Right of—If confined to share of husband alone—Decree for maintenance charging portions of family property—Subsequent partition—Part of charged property falling to share of member other than son of deceased—If exempt from charge *See* 1940 Dig., Col. 671. DODDA BASAPPA *v.* MALLAMMA.
194 I.C. 750=14 R.M. 52=
(1940) 1 M.L.J 204.

———Maintenance—Widow—Suit by—Costs of suit—Proper order—Principles. *See* 1940 Dig., Col. 671. ANNAPOORNAMMA *v.* VEERARAGHAVA REDDI.
194 I C 569=14 R.M. 7=(1940) 1 M.L.J. 608.

———*Maintenance—Wife—Claim to arrears of past maintenance—Proof of debts having been incurred—If necessary.*

In order to entitle a Hindu wife to the grant of arrears of past maintenance, it is not necessary for her to prove that she had to contract debts for her maintenance. The fact that her father or some other generous relation bore the expenses of her maintenance is by itself not sufficient to disentitle her to arrears of maintenance. (*Nageswara Iyer and Subrahmanya Aiyar, JJ.*) SUBBA RAO *v.* NAGALAKSHAMMA. 19 Mys.L J. 233=
45 Mys.H C.R. 485.

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———*Maintenance — Wife—Decree for maintenance against husband—Subsequent co-habitation with husband—Effect on executability of decree.*

Where a Hindu wife, after obtaining a decree for maintenance against her husband, returns to her husband, and co-habits with him, she becomes disentitled to claim maintenance against him under the decree. The decree is by the resumption of cohabitation annulled and becomes ineffective and the wife cannot therefore execute the decree thereafter; This will not, however, prevent her from obtaining a fresh decree if she has to leave her husband again as the result of his ill-treatment of her. (*Leach, C. J. and Mockett, J.*) VENKAYYA *v.* RAGHAVAMMA. 54 L W. 128=
1941 M.W.N. 978=(1941) 2 M.L.J. 263.

———*Maintenance—Wife—Right of, to separate maintenance—Grounds —Husband continually neglecting wife—Liability to pay separate maintenance.*

Cruelty and abandonment are not the only grounds on which separate maintenance can be granted to a wife against her husband under the Hindu law. Wherever a wife lives away from her husband for justifiable reasons, she is entitled to separate maintenance. Where the husband is guilty of continued neglect towards his wife and has practically abandoned her, the wife must be held entitled to separate maintenance. (*Nageswara Iyer and Subrahmanya Aiyar, JJ.*) SUBBA RAO *v.* NAGALAKSHAMMA. 19 Mys L.J. 233=
45 Mys.H.C.R. 485.

———Maintenance—Wife — Separate maintenance—Right to claim—Proof of actual cruelty—Necessity—Husband found not entitled to restitution of conjugal rights due to abandonment—Effect of. *See* 1940 Dig., Col. 671. SEETHAYAMMA *v.* VENKATARAMANA.
191 I.C. 738=13 R M. 594=(1940) 2 M.L.J. 276.

———*Maintenance—Wife—Suit by—Offer by husband to take back wife—If ground for dismissal of suit.*

An offer by a husband to take back his wife and to live with her, made without any *bona fide* and after a suit for maintenance is filed, is no ground for refusing separate maintenance to the wife, as such an offer is a mere attempt or ruse to defeat the wife's claim for maintenance. (*Nageswara Iyer and Subrahmanya Aiyar, JJ.*) SUBBA RAO *v.* NAGALAKSHAMMA.
19 Mys.L.J. 233=45 Mys.H.C.R. 485.

———*Marriage*—Anuloma *marriage—Validity of.*

Anuloma marriages, though recognized by several of the ancient smriti writers, have ceased to be regarded as permissible under the Hindu law; and in the absence of a custom or enactment to the contrary the only legal course is to treat such marriages as invalid in the present age. (*Pandrang Row and Somayya, JJ.*) SUBBARAMAYYA *v* VENKATASUBRAMMA.
1941 M.W.N. 464=53 L W. 693=
A.I.R. 1941 Mad. 513=(1941) 1 M.L.J. 724.

———*Marriage*—Asura *form—Payment of money to father of girl for making jewels for girl in pursuance of stipulation therefor as condition of giving the girl in marriage—If bride-price.*

A bargain or a stipulation made with the bridegroom in regard to the present of jewels to the b ide would not turn such present into a "bride-price" and make the marriage an "*asura*". Hence money paid by the bridegroom to the bride's father for the specific purpose of making jewels for the bride in pursuance of a stipulation for such gift as a condition of giving the girl in marriage cannot be held to be "bride-price"; nor does it make

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the marriage one in the *asura* form. (*Patanjali Sastri, J.*) VELAYUDHA PANDARAM *v.* SURYA MURTHI PILLAI. **1941 M.W.N. 998 = (1941) 2 M.L.J. 770.**

———*Marriage — Eligibility —Prohibited degrees—Rules and exception*—Trigotra *rule—Mode of computation—Rule, if applies where boy and girl are connected through* bandhu.

Where the parties are of the twice-born class, the following rules regarding eligibility for marriage are applicable:—(1) The bridegroom and the bride must not be of the same *gotra* and *provara*; (2) The bride must not be a descendant within the seventh degree from the bridegroom's father and of the latter's six male ancestors; (3) She must not be a descendant within the fifth degree from the bridegroom's maternal grandfather and of the latter's four male ancestors, (4) She must not be a descendant within seven degrees of the bridegroom's father's *bandhus* and of the latter's six male ancestors; and (5) she must not be a descendant within five degrees of the bridegroom's mother's bandhus and of the latter's four male ancestors. To these rules there is an important exception. It is that if the bride is removed by three *gotras*, she would be eligible for marriage even if she falls within the prohibited degrees as defined in rules (2) to (5). In the matter of computation for, the *trigotra* rule, the bridegroom's *gotra* has to be reckoned. That is to say, if on proceeding from the boy's *gotra* to that of the girl's there are four *gotras* in all, the girl would be regarded as being removed by three *gotras* from the boy and would be eligible for marriage. The *trigotra* rule applies where the connection between the boy and the girl is through a *bandhu*. (*Mitter and Khundkar, JJ.*) ANILABALA DEBI *v.* MADHABENDU NARAIN ROY.
74 C.L.J. 241 = 46 C.W.N. 20.

———*Marriage—Minor girl—Contract of marriage—Power to make—Contract by mother of minor girl with father of major male—Breach—Suit by minor for damages for breach—Liability of would-be bridegroom—Implied condition.*

Under the Hindu Law contracts of marriage (betrothal) entered into on behalf of minors by their legal guardians and shown to be for their benefit are enforceable at the instance of the minors. But a guardian has no right to enter into a personal covenant capable of being enforced against the minor, and hence a contract cannot be enforced against the minor while it can be enforced against the other contracting party at the instance of the minor. Where the mother of a minor girl acting as guardian and on behalf of such minor girl enters into a contract of a marriage with the father of a major, for the marriage of the minor girl with the major, on whose behalf his father is acting, and the contract is shown to be for the benefit of the minor according to the habits and customs of the community to which the parties belong, that is a valid contract and the minor can maintain an action for damages against the would-be bridegroom in case of breach by him. The contract under the Hindu Law is conditional on the other party, *i.e.*, the husband being a suitable spouse at the time when the marriage is to be performed, and there being no more suitable husband available. (*Beaumont, C.J. and Kania, J.*) KHIMJI KUVERJI *v.* LALJI KARAMSI. **I.L.R. (1941) Bom 211 = 196 I.C. 858 = 43 Bom.L.R. 35 = A.I.R. 1941 Bom. 129.**

———**Partition.**
EVIDENCE.
MOTHER.
NATURE AND SCOPE.
PARTIAL PARTITION.

HINDU LAW—Partition.

PATERNAL GRANDMOTHER.
REGISTRATION.
REUNION.
SEPARATION IN STATUS.
SEVERANCE IN STATUS.
SUIT FOR.

———*Partition—Evidence—Definition of shares in revenue papers—If sufficient to displace presumption of joinness.*

A definition of shares in revenue and village papers affords but a very slight indication of an actual separation in a Hindu family. Such a definition of shares standing alone is not sufficient evidence to displace the presumption in law which is peculiarly strong in the case of sons of one father. (*Stone, C.J. and Niyogi, J.*) BABULAL NANDRAM *v.* MANIKLAL BEHARILAL.
I.L.R. (1941) Nag. 124 = 192 I.C. 826 = 13 R.N. 280 = 1941 N.L.J. 142 = A.I.R. 1941 Nag. 79.

———Partition—Evidence—Entry in revenue papers—Value of. *See* 1940 Dig., Col. 672. ATMA RAM *v.* UMAR ALI. **I.L.R (1941) Lah. 39.**

———*Partition—Evidence of—Keeping of earnings separate—Living in different places—Effect.*

The members of a joint Hindu family can have separate property and hence the fact of the members usually keeping their earnings separately, is not enough to show that they had separated. Nor does the fact of their living separately in different places afford much evidence of separation, where the members are in service and have to be at the places to which they are posted. (*Yorke and Agarwal, JJ.*) MOHAN LAL *v.* RAM DAYAL.
194 I.C. 61 = 13 R.O. 525 = 1941 A.L.W. 525 = 1941 O.L.R. 384 = 1941 O.A. 370 = 1941 A.W.R. (C.C.) 139 = 1941 O.W.N. 577 = A.I.R. 1941 Oudh 331.

———*Partition—Evidence—Specification of shares.*

Specification of shares of members even without actual partition is sufficient to establish severance of joint family. (*Bhide, J.*) SHIMBHU NATH *v.* BRAHAM WATI. **194 I.C. 304 = 13 R.L. 528 = 42 P.L.R. 806 = A.I.R. 1941 Lah. 49.**

———*Partition—Joint family firm—One member taking certain property and abandoning his claim in joint family property without specification of share—Effect of.*

Where one of the members of a joint Hindu family firm takes certain property and abandons his claim in the joint family firm, the absence of specification of share in the deed of relinquishment coupled with the implied intention on the part of the rest of the members of the joint family firm to continue as such operates in the continuance of the joint family business. (*Almond, J.C. and Soofi, J.*) GURDIT SINGH *v.* SIRI RAM.
A.I.R. 1941 Pesh. 89.

———Partition—Minor—Suit by—If effects disruption of joint family. *See* 1940 Dig., Col. 673. NATHU SINGH *v.* ANANDRAO. **I.L.R. (1941) Nag. 652.**

———*Partition—Mother—Position and rights of.*

Under the Mitakshara law, when the family estate is divided, a wife or mother is entitled to a share, but is not recognized as the owner of such share, until the division of the property is actually made. A wife can sue for her share when there has been a partition and she has not been assigned any share and has not assented or waived her rights or acquiesced. Where parties did not know that a mother was entitled to a share and in fact no provision was made for her, apart from her being allowed to retain her ornaments, it cannot be said that she had lost her right to claim partition by acquiescence. (*Stone, C.J. and Bose, J.*) MST. RADHABAI *v.*

HINDU LAW—Partition.

PANDHARINATH. **194 I.C. 724=14 R.N. 9=1941 N L.J. 87=A.I.R. 1941 Nag. 135**

———*Partition—Mother—Reopening—Procedure.*

Where after the lapse of many years after the event a partition is reopened at the instance of a mother the proper course to pursue in allocating her share would be so to rearrange the property that it interferes with past transactions as little as may be; and whatever she has received by way of gold or silver ornaments will be taken into account in settling her share. (*Stone, C.J. and Bose, J.*) MST. RADHABAI *v.* PANDHARINATH.

194 I.C. 724=14 R.N. 9=1941 N L J. 87=A.I R. 1941 Nag. 135

——— Partitition—Mother—Share of—If affected by existence of property enough for her maintenance. *See* 1940 Dig., Col. 674. RAM NARAIN SINGH *v.* RAJ BAHADUR SINGH **16 Luck. 266=191 I C. 402=13 R.O. 227=A.I.R 1941 Oudh 150.**

———Partition—Nature and scope of. *See* REG ACT, S. 49, PROVISO. **1941 N L J. 266.**

———*Partition—Partial partition—Rule against—If can be relaxed.*

The rule that there can be no partial partition of a joint estate is aimed at preventing multiplicity of litigation which would result if separate suits for partition could be instituted in respect of fragments of a joint estate. The rule that there cannot be a partial partition of a joint estate is not an inelastic rule which admits of no exceptions. The application of this rule can be relaxed, if the circumstances of a particular case or the interests of justice so require. (*Mukherjea and Biswas, JJ.*) HEMANTA KUMAR BANERJEE *v.* SATISH CHANDRA BANERJEE. **A.I R. 1941 Cal 635.**

———*Partition—Paternal grandmother—Right to share on partition between grandson and collaterals of his deceased's father—Right to share—When arises.*

A grandmother (father's mother) under the Mitakshara law is not entitled to a share in the family estate upon a partition between her grandson on the one part and his deceased father's collaterals or cousins who are not the direct descendants of the deceased grandfather. But the share taken by the grandson will be subject to her maintenance as well as to his mother's maintenance. In order to entitle the grandmother to a share, there must be a division between the direct descendants *inter se* of her deceased husband, provided that the dividing parties are not related to one another as father and son. (*Wadia and Wassoodew JJ.*) JOTIRAM EKOBA *v.* RAMCHANDRA TRIMBAK. **43 Bom.L R. 843=A.I R 1941 Bom, 382.**

——— Partition—Registration—Necessity. *See* REGISTRATION ACT, S. 17. **1941 N L J. 266.**

———Partition—Re-union—Who can re unite. *See* 1940 Dig, Col. 674. NANURAM *v.* RADHABAI **192 I.C. 630=13 R.N. 272**

———*Partition—Separation—Filing of suit for partition—Effect of—Suit dismissed for want of prosecution—Effect.*

The institution of a suit for partition by member of a joint family is an unequivocal intimation of his intention to separate and amounts to a severance of his joint status from the date of the suit. It is not necessary that the suit should ripen into a decree. Even if the suit be dismissed for want of prosecution, there is in law a severance of the joint status. It may be that if the suit is withdrawan on the ground that the plaintiff does not desire a separation, there will be no severance of the joint status. But when that is not the case, and the suit is allowed to be dismissed owing to other reasons, there is a severance of the joint tie. (*Lobo, J.*)

HINDU LAW—Partition.

KAEM CHAND *v.* DAYARAM. **I.L.R. (1940) Kar. 534=194 I.C. 137=13 R.S. 249=A.I.R. 1941 Sind 50.**

———*Partition—Separation in status—Suit for partition by widow as next friend of minor son—Death of minor before decree—Effect of on status—Rights of minor—If go to legal representative or survive to other members*

Where a Hindu widow, acting as the next friend of her minor son for partition of joint family property, and the minor son dies before the preliminary decree is made in the suit, the law in Mysore is that the minor dies an undivided member of his family, and any right which he may so have goes not to his mother or to any one else as legal representative but by survivorship to the other members of the family at that time. (*Reilly, C.J and Venkataranga Iyengar, J.*) NARASIMHA SETTY *v.* NANJAMMA. **45 Mys H.C R. 460.**

———*Partition—Separation of one brother—Presumption of separation in family of another brother—If arises.*

It is clear that where one brother in a joint Hindu family separates from the family, there is no presumption that such separation works a disruption in the family of another brother and his sons and grandsons. (*Harries, C.J and Manohar Lal, J.*) BHULAN PRASAD SINGH *v.* RUP NARAIN SINGH. **195 I.C. 664=14 R.P. 142=7 B.R. 955=22 Pat.L.T. 12=A.I.R 1941 Pat. 233.**

———Partition—Severance in status—Conversion to Christianity — Effect — Subsequent re-conversion—If brings about coparcenary relationship. *See* HINDU LAW—CONVERSION. **(1941) 2 M.L J. 877.**

———*Partition—Severance in status—Suit for partition by minor—Effect of—Insolvency of father—Sale of minor's share by Official Receiver—Propriety and validity of—Procedure.*

The filing of a suit for partition on behalf of a minor coparcener of a Hindu joint family does not automatically create a final severance of status between the minor and the family. When the guardian of a minor coparcener files a suit for partition, he remains a coparcener until the Court gives a finding that the proposed partition is beneficial to the minor; when that has been done, a severance of status takes place which dates back at any rate to the date of the plaint in the suit for partition. The minor being still a coparcener, the father's right to sell the minor's property to discharge his own debts which are not illegal or immoral still subsists until the Court finds that the partition is beneficial to the minor. Until that finding is given it cannot be said whether the sale by the father, or by the official receiver on the insolvency of the father, will or will not confer any title in the minor's property. It is therefore desirable that a sale of the minor's share should not be held but should be postponed until the Court gives the necessary finding in the partition suit. (*Wadsworth, J.*) OFFICIAL RECEIVER, EAST GODAVARI *v.* VEERREDDI. **1941 M.W.N. 778=54 L.W. 302=A.I.R. 1941 Mad. 838=(1941) 2 M.L J. 951.**

———*Partition—Severance of status—Suit for partition on behalf of minor coparceners—Effect.*

When a partition suit is brought on behalf of minor coparceners of a Hindu joint family by their next friend, there is no severance of status unless and until a decree is made in the suit for partition. (*Broomfield and Divatia, JJ.*) MULGUND CO-OPERATIVE CREDIT SOCIETY *v.* SHIDLINGAPPA ISHWARAPPA. **43 Bom.L.R. 807=A.I R. 1941 Bom 385.**

———*Partition—Suit for—Claim by widow of deceased coparcener for maintenance and residence—Failure to adduce evidence as to right or quantum thereof—*

HINDU LAW—Partition.

Absence of evidence as to nature and extent of property available—Procedure—Claim—If to be finally decided—Mere declaration of right—Sufficiency.

Where a widow of a deceased coparcener in a Hindu joint family who is impleaded as a defendant in a partition suit makes a claim for maintenance and residence, but leads no evidence as to their right to the same or as to the quantum of their rights, the claim cannot be conveniently or effectively dealt with when there are no materials on the record as to the nature and extent of the property out of which provision has to be made for maintenance and residence. In such a case, it would be proper for the Court only to make a declaration of the widow's right to maintenance and residence in the preliminary decree, leaving her to enforce her claim for maintenance and residence in a separate suit. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM.
I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind. 50.

———*Partition—Wife—Rights of.*

Under the Hindu law wife cannot herself demand a partition but if a partition does take place between her husband and her sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. Where a person institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants and the wife denies out and out the plaintiff's right to ask for the partition during the lifetime of his father on the ground of a special custom and the plea of special custom is subsequently given up the question of a pleading on the part of the wife to ask for her own share does not arise and the wife must be given a share if a partition is ordered. (*Almond, J.C. and Sooft, J.*) GURDIT SINGH *v.* SRI RAM. **A.I.R. 1941 Pesh. 89.**

———**Religious Endowment.**

ALIENATION.
DEDICATION.
IDOL.
MANAGEMENT.
MAHANT.
RIGHT OF SUIT.
SHEBAIT.
TEMPLE.

———*Religious endowment—Alienation by Mahant—Necessity—Proof—Recital in deed of alienation—Value of.*

In the case of alienation by the Mahant of an asthal effected many years before suit, where the parties as also the attesting witness to the deed of alienation are all dead, some value has to be attached to the recitals as to necessity in the deed of alienation. When by efflux of time evidence independent of the recitals become unavailable, a recital of necessity consistent with probability and the circumstances, assumes greater importance, and is clear evidence of a representation to the alienee, and when evidence of actual inquiry by him has become impossible, the recital coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the deed. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD.
192 I C 789 = 7 B R. 569 = 13 R P. 535 = (1941) P.W.N. 75 = 22 Pat L T. 239 = A I R. 1941 Pat. 354.

———*Religious endowment—Alienation—Mortgage by Mahant of Math—Necessity—Money borrowed to purchase elephant for Math—Elephant maintained for long time and necessary for use on festival occasions—Validity of mortgage.*

HINDU LAW—Religious Endowment.

In deciding a question as to whether a mortgage by the mahant of an asthal is justified by necessity, the matter should be approached not from an absolute standard of necessity, but from the point of view of what considerations would weigh in the mind of a prudent manager. "Necessity and benefit of the estate" are general and elastic terms. To a religious institution like a Matt or asthal, its prestige and influence are of vital importance. Preservation of its prestige and influence is no less necessary than preservation of its property. Where there is evidence showing that an elephant was being maintained in an asthal from a very early time and that an elephant was necessary for use during festivals in the asthal, a mortgage by the mahant to purchase an elephant would be justified by necessity in the absence of anything to show that he did not act as a prudent manager. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD. **192 I.C 789 = 7 B.R. 569 = 13 R.P. 535 = 1941 P.W N. 75 = 22 Pat L T. 239 = A.I.R. 1941 Pat. 354.**

———*Religious endowment—Alienation — Shebait — Alienation by some of shebaits—Validity.*

The shebaits of a deity, when they are more than one, form, as it were, but one body in the eye of law. The deity is represented by all of them acting together and no one shebait can be said to represent the idol in part or to possess any specific interest in any share of the idol's property. Consequently before a transfer by way of a lease or otherwise can be binding on the deity, there must be a joint transfer by all the shebaits acting together. A transfer by some of them of their fractional interests in the idols' property without the consent of the other co shebaits is invalid. (*Mukherjea and Biswas JJ.*) ISWAR LAKSHI DURGA HAR TATNESWAR *v.* SURENDRA NATH SARKAR
45 C.W.N. 665.

———*Religious endowment—Alienation — Shebait—Alienation of idol and shebaiti rights—Permissibility—Alienation of* debutter *property along with that of idol and shebaiti rights—Validity.*

An alienation by the shebaits of the idol itself and their shebaiti rights is not permissible in law. But if along with such alienation they alienate the *debutter* property, the alienation of the property can be upheld as an independent transaction, if it is otherwise valid. (*Mukherjea and Biswas, JJ.*) ISWAR LAKSHI DURGA HAR TATNESWAR *v.* SURENDRA NATH SARKAR.
45 C.W N. 665.

———*Religious endowment—Dedication—Bathing ghat—Dedication—Character and scope of.*

In the case of a bathing ghat at Benares, land or other property is dedicated to an object both religious and of public utility just as much as is a *dharam sala* or a *muth*, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Where with respect to a bathing ghat in Benares no express dedication was proved by production of any deed of endowment or otherwise and no manager had ever been appointed, and not one instance had been shown in which the plaintiff or any predecessor

had purported to act as superintendent shebait or mutawalli but on the contrary they had been treated as owners and they had repaired and improved the ghat at their own expense and closed it to bathers on proper occasions and had levied tolls on the shop keepers during festivals, it was *held* that the plaintiff's predecessors or any of them had not divested themselves of all property in the ghat and accepted the position of having a mere right of management. Their Lordships further added that the river bank at Benares was a sacred and historic spot with a powerful claim to the regard of a pious Hindu, that the practice of bathing in the Ganges was not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank did not require it, nor did the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication; rather it began by acts of user which were acquiesced in by the owner of the property who in due course made pro vision for the public needs as an act of charity or piety. (*Sir George Rankin.*) HEMANTA KUMARI DEBI *v.* GAURI SHANKAR. **I.L.R. (1941) All 401 = 45 C.W.N. 637 = 7 B.R. 709 = 193 I.C. 882 = 13 R.P.C. 180 = 941 O.L.R. 408 = 1941 P.W.N. 390 = 22 P.L.T. 639 = 43 Bom L.R. 777 = I.L.R. (1941) Kar (P.C.) 71 = 73 C.L.J. 586 = 1941 M.W.N. 685 = 54 L.W. 159 = 1941 O.W.N. 1002 = 1941 A.L.J. 491 = 1941 A.L.W. 846 = 1941 A.W.R. (Rev.) 413 = 1941 O.A. 467 = A.I.R. 1941 P.C. 38 = (941) 2 M.L.J. 1 (P.C.).**

———Religious endowment—Dedication—Bequest—Performing '*nek kam*'—If void for uncertainty. *See* 1940 Dig. Col. 676. GAURI SHANKER *v.* MOHAN LAL. **15 Luck. 674.**

———*Religious endowment — Dedication—Proof—Inference from circumstances.*

Where there is no deed of dedication, dedication may be inferred from circumstances. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD MISSIR. **192 I.C. 789 = 7 B.R. 569 = 13 R.P. 535 = 1941 P.W.N. 75 = 22 Pat. L.T. 239 = A.I.R. 1941 Pat. 354.**

———Religious endowment — Dedication—Real or colourable imitation—Test. *See* 1940 Dig., Col. 676. GAURI SHANKER *v.* MOHAN LAL. **15 Luck 674.**

———Religious endowment—Idol—Representation in suit—Next friend, if should be impleaded. *See* 1940 Dig., Col. 676. SRIDHAR JEU *v.* MANINDRA KUMAR MITTER. **195 I.C. 473 = 14 R.C. 101 = A.I.R. 1941 Cal 272.**

———Religious endowment—Idol—Representation—Questions relating to transferability of shebaitship and partition of joint Pala. *See* 1940 Dig., Col. 676. PULIN KRISHNA MUKHERJEE *v.* ADVA NATH. **193 I.C. 692 = 13 R.C. 447 = A.I.R 1941 Cal. 98.**

———*Religious endowment—Idol—Right of suit—Rights of shebait and worshipper to sue—Distinction between—Suit by worshipper as next friend of idol dismissed for default owing to his negligence—Fresh suit by shebait as next friend of idol—If barred—Analogy between minor and idol—C. P. Code, O. 9, R. 9.*

Per *Nasim Ali, J.*—There is some analogy between a minor and a Hindu idol but the latter is neither a minor nor a perpetual minor. Although in law an idol has the power of suing, it has no physical capacity to sue. On the analogy of the power of the legal guardian of an infant, the shebait of the idol has the right to sue on

behalf of the idol, for the protection of its interests. In this sense the right of suit vests in the shebait. The idol's power of suing for protecting its own interests is to be exercised by it through its *de jure* or *de facto* shebait. The worshippers of the idol are interested in the idol and as such are interested in the property dedicated to it for its maintenance. Their right to sue for the protection of the idol's property is founded upon their own interest, *viz.*, the right of worship apart from and independent of the idol's right to sue for the protection of its own interests and properties. They have no right to exercise the idol's power of suing. If a worshipper exercises the idol's power of suing on its behalf, the idol is not bound by the result of the exercise of such powers. A suit instituted by him as next friend of the idol is not, therefore, the idol's suit. If that suit is dismissed for default owing to the negligence of the next friend, O. 9, R. 9, C. P. Code, is not a bar to a subsequent suit in respect of the same cause of action by a shebait as next friend of the idol. Even if the previous suit was instituted by a shebait as next friend of the idol, a fresh suit by the idol is maintainable The preponderance of authority is in favour of the view that a decree passed against a minor owing to the gross negligence of his guardian is not binding on the minor and that such a decree can be set aside or declared to be not binding on the minor in a separate suit brought by the minor. If this view is correct, there is no reason why this protection should not be extended to a Hindu idol, as there is no statutory law prohibiting the extension of such protection.

Per *Pal, J.*—Though an idol is recognised as a juristic person capable of suing and being sued, strictly speaking it has no material interest of its own. The so-called interest of the idol is merely an ideal interest very different from the interest which an infant has in his property. The introduction of the idol and its recognition as a juristic person are more a matter for procedure and the procedure in India recognises the idol as having a *locus standi in judicio*. The real material interest and enjoyment lie with some human beings. It is the concern of those interested persons to see how best they will protect and preserve their interests and in this respect when the properly represented idol is brought before a Court of law, that proceeding is more analogous to the one brought by a few persons representing a multitude under O. 1, R. 8, C. P. Code, than the suit by a next friend in the name of an infant, for the protection of that infant's own interest. Negligence of the person or persons representing the idol (or more correctly, the interest of the ultimate multitude having interest in the endowment) should not be available for the purpose of avoiding the result of that litigation. (*Nasim Ali and Pal, JJ.*) TARIT BHUSAN RAI *v.* ISWAR SRIDAR SALAGRAM SHILA. **45 C.W.N. 932 = 74 C.L.J. 13.**

———*Religious endowment—Management—Right of—Shebait disqualified—Court of Wards—Power to take up management.*

Where the shebait of an idol is disqualified to manage the property of the idol, the idol being under a perpetual disability the Court of Wards can take over its management. (*Fazl Ali and Chatterji JJ.*) RAJA BRAJASUNDER DER *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I.C. 313 = 14 R.P. 100 = 7 B.R. 897 = 22 P.L.T. 699 = A.I.R. 1941 Pat. 260.**

———*Religious endowment — Math—Mahant—Mortgage by—Suit on—Absence of allegation that debt was for benefit of Math—Nothing to show that Mahant was sued as representing Math—Decree—If* res judicata *against succeeding Mahants.*

HINDU LAW—Religious Endowment.

A decree passed in a suit on a mortgage executed by the Mahant of a Math or asthal, in the absence of anything to show that the Mahant was impleaded as representing the deities of the Math and in the absence of any allegation that the mortgage debt was contracted for the benefit of the Math or deities and that the mortgage was binding on them, cannot be held to be binding on the succeeding Mahants or to operate as *res judicata*, because in such a case it cannot be said that the deities were effectively represented in the suit. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD. **192 I.C. 789=7 B.R. 569=3 R P. 535=1941 P W N. 75=22 Pat L.T. 239=A.I.R. 1941 Pat. 354.**

——*Religious endowment—Mahant—Powers of—Scheme under S. 92, C. P. Code.*

Under the general law, the Mahant is the head of the institution; it is he and he alone who has the power of management and administration over the whole institution, over the worship and the properties and all the officers are to be under his control and to act according to his direction in all matters concerning the institution. These powers can be curtailed by the Civil Court in a scheme framed under S. 92, C. P. Code, but only to the extent indicated in the scheme either expressly or by necessary implication. (*Mitter and Khundkar, JJ.*) SRIJIB NYAYATIRTHA *v.* DANDY SWAMI JAGANNATH ASRAM. **73 C.L.J. 532=A.I.R 1941 Cal. 618.**

——*Religious endowment—Origin of property unknown—Proof of author of trust, intention to create trust and the purpose of trust, if necessary—Inference from user.*

The requirements as to proof of the author of the trust, the intention to create and the purpose of the trust before it could be sought to be enforced do not apply to case where the origin of the property of a religious endowment is unknown. The question whether it is a public trust or not and whether the management is to be in the hands of particular persons are matters which have to be determined on the evidence of user of the property in the past. (*Stone, C.J. and Bose, J.*) MANIKSA *v.* ANNA. **1941 N L.J. 625.**

——*Religious endowment—Right of suit*—De facto *mahant—Suit by—When maintainable.*

Where the suit is in the interests of the trust and there is no suggestion that the amount that may be decreed, if realised, would be lost to the trust, it could be maintained by a *de facto* trustee. (*Iqbal Ahmad, C. J. and Collister, J.*) SOM GIRI *v.* RAM RATAN GIRI. **1941 O.A. (Supp.) 770 (2)=1941 A.L.W. 921=1941 A.W.R. (H.C.) 283=1941 A.L.J. 660=A.I.R. 941 All. 387.**

——*Religious endowment—Right of suit*—De facto *shebait—Right to sue.*

As regards the right of a *de facto* shebait to sue on behalf of an idol, a distinction may well be drawn between the case of a *math* and that of a private idol. (*Lord Thankerton.*) ISWAR RAM CHANDRA *v.* BENGAL DUARS BANK, LTD. **I.L.R (1941) Kar. (P.C.) 51=196 I.C. 12=1941 O.L.R. 714=14 R.P.C. 30=8 B. R. 66=45 C W.N. 497=A.I.R. 1941 P C. 33 (P.C.).**

——Religious endowment—Right of suit—Idol. *See* HINDU LAW—RELIGIOUS ENDOWMENT—IDOL.

——*Religious endowment—Rights of suit—Persons entitled to sue in respect of endowed property.*

Per *Pal, J.*—There are several distinct rights of suit in respect of an endowed property, *viz.*:—(1) The idol itself as a juristic person has the right of suit like all other owners; (2) the shebait, the recognised human agency through which the idol must, from its very

HINDU LAW—Religious Endowment.

nature, act, has a distinct right, distinct from, and, in normal cases in supersession of the idol's right of suit; (3) the prospective shebaits as persons interested in the endowment have a right of suit; (4) worshippers and members of the family have right of suit. Normally a shebait alone can represent an idol in a suit or proceeding. Where there are several shebaits, the entire body of them will represent the idol, but under some special circumstances even a co-shebait can represent the idol. It is only under some special circumstances that the idol may be represented by (*a*) a prospective shebait; (*b*) a worshipper or any person interested in the endowment. When persons other than the shebaits come to represent the idol, they can represent the idol only by an appointment by the Court. In such a case, such persons may be under the control of the Court in the manner in which and to the extent to which a next friend or a guardian of a minor is under such control under the provisions of O. 32, C. P. Code. Worshippers and members of the family cannot as of right represent the deity in a legal proceeding. They can sue in their own name and on their own behalf for the benefit of the *debutter*. (*Nasim Ali and Pal, JJ.*) TARIT BHUSAN RAI *v.* ISWAR SRIDHAR SALAGRAM SHILA. **45 C.W.N. 932=74 C.L.J. 13.**

——*Religious endowment — Shebait—Co-shebaits—Accounts—Suit by shebait against two co-shebaits for their removal from office and for accounts—One of them alone found liable to be removed—Liability of dismissed shebait to account to both plaintiff and other shebait—Basis and period of accounting.*

Where in a suit by a shebait against his two co-shebaits for their removal from office on the ground of misappropriation and breach of trust and for accounts, one of them alone is found liable to be removed, the dismissed shebait should account to both the plaintiff and the other defendant shebait. If the claim for accounts is not on the basis of wilful default, it is enough if the dismissed shebait renders accounts of the moneys actually received by him out of the debutter funds and spent by him for debutter purposes. The period for which accounts may be directed by the Court will vary according to the circumstances presented to its consideration. As a general rule, the Court will direct accounts so far as there has been misapplication of funds or from the date on which the breach of trust commenced. The Court may also in the exercise of its discretion decline to direct accounts when the prosecution of them would lead to harassing and protracted enquiry which would not at all be beneficial to the endowment. (*Mukerjea and Biswas, JJ.*) NIRMALCHANDRA *v.* JYOTI PRASAD. **I.L.R. (1941) 2 Cal. 128=73 C.L.J. 453=45 C.W.N. 709=A.I.R. 1941 Cal. 562.**

——Religious endowment—Shebait—Office of—Gift—Validity. *See* 1940 Dig., Col. 677. PULIN KRISHNA MUKHERJEE *v.* ADYA NATH. **193 I.C. 692=13 R.C. 447=A.I.R. 1941 Cal. 98.**

——Religious endowment—Shebait — Partition of joint Palas— Legality — Joint Pala—If can be put up for sale. *See* 1940 Dig., Col. 677. PULIN KRISHNA MUKHERJEE *v.* ADYA NATH. **193 I.C. 692=13 R.C. 447=A.I.R. 1941 Cal. 98.**

——Religious endowment—Shebait—Position of—Co-shebait paying entire Government revenue—Right to contribution from others. *See* 1940 Dig., Col. 678. GOBINDA DAS *v.* SHYAMA CHARAN. **193 I.C. 200=13 R.C. 382.**

——*Religious endowment—Shebait—Removal from office—Ground for—Abuse of fiduciary position—No actual misappropriation.*

HINDU LAW—Religious Endowment.

A shebait who is guilty of grossly improper conduct amounting to an abuse of his fiduciary position, is liable to be removed from his office, although there is no actual misappropriation by him and the deity has not actually suffered any loss. (*Mukherjea and Biswas, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD.

I.L.R. (1941) 2 Cal. 128=73 C.I. J. 453= 45 C.W.N. 709=A.I.R. 1941 Cal. 562.

———*Religious endowment—Shebait—Removal from office—Ground for—Subsequent lunacy.*

A shebait who was of sound mind when the shebaitship devolved upon him, does not forfeit his rights by subsequently becoming insane, nor is he liable to be removed from his office or suspended so long as his disability lasts. In such a case, the guardian of the lunatic may take charge of the endowed property on behalf of the lunatic and provide for the conduct of the necessary worship and the religious ceremonies. There may, however, be exceptional cases where the duties imposed on the shebait are of such a character that they cannot possibly be discharged by a representative; and in such a case it may be proper to make other exceptional arrangements so long as the lunacy subsists. (*Mukherjea and Biswas, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD.

I.L.R. (1941) 2 Cal. 128= 73 C.L.J. 453=45 C.W.N. 709= A.I.R. 1941 Cal 562.

———Religious endowment—Shebait—Right to sue co-shebait. *See* 1940 Dig., Col. 678. GOBINDA DAS *v.* SHYAMA CHARAN. **193 I.C. 200=13 R.C. 382.**

———*Religious endowment—Shebait—Right to sue—Suit for removal of co-shebaits from office and for accounts—Maintainability—Deity, if necessary party.*

A suit by a shebait brought on behalf of the deity for the removal of his co-shebaits from their office on the ground of breach of trust and misappropriation and for accounts against them is maintainable. The suit is not defective merely because all the shebaits of the deity do not appear as plaintiffs, and it cannot be held to be defective even if it is found later on that the charges brought against one or both of the defendants shebaits are not well-founded. Such a suit is maintainable even if it is neither in form nor in substance one on behalf of the deity. A shebait is certainly a person interested in the endowment and he can maintain a suit in the interests of the endowment itself for removal of his co-shebaits from their office on the ground of misappropriation of the deity's money and for recovery of the money that might be illegally retained by the latter, although the deity is not a party to the suit. (*Mukherjea and Biswas, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD.

I.L.R. (1941) 2 Cal. 128=73 C.L J. 453= 45 C.W.N. 709=A.I.R. 1941 Cal. 562.

———Religious endowment—Shebaitship—Devolution—Principles applicable. *See* 1940 Dig., Col. 677 DHARAM NARAIN *v.* SURAJ NARAIN.

I.L.R. (1940) All. 815=192 I.C. 697= 13 R.A. 435=A.I.R. 1941 All. 1

———*Religious endowment— Shebait— Succession—Alteration of line—Power of shebait adding to existing foundation.*

In making additions to an existing foundation it may not be competent for a shebait by his own act alone to alter the line of succession to the office of the shebait, but if the new line of shebaits laid down by the grantor is attached as an essential condition to the grant, the deity or its representatives may reject the grant if they like, but if they choose to accept it they must accept it subject to that condition. (*Mukherjea and Biswas, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD.

I.L.R. (1941) 2 Cal. 128=73 C.L.J. 453= 45 C.W.N. 709=A.I.R. 1941 Cal. 562.

HINDU LAW—Schools.

———*Religious Endowment—Shebait— Transfer of* palas *of worship—Validity of custom.*

A custom according to which *palas* or turns of worship held by a shebait of a private endowment can be transferred to any person who professes the Hindu faith provided the transferee belongs to any of the three higher castes or is a Sanyasi, is unreasonable, as it is prejudicial to the interests of the endowment and goes contrary to the presumed intentions of the founder. Such a custom being bad in law cannot be upheld by Courts. Consequently a sale by a shebait of his *palas* of worship in order to satisfy a personal decree obtained against him is void, and the purchaser does not acquire the rights of a shebait on the strength of the same, even though a custom is established supporting such a sale. (*Mukherjea and Biswas, JJ.*) JOGESH CHANDRA GHOSH *v.* SREE DHAKESWARI MATA.

I.L.R. (1941) 2 Cal. 258=73 C.L J. 544= 45 C.W.N. 809.

———*Religious endowment— Temple—Transfer in favour of—Construction.*

As a matter of construction of a document, if a transfer is made in favour of a temple, it may be and can be construed as a transfer in favour of the idol or a transfer in favour of the manager of the temple for the benefit of the endowment. (*Dar. J.*) MEGHRAJ *v.* SRI DIGAMBIR JAIN MANDIR. **195 I.C. 500=14 R.A. 44= 1941 A.L.W. 564=1941 O.W.N. 731= 1941 O.A. (Supp.) 409=1941 A.W.R. (H.C.) 195= 1941 AL J. 397=A.I.R. 1941 All 290.**

———Religious endowment—Temple—Trust for performance of charity—Special trustee failing to perform—Right of general trustee of temple to enforce—Suit for recovery of expenses from special trustee and from charged properties — Maintainability. *See* TRUST—TRUSTEE. **54 L.W. 408=(1941) 2 M L.J 636.**

———*Religious endowment—Worshipper—Right to sue.*

A worshipper as such has not an unqualified right to sue for a declaration that immovable property is the debutter property of the idol. When the shebait himself is negligent or alienates debutter property in breach of trust, not only a prospective shebait under the terms of the grant but any member of the family in case of a family endowment may maintain the suit on behalf of the deities to recover that property from a trespasser. (*Khundkar and Lodge, JJ.*) SASHI KUMARI DEVI *v.* DHIRENDRA KISHORE. **I.L.R. (1941) 1 Cal. 309= 45 C.W.N. 699=196 I.C. 241=14 R C. 199= A I.R. 1941 Cal. 248.**

———Reversioner—Election. *See* 1940 Dig., Col. 678. BALARAM *v.* KEWAL RAM. **191 I.C. 881= 13 R.N. 221.**

———Reversioner—Right of suit—Alienation by widow—Suit to declare invalidity by person claiming to be nearest reversioner—Finding that plaintiff is not the nearest reversioner—Decree on footing that nearer reversioners have precluded themselves to sue—If can be made in absence of necessary allegations in plaint. *See* 1940 Dig., Col. 679. BIGNA KUER *v.* RADHA PRASADRAI. **7 B.R. 138.**

———Reversioner—Right to sue for administration of estate vested in widow of last male owner—Estate held by widow—Daughter's suit for administration—Maintainability. *See* 1940 Dig., Col. 679. BAI VIDYAGAURI *v* CHATURDAS AMBARAM. **191 I.C. 534= 13 R.B. 184.**

———*Schools — Mitakshara and Mayukha — If two different schools exclusive of each other.*

The Mitakshara and the Mayukha, are not two schools of Hindu Law exclusive of each other and based upon

different foundations. The Mayukha, in spite of its different interpretation of the ancient texts on some points belongs to the Mitakhara school of Hindu Law. (*Broomfield and Divatia, JJ.*) AMBABAI BHAI CHAND *v.* KESHAV BANDO CHAND. **I.L.R (1941 Bom. 250 = 195 I.C. 172 = 14 R B. 20 = 43 Bom.L.R. 114 = A.I.R. 1941 Bom. 233.**

———Stridhanam. *See* HINDU LAW—SUCCESSION—STRIDHANAM.

———*Bandhus—Succcession—Father's father's daughter's son's son—If an atmabandhu.*

Father's father's daughter's son's son is an atma bandhu. (*Ghulam Hasan and Agarwal, JJ.*) UNITED PROVINCES *v.* KHANHAIYA LAL. **16 Luck. 551 = 192 I.C. 131 = 13 R.O. 326 = 1941 O.L,R. 75 = 1941 O.W.N. 33 = 1941 O A. 1 = 1941 A.W.R. (C.C.) 37 = A.I.R. 1941 Oudh 337.**

———Succession — Bandhus — Female bandhus—Brother's son's daughters—Right to inherit. *See* 1940 Dig., Col. 681. JAGANNADHAN *v.* ADILAKSHMI. **193 I.C. 135 = 13 R.M 619 = (1940) 1 M.L.J. 433.**

———Succession—Brother and brother's son. *See* 1940 Dig., Col. 681. MURLIDHAR *v.* AMAR NATH. **I.L R. (1941) Lah. 340.**

———*Succession—Brother's self-acquired property—Brother living with deceased and brother living separate—If take equally.*

The considerations in the case of succession to father's self-acquired property are different from those arising in the case of property left by a brother. The result of the distinction is that while the son's interest in his father's self-acquired property arises by birth, that of a person in the self-acquired property of his brother arises on the death of the propositus; the property passes by succession and becomes not the ancestral but the self-acquisition of the brother inheriting it. The principle of representation which applies in the case of the devolution of property from father to son does not operate in the case of a brother's succession to a brother. The circumstances as to the inheriting brother being joint with or separate from the deceased brother whose property he inherits becomes wholly immaterial. The property of a deceased brother falls to be regulated entirely by the principle of succession so as to entitle the surviving brothers to take equally. (*Niyogi, J.*) SHAMRAO *v.* KRISHNARAO. **I.L.R. (1941) Nag. 598 = 1941 N.L.J. 421 = A.I.R. Nag. 297.**

———Succession—Brother's widow and paternal uncle's son's son—Preference. *See* 1940 Dig., Col. 681. KAMALJABAI *v.* DASRU. **1941 N.L.J. 140 = A.I.R. 1941 Nag. 92.**

———Succession—Limited owner—Sister succeeding to sister after obtaining decree against him—Effect—Debt—If extinguished—Right of retainer—If available as against other creditors. *See* DEBTOR AND CREDITOR. **54 L W. 688 = (1941) 2 M.L.J 1024.**

———*Succession—Separated sons and son living with father in father's property—Rights of.*

Under Hindu Law sons who had separated from their father many years before his death but who had received no property from him on separation are entitled on his death to share in his property equally with sons who did not separate from him. (*Bennett and Ghulam Hasan, JJ.*) AMBIKA PRASAD *v.* JAMUNA PRASAD. **95 I.C. 89 = 194 A W.R. (C.C.) 208 = 1941 A.L.W. 631 = 14 R.O. 47 = 1941 O L.R. 537 = 1941 O.A. 536 = 1941 O.W.N. 786.**

———*Succession—Stridhan—Brahmin widow having illegitimate son and illegitimate daughter—Latter—If excludes former.*

The reason which exists for permitting legitimate daughters to take their mother's stridhanam property in preference to her legitimate son applies with equal, if not greater, force to illegitimate daughters when they are competing with illegitimate sons. There is nothing in principle to draw any distinction based on the status of the degraded woman, whether she belongs to one of the three higher castes or the Sudra caste, so far as the capacity of her illegitimate daughters to inherit her stridhanam is concerned. The right of illegitimate daughters to succeed to their mothers' stridhanam properties is not confined to the Sudra caste alone. Where a Brahmin widow dies leaving her surviving an illegitimate son and an illegitimate daughter, the latter will succeed to the stridhanam property left by the deceased in preference to the illegitimate son. (*Abdur Rahman J.*) SUBBAYYA *v.* CHANDRAYYA. **A.I.R. 1941 Mad. 811 = (1941) 2 M.L.J. 442.**

———*Succession*—Stridhan—*Mithila School—Woman dying without issue — Husband's paternal great-grandfather's grand-son—Priority over husband's sister or sister's son—Mitakshara rule—Applicability in* Mithila.

The Mitakhara applies to Mithila except in a few matters in which the Mithila school has departed from it; but so far as succession to the *stridhan* of a woman who leaves no issue (down to the daughter and the daughter's son) is governed by the Mitakshara school and not by the verses given by Brihaspathi. Succession to stridhan in Mithila is governed by the Mitakshara with its "nearest sapinda" rule. Consequently the husband's paternal great-grandfather's grandson being a nearer sapinda (as an agnate), than the husband's sister and sister's son. is entitled to priority over the latter and takes the *stridhan* of a woman dying without issue to the exclusion of the latter, who belong to a different gotra from him. (*Dhavle, J.*) NAUBAT SINGH *v.* SHAMBARAT KUER. **197 I.C. 192 = 1998 PW.N. 628.**

———*Succession—Stridhanam—People succeeding to—Nature of estate taken.*

When two people succeed to the stridhanam of a lady, they take it as tenants in common and not as joint tenants. (*Yorke and Ghulam Hasan, JJ.*) MUNIA *v.* MANOHAR LAL. **1941 O A. 422 = 1941 A.L.W. 492 = 1941 O.W.N. 648 = 194 I.C. 161 = 13 R.O, 558 = 1941 A.W.R. (Rev.) 395 = 1041 R.D. 859 = 1941 O.L.R. 428 = A.I.R. 1941 Oudh 429.**

———*Succession*—Stridhana—Sulka—*Amount paid by bridegroom's father—Not in any sense payment for purchasing bride—Stridhana property.*

If a present is given to a girl or to the father of the girl for the primary purpose of purchasing a bride or securing the marriage then it would come within the definition of *sulka*; but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of *sulka*. Where the Courts were satisfied from the evidence that the suit gift was not considered by the parties to be in any sense a payment for the bride without which the marriage could not take place.

Held, that the gift was not bride's price or *sulka* but ordinary stridhana capable of passing to the bride's stridhana heirs in the order of succession. (*Horwill, J.*) SURAYYA *v.* BALAKRISHNAYYA. **1941 M.W.N. 306 = 53 L.W. 449 (2) = A I.R. 1941 Mad. 618 = (1941) 1 M.L.J. 496.**

——— Succession—Widow of predeceased son—Rights of. *See* 1940 Dig., Col. 681. SALAMAT RAI *v.* MOKHAND LAL. **191 I.C. 190 = 13 R.L. 269**

HINDU LAW—Succession.

———*Succession—Widow—Widow of gotraja sapinda—Unchastity—If bar to inheriting property of husband's kinsmen.*

Under the Hindu Law as it stands at present, an unchaste widow of gotraja sapinda in the Bombay Presidency is not incompetent to inherit the property of her husband's kinsmen. (*Divatia, J.*) AKOBA LAXMAN *v.* SAI GENU LAXMAN.

I.L.R. (1941) Bom. 438=179 I C. 157=43 Bom. L R. 338=A.I.R 1941 Bom. 204.

———Trusts—Trust for benefit of deity and of founder's heirs—Conversion of immovable property into funds—Power of Court to order. *See* 1940 Dig., Col. 681. SRIDHAR JEU *v* MANINDRA KUMAR MITTER.

195 I.C 473=14 R.C. 101=A.I R 1941 Cal. 272.

———Trusts—Trust in English sense—If recognised in India—Creation of trust in favour of deity. *See* 1940 Dig , Col. 682. SRIDHAR JEU *v.* MANINDRA KUMAR MITTER. **195 I C. 473=14 R C. 101=A.I.R. 1941 Cal. 272.**

———**Widow.**

ACQUISITION BY.
ADOPTION. (*See* HINDU LAW—ADOPTION.)
ALIENATION. (*See* HINDU LAW—ALIENATION—WIDOW.)
MAINTENANCE. (*See* HINDU LAW—MAINTENANCE.)
MOTHER INHERITING TO SON.
REPRESENTATION OF ESTATE.
SURRENDER.

———Widow—Acquisition by—Nature of—If accretions to estate or absolute property of widow—Rule as to. *See* 1940 Dig., Col. 682. SURAYYA *v.* MANGAYYA **A.I.R. 1941 Mad. 345.**

———*Widow—Mother inheriting to son—Nature of estate taken—Powers of dealing with property—Suit by reversioners to restrain waste—Maintainability—Principles.*

It is no doubt true that the nature of the estate taken by a mother inheriting the property of her son under the Hindu Law is the same as that taken by a widow inheriting the property of her husband, that she is not a trustee for the reversioners and that whether the property is movable or immovable, she is entitled to have possession thereof and enjoy the same in accordance with the powers which the Hindu Law confers on her. Her powers of disposal over the corpus of the estate are limited. She can only deal with and dispose of the property for purposes which are sanctioned by Hindu Law; but where she acts in excess of her powers, there can be no doubt that she can always be restrained. Though no specific acts of waste or mismanagement are proved, yet where the property is movable or cash, and her conduct is such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it she would not administer it in accordance with the powers which the law confers on her, it is open to the Court to give such appropriate relief to the reversioners as would secure the property from being spent away for purposes other than those sanctioned by the Hindu Law. It is not necessary that the widow should be guilty of an actual *devastavit*, to justify the Court's interference; it is enough if there is the intention of committing a *devastavit*. The relief to be granted to the reversioners will have to be moulded according to the circumstances of the case. The principle which has to be kept in view is that while the widow or mother should not be allowed to deal with the property in excess of her powers, she must at the same time be protected from unnecessary harassment at the hands of the reversioners. (*Venkataramana Rao and Abdur Rahman, JJ.*) ARUNACHALAM CHETTI *v.* KRISHNAVENI AMMAL.

1941 M.W.N. 392=53 L.W. 552=A.I.R. 1941 Mad. 724=(1941) 1 M.L.J. 697.

HINDU LAW—Widow.

———Widow—Representation of estate—Reversioners, when and when not bound—'Necessity', meaning of. *See* 1940 Dig., Col. 684. TEJ SINGH *v* HANNU PRASAD. **191 I.C. 786=13 R.A. 272.**

———*Widow—Surrender by—Effect — Surrender by widow in favour of nearest reversioners—Receipt of amount for maintenance—Inclusion of item of property which afterwards turned to be property of one of the surrenderees—Claim by latter—Estoppel or election—Applicability—T. P. Act, S.* 35.

V, a Hindu died in 1887, leaving a widow who succeeded to his properties for a limited estate under the Hindu Law. In 1923, the widow executed a deed of surrender by which she relinquished the entire estate inherited by her from her hustand to *N* and the predecessor-in-interest of the appellant, who were the then nearest reversioners. She received certain amounts from the reversioners for her maintenance and other expenses. Among the properties included was an item which was claimed by the appellant's predecessor as his own but which the widow and *N* claimed as part of *V's* estate. Ultimately it turned out that that item was the exclusive property of the appellant's predecessor. In a suit for partition by *N* for partition of this property, the appellant claimed that the property could not be partitioned as it was the exclusive property of his predecessor and that the same was not part of the estate of *V*. *N* contended that the appellant was estopped from raising that plea as he had taken under the deed of surrender.

Held, that an essential condition for the application of the doctrine of estoppel or election founded on the rule against permitting a party to approbate and reprobate the same transaction, was that the person sought to be estopped or his predecessor should have obtained possession of the property under the deed, and that condition was not present in the case, because the appellant's predecessor did not obtain title to the property or possession under the deed of surrender; (2) that the surrender by the Hindu widow did not amount to a conveyance, but was only a self-effacement by her, and this principle was not displaced by a reasonable provision being made for the maintenance of the widow, when it was made *bona fide*; (3) that there was no scope for the application of the doctrine of estoppel or election, as in case of election, the property surrendered could not go back to the widow but to the reversioner of her husband; and if it did go back, all of them including the reversioner who refused the gift would take the property by inheritance, election or no election; and (4) that the appellant was not therefore estopped from relying on the title of his predecessor in interest. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) VENKATARAYUDU *v.* NARAYANAYYA.

I.L.R. (1941) Mad. 551=53 L W. 344=1941 M W.N. 208=A.I R. 1941 Mad. 430=(1941) 1 M L.J. 349.

———Widow—Surrender—Nature and effect of. *See* 1940 Dig., Col. 684. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA. **I.L.R. (1941) 1 Cal. 234=193 I C 419=13 R.C. 396=A.I R 1941 Cal. 41.**

———Widow—Surrender—Validity—Burden of proof. *See* 1940 Dig., Col. 684. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA. **I.L R. (1941) 1 Cal 234=193 I.C. 419=13 R.C. 396=A.I.R. 1941 Cal. 41.**

———Widow—Surrender—Validity—Motive of widow—Protection of husband's estate—If relevant consideration. *See* 1940 Dig., Col. 684. JANAKI NATH ROY

HINDU LAW—Widow.

v. JYOTISH CHANDRA ACHARYA.
I.L.R. (1941) 1 Cal. 234=193 I.C. 419=13 R.C. 396=A.I.R. 1941 Cal. 41.

——Widow—Surrender — Validity—Stipulation for hereditary maintenance allowance—Effect of. *See* 1940 Dig., Col. 685. JANAKI NATH ROY *v* JYOTISH CHANDRA ACHARYA. **I.L.R. (1941) 1 Cal. 234=193 I.C. 419=13 R.C. 396=A.I.R. 1941 Cal. 41.**

——Widow — Surrender —Validity — Surrender to daughter's son with daughter's consent—Daughter's consent given for consideration—Effect of. *See* 1940 Dig., Col. 685. JANAKI NATH ROY *v* JYOTISH CHANDRA ACHARYA. **I.L.R. (1941) 1 Cal. 234=193 I.C. 419=13 R.C. 396=A.I.R. 1941 Cal 41.**

——*Will—Absolute estate—Words forbidding alienation—Validity.*

If an estate is given to a person simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law an estate of inheritance, and words forbidding alienation must be rejected as being repugnant to that estate. (*Nasim Ali and B. N. Rau, JJ.*) ABANI NATH MUKHOPADHYAYA *v* AMAR NATH. **194 I.C. 448=13 R.C. 507=72 C.L.J. 348=A.I.R. 1941 Cal. 92.**

——*Will—Construction—Bequest to female—Bequest in favour of brothers and foster-daughter in identical phraseology—Brothers taking their shares absolutely—Estate conferred on foster-daughter.*

Where a Hindu by his will divided his property equally among his two brothers and his foster-daughter giving each a one third share, and the phraseology used in reference to the three bequests is almost identical, and there is nothing in the will to indicate that the estate conferred on the foster-daughter was in any way different from that conferred on the two brothers who admittedly took their shares absolutely, there is no doubt that the intention of the testator was to confer an absolute estate on the foster-daughter in one-third of his property which is bequeathed to her. (*Tek Chand and Beckett, JJ.*) GURAN DITTA MAL *v.* MST. RAM RAKHI. **194 I.C. 742==14 R.L. 8=43 P.L.R. 185=A.I.R. 1941 Lah 218.**

——Will—Construction—Devise of all properties to son—Subsequent clause, if son or his son had no child, properties shall go to idol--Estate taken by son--Absolute or conditional—Executory devise in favour of idol—If made. *See* 1940 Dig., Col. 687. TIRUCHENDUR SRI SUBRAMANIASWAMI TEMPLE *v.* RAMASWAMIA PILLAI. **A.I.R. 1941 Mad. 39=(1940) 2 M.L.J. 510.**

——*Will—Construction—Gift to person as intended illatom son-in-law—Death of such person before marriage—Bequest if takes effect—Marriage—If condition precedent to taking under will—Gift—If one to* persona designata—*Test.*

In construing a bequest made by a testator the Court has to ascertain his intention. If the testator is intended to have conveyed a benefit on a particular individual as a *persona designata*, the bequest would take effect although the description of the person may be, or may turn out to be, wrong. If, on the other hand, the testator's intention is found to be that the bequest is conditional on an adoption or on some other relationship on account of which he is making the gift, the gift must fail if the adoption or other relationship is not found to exist or does not come to existence. A Hindu, *V* left a will dated 27th April, 1923, which provided, *inter alia*: "I am now ill in body and apprehend that I may not live. As I have no male issue and as I have a female issue by name *R* I have brought to my house five years ago. *P.S.* son of my uterine sister, and I have been keeping him in my house and giving him education with a view that a marriage may be celebrated by giving my daughter to him and that these two might become entitled to and enjoy the movable and immovable properties specified herein. I have kept him as the huqdar of the office of village Munsif in Vasili held by me and kept him as *Illatom* . . . . . out of the remaining movable and immovable properties owned by me, my daughter *R.* and my illatom son-in-law *P. S.* shall, after my lifetime, enjoy with absolute right two shares out of the four shares. My wife, my mother and father shall retain in their possession the other two shares, bring and keep in our house my wife's brother *G.*, . . and the said *G.*, shall, after the lifetime of my father and mother, have a right to one share. The other one share shall, after the lifetime of my wife *L.* pass to my daughter and son-in-law. She shall be in enjoyment of them till then". The testator died two days later. *P. S.* died before his marriage on 22nd June, 1926, leaving his mother as his heir. He was then about 13 years old. *R.*, was subsequently married to another. *P. S.'s* mother brought a suit for recovery of the share bequeathed by *V.* to her son *P. S.* under the will.

Held, that the will was providing for the person who was to marry the testator's daughter and not for *P. S.* in any other capacity; the illatom son in law was not a mere description of *P. S.* and the property was meant to be given to the prospective son-in-law in his capacity as son-in-law and not to *P.S.* in his individual capacity On a proper construction of the will, therefore, the bequest to *P. S.* and *R*, must be held to have been made on the condition that they were married to each other, and *V.* did not intend to confer any benefit on *P. S.* if the latter did not marry his daughter,

Held, further, that the fact that *P. S.* was called an illatom son-in-law before his marriage was not of any importance. (*Pandrang Row and Abdur Rahman, JJ.*) RAMAMMA *v.* VENKATALAKSHMAMMA.
53 L.W 15=1941 M.W.N. 335 (2)=A.I.R. 1941 Mad. 375=(1941) 1 M.L.J. 286.

——*Will — Construction — Purushanukramah — Meaning of.*

The word "Purushanukramah" has not acquired any technical meaning. It is used in two senses; (1) from male to male and (2) from generation to generation. The Court ought not to adopt the former construction and create an intestacy when the latter construction not leading to an intestacy is possible. (*Nasim Ali and B. N. Rau, JJ.*) ABANI NATH MUKHOPADHYAYA *v.* AMAR NATH. **194 I.C. 448=13 R.C 507=72 C.L.J. 348=A I.R. 1941 Cal. 92.**

——*Will—Construction—"Satyadhikari oh Dukholikar"—Interpretation.*

The words "Satyadhikari oh Dakholikar" in a will may be used to confer some interest which is less than the testator's own interest. (*Nasim Ali and B. N. Rau, JJ.*) ABANI NATH MUKHOPADHYAYA *v.* AMAR NATH. **194 I.C. 448=13 R.C. 507=72 C.L J. 348=A.I.R. 1941 Cal. 92**

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929), Ss 2 and 3 (a)—*Applicability to Jains—Jains migrating from Gujarat and settling in Belgaum—Sister's son and father's sister—Preferential right of inheritance—Position of father's sister—If saved under S. 3 (a).*

The Hindu Law of Inheritance (Amendment) Act of 1929 applies to Hindus including Jains, and to all persons governed by the Mitakshara law including those governed by the Mitakshara law as modified by the Mayukha. Among Jains from Gujarat who have migrated and settled in the Belgaum District, the sister's son

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H. L. OF INHER. (AMEND.) ACT (1929), S. 3.

is entitled to succeed to a deceased male in preference to a father's sister. The position of the father's sister as a preferential heir as a gotraja sapinda is not saved by S. 3 (*a*) of the Act. (*Broomfield and Divatia, JJ.*) AMBABA BHAI CHAND *v.* KESHAV BANDO CHAND.
I.L.R. (1941) Bom. 250 = 195 I.C. 172 = 14 R B. 20 = 43 Bom.L.R 114 = A I R. 1941 Bom. 233.

——**S. 3 (a)**—*Custom—If includes judicial decisions.*

Whether or not the custom referred to in S 3 (*a*) of the Hindu Law of Inheritance (Amendment) Act of 1929 must be one in derogation of the law of the school governing the parties, it is clear that judicial decisions based either on inferences drawn from the texts or on the principle of *stare decisis* cannot constitute a custom within the meaning of the Act. (*Broomfield and Divatia, JJ.*) AMBABAI BHAI CHAND *v.* KESHAV BANDO CHAND. **I.L.R. (1941) Bom. 250 = 195 I.C. 172 = 14 R.B 20 = 43 Bom.L.R. 114 = A.I.R. 1941 Bom. 233.**

HINDU WOMEN'S RIGHT TO PROPERTY ACT (XVIII OF 1937)—*Applicability—Agricultural land—Rights of widow of predeceased son.*

The Hindu Women's Right to Property Act does not operate to regulate succession to agricultural land in the Governor's provinces. Hence the widow of a predeceased son has no title except to maintenance according to ordinary Hindu Law. (*Harper, S.M. and Shirreff J., M.*) CHANDAR BALI SINGH *v.* PATIRAJ KUNWAR.
1941 O.A. (Supp.) 715 (2) = 1941 A.W.R. (Rev.) 804 (2) = 1941 R.D. 742.

——*Validity—Government of India Act, S* **317.**

The language of S. 317, Government of India Act, 1935, is particularly clear and not open to any doubt and the Parliament in enacting S. 317 and Sch. 9, Government of India Act, 1935, could not have used language that could be more clear and definite. Hence Hindu Women's Right to Property Act (XVIII of 1937), which was passed as a bill by the Indian Legislature while the Government of India Act of 1919 was in force and to which assent of the Governor-General was given after 1st April 1937 is validly passed. (*Lobo, J.*) MANIBAI *v.* BHIMJI LALJI. **195 I.C. 636 = 14 R.S. 44 = 4 F.L J. (H C.) 302 = A.I R. 1941 Sind 114.**

——*Validity of Act—Act, if properly passed—Change of powers of Legislature during passage of Bill from Legislative Assembly to Council of State—Effect of.*

No objection can be taken to the validity of the Hindu Women's Right to Property Act, 1937, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force, as the Indian Legislature which was in existence immediately before the coming into force of Part III was continued in existence afer that date, and was in all respects the same legislature, though its legislative powers were no longer as extensive as they had previously been. Nor can any objection be taken to the validity of the said Act on the ground that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of the Legislature is a matter with which a Court of law is not concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of he Chamber, as interpreted by its Speaker, and is not a

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matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. The only function of a Court is to pronounce upon the Bill after it has become an Act. Consequently the only date with which the Court is concerned is the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937, *In the matter of.*
45 C.W.N. (F.R.) 81 = 22 Pat.L.T. 469 = 4 F.L.J. 1 = 1941 M.W.N. 556 = 1941 A.L.W. 774 = 194 I.C. 357 = 73 C.L.J. 415 = 54 L.W. 22 = 13 R.F C. 70 = 1941 P.W.N. 401 = 7 B R. 788 = 1941 O.W.N. 880 = 1941 O.A. 661 = I.L.R. (1941) Kar. (F C.) 148 = 1941 A.W.R. (Rev.) 648 = A.I.R. 1941 (F.C.) 72 = (1941) 2 M.L.J. 12.

——**(amended by Act XI of 1938)**—*Validity of Act—Act, if invalid as regulating succession to agricultural land and devolution by survivorship—"Property"—Meaning of—Government of India Act, Sch. VII, List III, Entry No. 7.*

The Hindu Women's Right to Property Act, 1937, and the Hindu Women's Right to Property (Amendment) Act, 1938, do not operate to regulate succession to agricultural land in the Governors' Provinces; but do operate to regulate devolution by survivorship of property other than agricultural land. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property", the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate, and to no other. In the Hindu Women's Right to Property Act, 1937, the word "property" must accordingly be construed as referring to property other than agricultural land, and on the true construction of the said Act and especially of the word 'property' as used in it, no part of the Act was beyond the Legislature's powers. Though S. 3 of the Act of 1937 does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers, yet there can be no doubt that in the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent, the benefit of the rule of survivorship which would have accrued to the remaining coparceners. So far as its effect goes, the Act does legislate "with respect to the law of survivorship. But it is not *ultra vires* the Indian Legislature on that ground, as the subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III of the concurrent list. (*Gwyer, C.J., Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937, *In the matter of.*
45 C.W.N. (F.R.) 81 = 22 Pat L T. 469 = 4 F.L.J. 1 = 1941 M W N. 556 = 194 I.C 357 = 73 C.L.J. 415 = 54 L.W. 22 = 13 R F C. 70 = 1941 P.W.N. 401 = 7 B.R. 788 = 1941 O W N. 880 = 1941 O A. 661 = I.L.R. (1941) Kar (F C.) 148 = 1941 A W.R (Rev.) 648 = 1941 A.L W. 774 = A.I.R. 1941 F C. 72 = = (1941) 2 M.L.J. 12.

——**S. 3 (2) and (3)**—*Interest taken by widow in joint family property—Extent of—Liability for debts of deceased husband.*

Under S. 3 (2) of the Hindu Women's Right to Property Act, a widow gets the same interest which her husband had in the joint family property, that is the

interest of an undivided member of a joint family in the joint family property. The widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by Cl. (3) of S. 3. As the husband's interest could be seized in execution by a creditor for his debt in his lifetime, the creditor of the husband is entitled to the same remedy against the interest of the widow accrued under the Act in respect of non agricultural land, the property taken by the widow being liable for the debts of her husband. (*Venkataramana Rao, J.*) SARADAMBAL *v.* S. SUBBARAMA AIYAR.

54 L.W. 651=(1941) 2 M L.J. 862.

HUSBAND AND WIFE—Buildings erected by husband on wife's land—Wife's right to. *See* 1940 Dig., Col. 688. K. K. DAS *v.* AMINA KHATUN.

72 C.L.J. 396.

———*Dissolution—Jurisdiction of Courts—Tests—British and non-British subjects—Law in India.*

According to English law, a Court has no jurisdiction completely to dissolve the marriage tie unless the parties are domiciled within its jurisdiction at the time when the proceedings are commenced. By the amendment of 1926 the provisions of the Indian Divorce Act as regards domicile have been brought into conformity with the law of England. Further, in order to enable certain British subjects not domiciled in India, to obtain relief in matrimonial causes in the Indian Courts, the Indian and Colonial Divorce Jurisdiction Act was passed in 1926, which conferred upon High Courts in this country power in certain cases with respect to dissolution of marriages, the parties whereof are domiciled in England and Scotland. As regards non-British subjects, however, the law remains unchanged, and according to the ordinary principles of private international law, a petitioner in this country with a foreign domicile, who wishes to obtain dissolution of his marriage must seek the appropriate relief in the Courts of the country in which he is domiciled. (*Edgley, J.*) NOOR JEHAN BEGUM *v.* EUGENE TISCENKO.

74 C.L.J. 212=45 C.W.N. 1047= A.I.R. 1941 Cal. 582.

———*Marriage—Dissolution—Law as to—Personal law of one of parties—If applicable.*

Marriage according to the principal Indian communities no less than in Europe confers a definite status on the spouses and such status can only be altered by having recourse to the provisions of a law of general application or to a personal law to which both parties to the marriage are subject, which has been adopted as the *lex fori* of this country. It is not the law of India that a marriage which has been duly celebrated according to the *lex loci contractus* and contemplated a life-long union, can be dissolved by having recourse to some provision of the personal religious law of one of the parties to the marriage in a case in which the parties belong to different religious communities. (*Edgley, J.*) NOOR JEHAN BEGNM *v.* EUGENE TISCENKO.

74 C.L.J. 212=45 C.W.N. 1047= A.I.R. 1941 Cal. 582.

———*Marriage—Rights and obligations of parties—Law applicable—General principles of private international law—Matrimonial actions—Jurisdiction of Courts.*

Certain general principles of law relating to the determination of matrimonial suits are firmly established in the realm of private international law: (1) the forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex loci contractus*, that is, the law of the place where the marriage ceremony is performed; (2) on marriage the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are governed by the *lex domicilli*, that is, by the law of the country in which for the time being they are domiciled; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to such contract, and are governed by the *lex domicilii*: (5) it is the duty of the Court before which a matrimonial action is brought to decide in accordance with the rules of its own municipal law, whether it has jurisdiction to entertain the action. If the *lex fori* contains a definite rule governing jurisdiction over the case, that rule must be followed irrespective of the question whether it is in accordance with the corresponding rule of other countries or not, and whether the decree granted by the Court would or would not be recognised by the tribunals of a foreign country. (*Edgley, J.*) NOOR JEHAN BEGUM *v.* EUGENE TISCENKO.

45 C.W N. 1047= 74 C.L.J. 212=A.I.R. 1941 Cal. 582.

———*Presumption of marriage—Proof to the contrary—Onus—Question when not important—Presumption in case of Brahmin widow.*

Where a woman has lived for a number of years with a man as man and wife, the onus of proving that she was living in sin rests on the persons who make the allegations. The question of onus assumes importance when one side produces evidence while the other side produces no evidence whatever. But where both sides produce evidence and after considering it two Courts come to a concurrent finding, the question of onus loses all importance. The presumption in favour of marriage is not a conclusive one and is rebuttable. The presumption in favour of the marrriage of a Brahmin widow in an out of the way village cannot be so strong as for example that in favour of marriage of a Shudra woman in which community re-marriage is recognized by custom. (*Sathe, A.M.*) SITAL DEI *v.* JAGDAMBIKA PARTAP NARAIN SINGH.

1941 A.W.R. (Rev.) 1066= 1941 O.A. (Supp.) 864.

———Restitution of conjugal rights—Suit for—Valuation—Forum. *See* SUITS VALUATION ACT, S. 8.

A.I.R. 1941 Rang. 187 (F.B.).

———*Separation deed—Covenant that neither party to have any claim against other in respect of any matter or account—Deed acted upon for several years—Subsequent suit by wife for judicial separation and alimony on ground of desertion—Maintainability.*

In a suit by a wife for judicial separation and alimony on the ground of desertion, a separation deed entered into by the parties is a conclusive answer to a claim for desertion without reasonable cause. The deed constitutes a reasonable cause. When there is a formal separation deed entered into by the parties on the advice of their respective solicitors and acted upon for several years, under which the husband has made all the payments he was required to make, it cannot be ignored by the Courts when no attempt has been made to set that deed aside. The deed must be acted upon and as long as it stands, it is impossible to maintain that the husband has deserted his wife without reasonable cause. The petitioner and the respondent, husband and wife, who were Christians, were married in 1932. On 25—9—1934, a separation deed was executed by the parties, the parties being advised by their respective solicitors. The wife was being advised by independent solicitors who were looking after her interests. The husband paid all the amounts which he agreed to pay under the deed. There was the usual covenant by the

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wife not to molest the husband and to allow him to live separately, etc. Then another clause provided that "Neither party from this day shall have any claim against the other party in respect of any matter or account". In 1941, the petitioner (wife) filed a petition for judicial separation on the ground of desertion and for alimony.

Held, that the deed of separation was a conclusive defence to the claim and the petition must therefore be dismissed. (*Beaumont, C.J.*) ROZARIO *v.* ROZARIO.

43 Bom L.R. 830 = A.I.R. 1941 Bom. 372.

———*Separation—Deed of—Nature and incidents of—Duty of Court to enforce—Rules.*

Full effect has to be given in all Courts to contracts embodied in deeds of separation as to all other contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreements of whose nature they partake. As in other contracts, stipulations will not be enforced which are illegal either as being opposed to public policy or positive law. (*Beaumont, C.J.*) ROZARIO *v.* ROZARIO.

43 Bom L.R. 830 = A.I.R. 1941 Bom. 372.

———Wife obtaining decree for maintenance—Subsequent co-habitation—Effect—Right to execute decree thereafter. *See* HINDU LAW — MAINTENANCE—WIFE. **54 L.W. 128 = (1941) 2 M.L.J. 263.**

INAMS—Enfranchisement—Onus. *See* 1940 Dig., Col. 689. SHRIRAM *v.* BANYA BAI. **194 I.C. 454 = 13 R.N. 369.**

INCOME-TAX ACT (XI OF 1922)—Construction—English decisions—Applicability, *See* 1940 Dig., Col. 689. COMMISSIONER OF INCOME-TAX, BENGAL *v.* MAHALIRAM RAMJIDAS.

I.L.R. (1940) Kar. (P.C.) 242.

———**S. 2**—"Agricultural income"—Mokarrari lease by Zamindar—Subject of lease comprising agricultural and non-agricultural land—Amounts paid by mokarraridar to zamindar—Taxability. *See* 1940 Dig., Col. 690. BHUNESHWARI KUAR *v.* COMMISSIONER OF INCOME-TAX, B. & O. **192 I.C 316 = 7 B.R 380 = 13 R.P. 451 = 22 P.L.T. 670 = A.I.R. 1941 Pat. 39.**

———**Ss. 2, 24 and 66 (3)**—Salami or nazarana—If rent and income—If agricultural income—Determination—If question of law. *See* 1940 Dig., Col. 691. BHUNESHWARI KUAR *v.* COMMISSIONER OF INCOME-TAX B. & O. **192 I.C. 316 = 7 B.R. 380 = 13 R.P. 451 = 22 P.L.T. 670 = A.I.R. 1941 Pat. 39.**

———**Ss. 2 (1) and 3 (2) (viii)**—*Agricultural income—Cash remuneration payable from wakf to mutwalli under scheme of administration—Wakf properties entirely agricultural—Such remuneration, if liable to tax as arising from exercise of vocation.*

The assessee was a mutwalli of a wakf, the properties of which were entirely agricultural. A suit filed against him for his removal from mutwalliship and for accounts was compromised and the terms of the compromise included a scheme of administration under which the assessee continued to be the mutwalli but his duties were defined and his powers were limited. He was bound to discharge the duties of his office under the supervision of a committee and of the District Judge. Under the scheme he received as his remuneration payable from the wakf Rs. 2,500 a month (about 1/10 of the wakf income, the maximum allowed under Mahomedan Law) plus an allowance of Rs. 500. The question was whether the remuneration received by him was agricultural income within the meaning of S. 2 of the Income-tax Act and as such was not liable to tax.

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Held, that the assessee's remuneration was conditional upon his proper discharge of his duties as mutwalli and was remuneration for such work, that it was money earned by performing his office, not rents and profits of agricultural land coming to him simply as a beneficiary under a settlement, and that under those circumstances the remuneration received by him as mutwalli was not agricultural income within the meaning of S. 2 (1) of the Income tax Act but that it came within S. 3 (2) (*viii*) of the Act, being a receipt arising from the exercise of his vocation whether the fund from which he was paid came originally from an agricultural source or not, and as such was liable to income-tax. (*Derbyshire, C.J. and Panckridge, J.*) HABIBULLA, *In re.* **196 I.C. 883 = 1941 I.T.R 292 = 45 C.W.N. 647 = A.I.R. 1941 Cal. 598.**

———**S. 2 (1)**—"Agricultural income"—*Ex gratia* annual payment made by Raj in consideration of services rendered in the past—Income not derived from land—Liability to tax—Lease of lands at favourable rent—Subsequent resumption and grant of annual allowance instead—Allowance—Taxability. *See* 1940 Dig., Col. 691. COMMISSIONER OF INCOME-TAX, B. & O. *v.* DHANESHWARDHAR MISRA **193 I.C. 767 = 7 B.R. 623 = 13 R.P. 630 = A.I.R. 1941 Pat. 27.**

———**Ss. 2 (1) and 6**—*Agricultural income—Right to exemption—Such income coming under S. 6.*

Per *Panckridge, J.*—Agricultural income does not lose its right to exemption because it can be brought under one of the heads of income set out in S. 6 of the Income-tax Act. (*Derbyshire, C.J. and Panckridge, J.*) HABIBULLA, *In re.* **196 I.C. 883 = 45 C.W.N. 647 = 1941 I.T.R. 292 = A.I.R. 1941 Cal. 598.**

———**Ss. 2 (1) and 4**—"*Agriculturial income*"—*Simple mortgagee—Rents and profits collected by receiver and deposited in Court—Payment to mortgagee—If agricultural income—Income—When accrues or arises or is received.*

Under a compromise decree of 28—7—1928, in a suit on a simple mortgage, the mortgagor was to pay the mortgagee a sum of Rs. 3,75,000 in full discharge on or before 31—7—1931 until then the amount was to carry no interest. In default of payment on the date fixed the hypotheca was to become the absolute property of the mortgagee. By the decree a receiver was appointed to collect the rents and profits and it was provided that any money which the mortgagee received from the receiver should be set off against the sum of Rs. 3,75,000, and that the mortgagor should pay only the balance. If the balance was not paid the whole of the hypotheca should still be the property of the mortgagee. From 28—7—1928 until 31—7—1931, Rs. 42,000 was paid into Court by the receiver as the net collections and was later paid over to the mortgagee. The mortgagor did not pay the amount as provided in the compromise decree on 31—7—1931, and the mortgagee became the absolute owner of the mortgaged properties. The mortgagee's right to possession of the properties was finally decided by the High Court on 2—9—1936. The accounts of the mortgagee showed the mortgagor as a debtor till this date when the accounts were closed, and the moneys received in connection with the loan were transferred to a new account opened in the name of the mortgagee himself. The Income-tax authorities sought to include in the assessable income of the mortgagee for the year 1937-1938, all sums received on account of the mortgage though they had been received more than 3 years before the year of account, as well as the sum of Rs. 42,000 received by the mortgagee through the

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receiver. It was contended that this latter sum was agricultural income.

Held, (1) that the assessee (mortgagee) was neither the owner nor even the usufructuary mortgagee of the properties, but only a simple mortgagee whose title to the properties did not vest in him until after these moneys had been collected and paid into Court in reduction of the mortgage debt and hence the amount could not be said to be "agricultural income;" (2) that as the transaction was closed only in 1936, it was not until then that profits could properly be calculated, and the income from this transaction could therefore be said to have accrued, arisen or been received only in the year of account. (*Leach, C.J., King and Patanjali Sastri, JJ.*) VEERAPPA CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **194 I.C. 637=14 R M. 25= 53 L.W. 714 (2)=1941 M.W.N. 288= 1941 I.T.R. 56=A.I.R. 1941 Mad 246= (1941) 1 M.L.J. 262 (F.B.).**

——**S. 2 (1)**—*"Officer of Crown"—Meaning of—Collector—Position of.*

The expression "officer of the Crown" as used in the Income-tax Act clearly covers a Collector. The latter is in one sense an officer of the Provincial Government, but there can be no doubt that in India he is also an "officer of the Crown." (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) JHALAK PRASAD SINGH *v.* PROVINCE OF BIHAR. **20 Pat. 573=7 B R. 818= 1941 I.T.R. 386=194 I.C. 663= F.L.J. (H.C.) 178=14 R.P. 17=22 Pat.L.T. 863= A.I R. 1941 Pat. 306 (S.B.).**

——**Ss. 2 (1) (a)**—Interest on arrears of rent payable under S. 67, Bengal Tenancy Act—If agricultural income—Liability to income-tax. *See* 1940 Dig., Col 692. RADHIKA MOHAN ROY WARD'S ESTATE, *In the matter of.* **A.I.R. 1941 Cal. 443.**

——**Ss. 2 (4) and 4**—*Business—Stock-in-trade—Hindu joint family doing business in real property—Member getting properties and selling same at profit—Liability to tax—If profits or accretion to capital assets.*

The assessee was a member of an undivided Hindu family which was doing business in real property. The family disrupted in 1925 and the assessee was allotted property worth Rs. 2.40,857, including a plot of land valued at Rs. 2,500. This plot, which had originally been purchased by the assessee's father who was the head of the family, was sold in 1934—1935 at a profit of Rs. 10,000 along with another plot which was contiguous to it and which had been purchased by the assessee after the partition. The Income-tax authorities rejected the contention of the assessee that the profit which resulted to him in the sale of the plot of land was in the nature of accretion to capital assets and as such not liable to tax.

Held, that there was ample material for holding that what the assessee got on partition was converted by him into trading capital, *i.e.*, he had converted his inheritance into his stock-in-trade; the fact that he had been purchasing other plots of land and selling them and that he had been declaring profits on such sales pointed to this conclusion only. (*Dalip Singh and Ram Lall, JJ.*) SETH MATHURA PRASAD *v.* COMMISSIONER OF INCOME TAX. **1941 I.T.R. 244.**

——**S 2 (6-A)**—*"Dividend" — Distribution of accumulated profits of company to shareholders in the form of bonus shares—If "dividend."*

Where in accordance with a resolution passed at a general meeting of a company, its accumulated profits are capitalised and distributed to the shareholders in the form of *bonus shares*, unless the distribution amounts to a "release" of assets by the company to the shareholders, the shareholders cannot claim the value of the shares to be a dividend within the meaning of S. 2 (6-A) of the Income-tax Act. Though the company's profits have been taxed at the maximum rate, a shareholder receiving such bonus shares is not entitled to claim a refund of the difference between the maximum rate, and what he would have paid if the tax had been levied according to the rate appropriate to his income. (*Leach, C J., Wadsworth and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* P. RAMASWAMY CHETTIAR. **1941 I.T R 656= 54 L.W. 734=1941 Comp. C. 320= A.I.R. 1941 Mad. 922=(1941, 2 M.L J. 900 (S.B.).**

——**Ss. 3 and 9**—Association of individuals—Meaning of—Hindu joint family—Partition—Sale of family property and purchase of new property—Building constructed thereon managed jointly by members—Liability to assessment as association of individuals. *See* 1940 Dig., Col. 694. COMMISSIONER OF INCOME-TAX *v.* CHOTALAL MOHANLAL. **194 I C. 309= 13 R.S. 270=A.I.R. 1941 Sind 71.**

——**S. 3**—*Buying of animals in British India and selling them in Colombo—Profits where made—Assesssee having agents for purchase but supervising work—Inflated prices in invoices—Assessment to tax of amount alleged to be profits made in India—If justified.*

The assessee was the manager of a joint Hindu family which exported goats and sheep from India to Colombo and sold them there at a profit. For the year 1936 1937, he was assessed to income-tax on a total income of Rs. 16,412, which included a sum of Rs. 15,139, being profits made in Colombo and remitted to British India. The Commissioner of Income-tax who revised the order of assessment, assessed the income of the assessee at Rs. 31,384, in which was included a sum of Rs. 9,000, which was said to be the amount of profit which had accrued to the assessee in British India from this business, the assessee having bought the animals at lower prices than those disclosed in the invoices when shipping them to Colombo. The grounds on which the Commissioner held that the assessee had made profits in British India were: (1) that the assessee, though he had agents for the purchase of goats and sheep within the presidency, had himself exercised a certain amount of supervision, which had its value; (2) that there was usually an element of profit involved in F.O.B. prices, and that this profit had not been included by the assessee in the profit shown by the Colombo books.

Held, (1) that the reasons of the Commissioner for the inclusion of the sum of Rs. 9,000 were of a nebulous character and fallacious and the Commissioner was not justified in increasing the amount by Rs. 9,000 or by any figure as estimated profits made in British India; (2) that in the case of a business of buying in one place animals for human consumption and selling them in another place, the profit would arise only at the place of sale that the profit made by the assessee could only be calculated on what the goats and sheep actually cost the assessee and the amount at which they were actually sold in Colombo, and the figures in the invoices whether inflated or not, would not matter. (*Leach C.J., King and Patanjali Sastri, JJ.*) SUDALAIMANI NADAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **194 I.C 76=1941 M.W.N. 83=13 R.M. 738= 53 L W. 99=1940 I.T R. 619= A.I.R. 1941 Mad. 229=(1941) 1 M.L J. 99.**

——**S. 3**—Hindu undivided family—Joint family consisting of father and son– Death of father in 1938 leaving widow—Son and widow (step-mother) sole surviving members—Mode of assessment—Hindu Women's

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Rights to Property Act, S. 3 (1)—Effect of. *See* 1940 Dig., Col 694. COMMISSIONER OF INCOME-TAX, MADRAS *v.* LAKSHMANAN CHETTIAR.
I.L.R. (1941) Mad 104=13 R.M. 574=192 I.C. 599=(1940) 2 M.L.J. 834 (F.B.).

——**S. 3**—*Income—When accrues or arises—Mortgage in favour of assessee—Compromise decree on basis—Provision for execution of sale deed of property in favour of assessee in satisfaction of decree—Possession delivered and sale deed executed later—Income—When accrues.*

The assessee advanced a sum of money to a person on a mortgage deed in 1922, and he got a decree on the basis of the mortgage, which was passed by the Court in 1934 in terms of a compromise under which a sale deed of the entire mortgaged property was to be executed by the mortgagor in favour of the assessee within 4 months from the date of the decree; and in that event the decree was to stand fully satisfied. Possession of the property was delivered to the assessee in the same year, but the sale deed was executed only on 8th June, 1936. In the year of assessment 1937—1938, the assessee's accounting year being November, 1935 to November, 1936, the Income-tax authorities assessed the assessee's income from this transaction including it in his total income on the ground that full satisfaction of the decree was obtained only in June, 1936, on the execution of the sale deed. The assessee contended that the income accrued or arose in 1934 when he got possession of the property and so could not be taxed in 1936.

Held, that the assessee's title to the property became complete only on the execution of the sale deed in 1936, and the Income-tax authorities were justified in treating the income as having accrued during the account year and taxable in the year 1937—1938. (*Collister and Bajpai, JJ.*) KUNJAMAL & SONS, *In re*.
1941 I.T.R. 358.

——**Ss. 3 and 4**—Native State Bank—Investments in Government of India Securities out of surplus funds—Property in British India taken over in satisfaction of sum due from subject of Native State—Income from—Taxability in British India—Profits on sale of investments—Liability to income-tax. *See* GOVERNMENT TRADING TAXATION ACT, S. 2. **43 Bom.L.R. 84.**

——**Ss. 3, 6 and 9**—Private wakf—Income—Assessment—Mode of—If to be taxed in the hands of trustees or in the hands of beneficiaries—Trustees—If 'owners" of income—If association of individuals—Notice served on managing trustee—If proper—S. 2 (12) (*a*). *See* 1940 Dig., Col. 695. COMMISSIONER OF INCOME-TAX, BOMBAY *v.* IBRAHIMJI HAKIMJI.
I.L.R. (1941) Kar. 135=193 I C. 256=13 R S. 217=A.I R. 1941 Sind 9.

——**S. 4**—Income when accrues, arises or is received—Accounts closed only in previous year—Assessment in current year—If justified. *See* INCOME TAX ACT, SS. 2 (1) AND 4. **(1941) 1 M.L.J. 262 (F.B.).**

——**S. 4**—Profits—Firm—Partners—Deposits credited in personal accounts of partners in exact proportion to shares in business—Assessment to tax—Subsequent entry of deposits not in proportion to shares—Assessment—Inference of profits from unknown source—If justified. *See* INCOME-TAX ACT, S. 66 (2)
1941 I.T.R. 610.

——**S. 4 (1)**—Accruing or arising in British India—Railway Company—Receipt of guaranteed interest on capital in England from Secretary of State for India—Amount subsequently recouped out of profits of Company in India—Interest received—Assessability to Indian income-tax. *See* 1940 Dig., Col. 696. COMMISSIONER OF INCOME-TAX, MADRAS *v.* M. & S. M RY. CO. **194 I.C. 544=14 R.M. 1=(1940) 2 M.L.J. 110 (S B.).**

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——**S. 4 (2)**—Applicability—Foreign profits—Remittance to assessee's creditor in Native State by hundi and cashed by creditor in Native State—If profits received in British India. *See* 1940 Dig., Col. 697. COMMISSIONER OF INCOME-TAX, MADRAS *v.* MURUGAPPA CHETTIAR. **195 I C. 839=14 R.M. 231=53 L.W. 530=1941 M.W.N 352=A.I.R. 1941 Mad. 381=(1941) 1 M.L.J 476.**

——**S. 4 (2)**—*Foreign profits—Receipt in British India—Time of receipt—Profits from foreign firm remitted to British India and kept in suspense account—Subsequent adjustment towards assessee's indebtedness—Assessee accepting same later—If amounts to receipt of profits.*

The assessee was a partner in a firm carrying on a money-lending business at Kedah in the Federated Malay States. The senior partner of the firm was also a partner of a firm in Rangoon carrying on business under the same vilasam. The assessee had no interest in the Rangoon firm. The Kedah business resulted in considerable profits being made in 1931, and the assessee's share of these profits amounted to at least Rs. 30,000, which was remitted in that year to the Rangoon firm and placed in a suspense account. The senior partner caused the amount to be transferred on 12th April, 1932, to the credit of the assessee's account in the books of the Rangoon firm, and then utilised it in discharge of the assessee's indebtedness to the Rangoon firm. The assessee objected to it and ultimately as a result of mediation in Kedah agreed to accept Rs. 30,000, as representing a remittance of profits from Kedah to Rangoon and to the money being utlised in discharge of his indebtedness to the Rangoon firm. This was agreed to by the assessee some time between 14th February and 5th April, 1935.

Held, that though the money was actually brought into British India in 1931, it could not be taken as being then a remittance of profits belonging to the assessee, and that only in 1935 when the assessee agreed to the arrangement the money became in reality his money. Accordingly the amount was liable to income tax in respect of the year 1935—1936, as the money must be taken to be a remittance made to British India in 1935, Burma being then a part of British India. (*Leach, C. J., Somayya and Patanjali Sastri, JJ.*) NARAYANAN CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **197 I.C 31=1941 I.T.R. 509=54 L.W. 101=1941 M W.N. 925=A.I.R. 1941 Mad. 677=(1941) 2 M.L.J. 172 (S.B.).**

——**S. 4 (2)**—Remittance of foreign profits—Assessee having overdraft account with foreign bank—Income from foreign property paid into such account—Withdrawal of amount from Bank and remittance to British India—If remittance of profits or capital—Test to find out—Principles. *See* 1940 Dig., Col. 700. COMMISSIONER OF INCOME-TAX, MADRAS *v.* NADIMUTHU PILLAI. **194 I.C. 733=14 R M. 46=(1940) 2 M.L.J. 217 (S.B.).**

——**S. 4 (2)**—*Remittances from foreign business—If profits—Presumption—Nature — Remittance towards cost of production—Assessability.*

The presumption that a remittance made by a foreign business is a remittance from out of the profits of the foreign business, is rebuttable. Where the asssesee purchases timber in Burma, converts it into a saleable commodity in Burma and then consigns it to India to be sold, all expenditure incurred up to the stage the timber reaches the sales depots in India must be regarded as a

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capital expenditure of the Burma business and therefore to the extent of the costs of production of the timber consigned to India all remittances from India must be regarded as remittances of working capital and not remittances of profits. (*Roberts, C.J., Dunkley and Shaw, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* BHAGWANDAS BAGLA. **197 I.C 42= A.I.R. 1941 Rang. 274 (S.B.).**

——**S. 4 (3) (i)**—*Applicability—Association—Profits used for charitable purposes, absence of legal obligation to devote profits to such uses—Profits—If exempt from tax.*

What an assessee has to establish, if he is to avoid liability to income-tax under S. 4 (3) (*i*) of the Income-tax Act, is that the income assessed is derived from property held under trust or other legal obligation for religious or charitable purposes. If the purpose of an association is charitable, such as the relief of the poor, it is nonetheless charitable because some political body may consider that it affords the best method of relieving the poor and may therefore adopt the scheme. The fact that it is intended to advance the purposes of a political party, does not make it a purpose which is not charitable. But unless at the time when the profits were made, the assessee (Association) was under a legal obligation to devote the profits to a charitable purpose, the fact that in practice the profits have been devoted to charitable purposes would not create a legal obligation or trust. If the association is not bound to devote its profits to charitable purposes, and the members are free to apply to the profits to any purposes they chose, it cannot be held that the property is held under trust or other legal obligation for charitable purposes, and S. 4 (3) (i) cannot apply so as to exempt the profits from tax). (*Beaumont, C. J. and Wadia, J.*) ALL INDIA SPINNERS ASSOCIATION, *In re.*

43 Bom.L.R. 742=1941 I.T R. 484 = A.I.R. 1941 Bom. 374.

——**(as amended in 1939) S. 4 (3) (i)**—*Applicability—Private trusts — Provision in wakf deed for setting aside of income for donor's descendants—Income remaining unspent in hands of mutwali—Assessability.*

The expression "charitable purposes" in S. 4 (3) (i) must be construed strictly and can only be applied to a public charity. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and therefore S. 4 (3) was amended in 1939 in order to put beyond all doubt the intention of the Legislature not to exempt even private trusts for religious purposes. Consequently, the exemption in S. 4 (3) (i) only applies to a trust the object of which is public utility. A provision in a wakf deed for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of the wakf in the male line cannot be said to constitute a trust for general public utility. The trust being clearly of a private nature, the income allotted under the wakf deed for the purposes mentioned therein which remains unspent for want of beneficiaries is assessable in the hands of the mutwali. (*Leach C. J., Somayya and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v* JAMAL MAHOMED SAHIB.

I.L.R. (1941) Mad 862=196 I C. 13= 14 R.M. 253=54 L.W 167=1941 M W N 690= 1941 I.T.R. 375=A.I.R 1941 Mad. 535= (1941) 2 M.L.J. 148 (S B.)

——**S. 4 (3) (vii)**—*Receipt arising from exercise of profession—Payment voluntarily made by persons who were indirectly benefited by recipient's services.*

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A solicitor who was employed by a shareholder of a Company interviewed the managing agents of the Company and came to an arrangement with them which benefited substantially his client and the other shareholders for which he was duly paid for by his client. The arrangement incidentally benefited two firms of stock brokers who did not employ the solicitor. One of the firms paid a sum of Rs. 10,000 to the solicitor and it appeared that that firm received a similar amount from the other firm which had under written a part of the new shares which it was proposed to issue under the arrangement.

Held, that although the sum of Rs. 10 000 was not received by the solicitor under a contract to employ him from persons who were under no legal liability to pay it, it was a receipt by him arising from the exercise by him of his profession and was part of his income which was not exempt from tax under S. 4 (3) (*vii*) of the Income-tax Act, assuming that it was of a casual or non-recurring nature. The sum received by the solicitor was not a testimonial to his ability or qualities as a solicitor generally, but was directly connected with a particular professional act, namely, the part he played in procuring the new issue of shares by which the payers had derived great benefit. (*Derbyshire, C.J. and Panckridge, J.*) SUSIL C. SEN, *In the matter of.*

I.L.R. (1941) 1 Cal. 562=1941 I.T.R. 261= 45 C.W.N 542=A.I.R. 1941 Cal. 666.

——**(as amended in 1939), S. 4-A (b)**—*Hindu joint family—Residence.*

S. 4-A (*b*) does no more than clarify the existing position by pointing out that in the case of a joint Hindu family business the residence of individual members of the undivided family cannot be material from which it could be inferred that the family resided there if such residence were fortuitous and divorced from control and management of the business. Consequently the family cannot be said to reside in all those places where members of the family live, and the fact that one member of the undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there. (*Roberts, C.J., Dunkley and Shaw-JJ.*) COMMISSIONER OF INCOME TAX. *v.* S P K.A, R.M. FAMILY.

1941 I.T R. 685= A.I.R. 1941 Rang. 273 (S.B.).

——**(as amended in 1939), Ss. 5 (2) and 66 (2)**—*Jurisdiction to state case to High Court—Assessment completed on* 31—3—1939 *by Income-tax Officer, Special Circle, Bombay—Subsequent transfer of assessment to Commissioner of Income-tax (Central)—Appeal heard and disposed of by Assistant Commissioner Section I-VI-A Range—Application to Commissioner (Central) to state case under S.* 66 (2)*—Competency—Jurisdiction to state a case—Proper tribunal.*

The assessee was assessed on 31—3—1939 by the Income-tax Officer (Special Circle) Bombay and the next day, the Income-Tax Act, Amendment Act of 1939 came into force. On 15—4—1939, a demand was made on the assessee for payment of the tax. He applied under S. 27 of the Act to have the assessment set aside, but failed. On 18—4—1939, the Central Board of Revenue acting under S. 5 (2) of the Act, as amended, transferred the case of the assessee by name to the Commissioner of Income-tax (Central). On 10—5—1939, the assessee appealed against his assessment and the appeal was disposed of by the Appellate Assistant Commissioner, S. I. VI A Range, Bombay. The assessee applied to the Commissioner of Income-tax (Central) to state a case to the High Court under S. 66 (2) of the Income-tax Act, but the Commissioner refused to do so on the ground that he had no jurisdiction to deal

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with the matter. The assessee then applied to the High Court under S. 66 (3).

Held, (1) that cases transferred under S. 5 (2) of the Act could not include assessments already completed; therefore, the assessment in this case which was completed on 31—3—1939 was not included in the transfer of the assessee's case and hence not validly transferred, though any further proceedings relating to the assessee were validly transferred; (2) that though the Assistant Commissioner who heard and disposed off the assessee's appeal would have been the proper tribunal to hear the appeal whether or not the transfer made on 18—4—1941 embraced this assessment, yet since the transfer made on 18—4—1939 to the Commissioner of Income-tax (Central) was not validly made in respect of the assessment already made, it must be held that in virtue of the notifications 46 and 47 of the Central Board of Revenue published on 3—6—1939 and 10—6—1940, and the notification of 12—2—1940, that the appeal was disposed of by the Assistant Commissioner, S. I-VI-A Range, Bombay, as an officer subordinate to the Commissioner of Income-tax, Bombay, and not as an officer subordinate to the Commissioner of Income-tax (Central); (3) that therefore the Commissioner of Income-tax (Central) had no jurisdiction to entertain the case or deal with it, and his refusal to state a case was correct, the proper tribunal having jurisdiction being the Commissioner of Income tax, Bombay; (4) and the High Court could not therefore order the Commissioner of Income-tax (Central) to state a case under S. 66 (3) of the Act. (*Beaumont, C.J. and Kania, J.*) SETH GOVINDRAM *v.* COMMISSIONER OF INCOME-TAX (CENTRAL).

1941 I T R, 679.

——**(as amended in 1939), S. 5** (2)—Transfer of assessment already made—Validity. *See* INCOME-TAX ACT, SS. 5 (2) AND 66 (2). **1941 I.T.R. 679.**

——**S. 6**—*Bad debts—Deduction—When allowable—Debt, when becomes bad debt—How much of it is bad.*

Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. In order to permit of deduction the loss must be in the nature of a commercial or professional loss which means a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned. The assessee, a piece goods merchant solely in connexion with his business, maintained an open and current account with the Bank The daily receipts of the business were paid into the account and payments for goods purchased for and on account of the business were made by cheques drawn on this account. The Bank was adjudicated insolvent, and at that time the assessee's account was in credit to the extent of Rs. 34, 367.

Held, that the amount due to the assessee from the Bank was a loss connected with and arising out of the business and was a bad debt which must be deducted in order to arrive at the true profits and gains of the business. The debt became bad when in the insolvency of the Bank the Official Assignee declared a final dividend and the portion of the debt which was bad was the portion which remained outstanding after the final dividend had been declared. (*Roberts, C. J., Dunkley and Sharpe, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* HAJEE ABDUL GANNY.

1941 Rang.L R. 529 = 1941 I T R. 339 = A.I.R. 1941 Rang. 185 (S.B).

——**S. 6**—Income—Mining lease—Lessee given all rights of entering upon his land sinking shafts, erecting colliery and taking away coal—Lessee covenanting to pay premium and mininum of royalty annually irrespective of wha coal was produced—Royalty—If income

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assessable. *See* 1940 Dig., Col. 702. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R P. 295 = 1940 P.W.N. 1044 = 7 B.R. 172 (S.B.).**

——**S. 6**—Royalty on mines—If 'income from property'. *See* 1940 Dig., Col. 702. COMMISSIONER OF INCOME TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R.P. 295 = 1940 P.W.N. 1044 = 7 B.R. 172 (S.B.).**

——**S. 6**—Sale—Vendor securing income for himself—Such income, if assessable. *See* 1940 Dig., Col. 702. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R.P. 295 = 1940 P.W N. 1044 = 7 B.R. 172 (S.B.).**

——**S. 6**—*Taxable income—Interest awarded under S. 28 of the Land Acquisition Act—Nature of—If assessable to tax.*

The border line between a case where interest is chargeable to tax and a case where it is not so chargeable appears at times to be extremely fine. Where interest is awarded under the provisions of S. 28 of the Land Acquisition Act, it is in the nature of compensation for the loss of the late owner's right to retain possession of the property acquired. In other words, it is damages assessed in terms of interest for loss of possession of property up to date of receipt of its consideration. Further, the awarding of such interest is not mandatory but is discretionary with the Court; and the claimant is not entitled to it as of right under any rule of law. Hence such interest is not income and is not assessable as such to tax. (*Collister and Bajpai, JJ.*) BEHARI LAL BHARGAVA *v.* COMMISSIONER OF INCOME-TAX, C.P. AND U. P. **I.L.R. (1941) All. 54 = 193 I.C. 731 = 13 R.A. 447 = 1941 I.T.R. 9 = 1940 A.L.J. 860 = 1940 A.W.R. (H.C.) 669 = A.I R. 1941 All 135.**

——**Ss. 6 (i), (iv) and (vi), 7, 10 and 12**—*Applicability—Payment of fixed sum annually for several years by one to another in consideration of latter undertaking not to do particular act or business—If taxable salary or business profits or otherwise.*

A relationship of employer and employee or of principal and agent is essential before a payment from one party to another can be salary within the meaning of Ss. 6 (*i*) and 7 of the Income tax Act. A restrictive covenant whereby a person undertakes for consideration to abstain from doing a particular act or from following a particular course of conduct, is something quite outside an ordinary contract of employment, and the amount so paid as consideration under such a covenant cannot be held to be "salary" under S. 6 (*i*) or S. 7 of the Income-tax Act. Nor would it fall under S. 6 (*iv*) or S. 10 of the Act. The amount is not received as the direct consequence of any actual business transacted. On the other hand it is the direct consequence of no business being transacted. To fall under the head business in S. 6 (*iv*) of the Act, an amount must be the direct result of profits or gains accruing from particular business actually carried on by the assessee. When the object of the transaction in pursuance of which the amount is paid is not to secure an income to the assessee, the amount cannot also fall under Cl. (*vi*) of S. 6 or S. 12. The fact that the payment is spread over a number of years would not make it income, because a capital payment is not any the less a capital payment because it is to be paid in equal instalments over a period of years. If the object of the agreement is not the production of an income to the assessee, it is not income within the meaning of S. 12. (*Davis, C.J. and Weston, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* THE MILLS STORE CO., KARACHI. **1941 I.T.R. 642**

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——**Ss. 6 (iv) and (vi) and 24**—"*Business—Other sources*"—*Assessee selling Ayurvedic medicines manufactured by him—Maintenance of dramatic troupe—If mere hobby—Loss sustained in latter—Right to set off against profits in the former.*

The assessee, who was an Ayurvedic physician carrying on business on an extensive scale in the manufacture and sale of Ayurvedic medicines, maintained a dramatic troup which gave public performances at certain seasons of the year. Adjoining the premises where the assessee sold his medicines, he kept a hall for the performances and at all the performances prices were charged for admission. For some years the assessee was allowed to deduct the loss which he had sustained in this enterprise against his business income and in the years in which he made profits out of it they were included in his assessable income. In the year 1937-1938, the Income-tax authorities refused to allow the assessee to set off his loss in the maintenance of the dramatic troupe against his profits in the business on the ground that the loss arose from a mere hobby of the assessee and not from any business.

Held, that there was no material to support the finding that the dramatic troupe was maintained by the assessee as a hobby, and though that may not be a 'business', it was clearly a source of income under S. 6 (vi) of the Income tax Act, and the assessee was therefore entitled to set off the loss against his business income. (*Leach, C J., King and Patanjali Sastri, JJ.*) P. S. VARIER *v.* COMMISSIONER OF INCOME TAX, MADRAS. **194 I C 443 = 13 R.M. 772 = 1941 M W.N. 81 = 53 L.W. 96 = 1940 I.T.R. 628 = A.I.R. 1941 Mad. 249 = (1941) 1 M.L.J 103 (F.B.).**

——**S. 6 (iv)**—*Income—Interest on mortgages—Decree—Moneys paid by debtor from time to time—Appropriation—If to be credited to principal or to interest—Creditor not appropriating to interest—Debtor entering payments towards interest and subsequently reversing—Adverse inference to creditor—If justified.*

The assessee, a Hindu undivided family doing business in cloth, money lending and property, obtained a mortgage decree against *T*, who subsequently sold the mortgaged property to *B*. In the Sambat year 1992—1993 and in the following year, *B* paid several amounts to the assessee and entered them in his own books in the interest account. The assessee, however, credited these amounts in his books to the personal account of *B*, and stated in support of these entries that no instructions had been received from *B* as to whether the amounts paid by him from time to time should be appropriated towards principal or interest. *B* also stated in an affidavit that he had not sent any instructions to the assessee as to the allocation of these amounts. It was found that for Sambat year 1992—1993, *B* had claimed and received an allowance in respect of these payments under S. 10 of the Income-tax Act but that at the end of the year 1993—1994, *B* had reversed the entries and debited the items to property account and had claimed an allowance in respect of them under S. 9 of the Act. On these facts the Income-tax department held that the payments were intended to be on account of interest, that such intention was communicated to the assessee and that the subsequent reversal of the entries by *B* was to support the plea of the assessee that the payments were open and not towards interest.

Held, (1) that no inference adverse to the assessee necessarily followed from *B's* reversal of the entries and that the Income-tax department was not justified in holding that the payments were made towards interest; (2) that there was no particular reason why *B* should have instructed the assessee to credit the amounts to the interest accounts rather than to the principal, for it was ordinarily to the advantage of the debtor that such payments should be credited to principal; (2) that though it was obvious that some sort of message was sent by *B*, when the amounts were remitted, the probability was that the only message that a debtor would send would be that the money was to be credited to the decree, there being no allegation or proof that he particularly wanted it to be credited to the principal; and (3) that the facts upon which the Income-tax authorities based their presumption were not sufficient to justify such presumption. (*Collister and Baipai, JJ.*) KHAIRATI LAL BABU LAL, *In re*. **1941 I.T.R 627.**

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——**S. 6 (2)**—*Foreign income—Profits actually earned in foreign business—Remittance to British India—Taxability—Subsequent incurring of loss in foreign business in same year—If changes nature of remittances.*

Where remittances have been made by an assessee from a foreign state (Penang) into British India out of profits available for remittance, and such remittances are not in anticipation of profits profits having been actually earned more than sufficient to cover the remittances, the incurring of losses by the assessee in his foreign business subsequently in the same accounting period cannot change the character of the remittances so as to exclude them from assessment as profits, though such losses were sufficient to wipe out these profits. (*Leach C.J., Wadsworth and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SM. AR. VR. ANNAMALAI CHETTIAR. **1941 I.T R. 663 = 54 L.W. 707 = A.I.R. 1941 Mad. 928 = (1941) 2 M.L.J. 890 (F.B.).**

——**S. 7**—"Salary"—Meaning and essentials of. *See* INCOME-TAX ACT, SS. 6 (*i*), (*iv*) AND (*vi*). 7, 10 AND 12. **1941 I.T.R. 642.**

——**Ss. 8 and 12**—*Income of an impartible estate—Nature of.*

The income of an impartible estate is not income of the undivided family but is the income of the present holder notwithstanding that he has sons from whom he is not divided. Unity of ownership, unaccompanied by joint possession on the part of the sons or any other right of possession would not seem to affect the character in which the income is received. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable. It cannot be held that the respective chances of each son to succeed by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and them or on behalf of a Hindu family of which he and they are some of the male members. (*Sir George Rankin.*) COMMISSIONER OF INCOME TAX, PUNJAB *v.* DEWAN KRISHNA KISHORE. **1941 A L.W 953 = 1941 O W N. 1151 = 1941 A.W R. (P.C.) 98 = 54 L W. 635 = 1941 I.T.R. 695 = 1941 O A 974 = 196 I.C. 707 = 1941 O.L.R. 798 = 8 B.R. 137 = A.I.R. 1941 P.C. 120 = (1941) 2 M L J. 972 (P.C.).**

——**S. 8, Proviso 2**—*Assessee company inserting certain figure as interest on tax free securities in return—Right to challenge it in appeal.*

Even if an assessee company in obedience to the direction of the Income-tax department and under protest accepted certain figures as interest on tax free securities, and inserted it in their return, they are free to challenge it in appeal within the time allowed. (*Davis, C.J. and Weston, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* INDIAN LIFE ASSURANCE CO., LTD., KARACHI. **I.L.R. (1941) Kar. 191 = 193 I.C 714 = 1941 I.T.R. 177 = 13 R.S. 228 = A.I.R. 1941 Sind 17.**

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——**S. 8, Proviso 2**—*Scope and effect of—Life Assurance Company holding tax free securities—Right to deduct interest from total income.*

The mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in R. 25, Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities given by the proviso to S. 8, Income-tax Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the whole of the interest of their tax free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules. (*Davis, C. J. and Weston, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* INDIAN LIFE ASSURANCE CO, LTD., KARACHI.

I.L.R. (1941) Kar. 191 = 193 I.C. 714 = 1941 I.T.R. 177 = 13 R.S. 228 = A.I.R. 1941 Sind 17.

——**Ss. 9 (1) and 14**—*'Property of which he is the owner' in S. 9 (1)—Meaning of—Income of impartible estate held by member of joint Hindu family—How chargeable.*

The words 'property of which he is the owner' in S. 9 (1) of the Income-tax Act are not to be read as meaning 'of which annual value he is the owner'. However difficult it may be in some cases to apply the simple and ordinary phrase 'owner of property' to the facts of each case, it is not permissible to substitute a phrase which is of dubious and noticeably different meaning. Again the distinction between property owned by an individual Hindu and property owned by a Hindu undivided family must be made by applying the Hindu Law. It cannot be said that because the statute to be interpreted is an Income-tax Act broader or more general notions of ownership than the Hindu Law affords are to determine the matter. The Act is an Indian Act and the distinction takes its meaning from the Hindu Law. Property though impartible may be the ancestral property of a joint family, and in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara. 'The Keystone' of the position is, that the general law regulates all beyond the custom and the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line. Though the co-ownership of the junior member may be 'in a sense' only, carrying no present right to joint possession, if the question be whether the Hindu undivided family or the present holder is owner of the estate the answer of the Hindu Law is that it is the joint family property. The present holder cannot therefore be charged in respect of it under S. 9 of the Income-tax Act. (*Sir George Rankin*) COMMISSIONER OF INCOME-TAX, PUNJAB *v.* DEWAN KRISHNA KISHORE.

1941 A.L.W. 953 = 1941 O.W.N. 1151 = 1941 A.W.R. (P.C.) 98 = 54 L.W. 635 = 8 B.R. 137 = 1941 I.T.R. 695 = 1941 O.L.R. 798 = 1941 O.A. 974 = 196 I.C. 707 = A.I.R. 1941 P.C. 120 = (1941) 2 M.L.J. 972 (P.C.).

——**S. 10**—Banking business—Profits arising from sale of shares and investments—If assessable to income-tax *See* 1940 Dig., Col. 704. PUNJAB CO OPERATIVE BANK, LTD. *v.* COMMISSIONER OF INCOME TAX, LAHORE.

67 I.A. 464 = I.L.R. (1940) Lah 685 = I.L.R. (1940) Kar (P.C.) 447 = 1940 M.W.N. 1275 = 22 Pat L.T. 1 = 45 C.W.N. 232 = 1941 P.W.N. 54 = 1941 O.L.R. 42 = 191 I.C. 548 = 13 R.P.C. 130 = 7 B.R. 309 = 43 P.L.R. 168 = 43 Bom L.R. 372 = 73 C.L.J. 302 = (1941) 1 M.L.J. 130 (P.C.).

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——**Ss. 10 and 66 (2)**—*Book debts taken over—Irrecoverability—Loss, if capital loss—Question if one of law.*

Where the book-debts taken over by an assessee turn out to be irrecoverable the loss incurred by the assessee is a capital loss and not a trading loss. The determination of this matter is entirely a question of law once the facts have been ascertained. (*Roberts, C.J., Dunkley and Shaw, JJ.*) COMMISSIONER OF INCOME-TAX *v.* S.P.K.A.R.M. FAMILY.

1941 I.T.R. 685 = A.I.R. 1941 Rang. 273 (S.B.).

——**S. 10**—"Business profits or income"—What amounts to. *See* INCOME-TAX ACT, SS. 6 (*i*), (*iv*) AND (*vi*), 7, 10 AND 12.

1941 I.T.R. 642.

——**S. 10**—*Right to deduction—Firm dissolved—Assets and liabilities divided up between assessee and other partner—Assessee carrying on business himself—Certain debts falling to assessee's share of assets—Assessee accepting smaller sums and writing off balance as irrecoverable—Losses, if allowable against income, profits and gains of new firm.*

The assessee was a partner in a firm which carried on timber and money-lending business. On dissolution of the firm its assets and liabilities were divided up and allotted to the other partner and the assessee who thereafter carried on a business himself. Among the assets which fell to the assessee were certain debts in satisfaction of which the assessee accepted smaller sums and wrote off the balance as irrecoverable.

Held, that the losses claimed were the losses of the old business and therefore could not properly be allowed against the income, profits and gains of the new firm.

Held, further, that the losses sustained by the realisation of smaller sums of nominal debts were losses of capital and not trading losses. (*Derbyshire, C.J. and Nasim Ali, J.*) CHIMANLAL RAMESWARLAL *v.* COMMISSIONER OF INCOME-TAX, BENGAL.

1941 I.T.R. 408 = A.I.R. 1941 Cal. 142.

——**S. 10 (1)**—*Profit—Interest—Calculation—Money-lending business—Mortgage—Decree on basis of—Assessee purchasing property in execution—Market value of property—Price paid at auction—If market value—Presumption.*

Where a property is purchased by an assessee in execution of a mortgage decree against his debtor, the amount for which the assessee bids at the execution sale must ordinarily be taken to be its market value. It is, however, open to the Income-tax Department, if there is anything before it, to hold that the property was worth either more or less than the price which the assessee bids for it. But in order to hold that the property is worth more than the price fetched at the public sale, the department must have in its possession some tangible evidence. (*Harries, C.J. and Fazl Ali, J.*) BISHWANATH SINGH *v.* COMMISSIONER OF INCOME-TAX, B. & O.

1941 I.T.R. 474.

——**S. 10 (2) (iii)**—*Applicability—Partnership—Money invested by partner—Interest paid on—Right to deduct.*

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A partnership which was carried on by the assessee and another at Agra and Delhi was dissolved on 31—3—1936, and the assessee took over the business at Agra. In the assessment year of 1937—1938, a sum of Rs. 546, which was paid as interest by the assessee to his partner in the old firm on the capital invested by the latter, which the assessee claimed to deduct under S. 10 (2) (*iii*) of the Income-tax Act, was disallowed by the Income-tax Department. It was assumed for the purpose of the assessment that the assessee had succeeded to the old firm under S. 26 (2) of the Act.

Held, that no allowance could be made in respect to their interest of Rs. 546 under S. 10 (2) (*iii*), the advance made by the old partner being an investment by the latter. (*Collister and Bajpai, JJ.*) KUNJAMAL & SONS, *In re*. **1941 I.T.R. 358.**

——**Ss. 10 (2) (vi) and 26 (2)**—*Assessee succeeding to business in middle of previous year—Claim for depreciation—Basis of computation—Pre and post succession periods.*

An assessee who succeeds to a business in the middle of the previous year is entitled to have the current depreciation allowance permissible under S. 10 (2) (*vi*) of the Income-tax Act computed on the original costs of the assets of such business to his predecessor only with regard to that portion of the previous year prior to the succession, and not for the whole of the previous year. For the post-succession period, current depreciation should be computed on the costs of the assets to the assessee, that is to say, on the basis of the price paid for the assets by him. (*Derbyshire, C.J. and Panckridge, J.*) *In the matter of* INDIAN IRON AND STEEL CO., LTD. **1941 I.T.R. 539=45 C.W.N. 681**

——**S. 10 (2) (vi)**—Original suit—Determination—Contract of purchase—Power of Income-tax authorities to go behind and ascertain true value. *See* 1940 Dig., Col. 705. COMMISSIONER OF INCOME-TAX, MADRAS *v.* HARVEYS, LTD. **194 I.C. 778=14 R.M. 61=(1940) 2 M.L J. 95 (F.B.).**

——**Ss. 10 (2) (vi), Proviso and 26 (2)**—*Unabsorbed depreciation of predecessor in business—Right of successor to benefit of.*

Unabsorbed depreciation on the assets of the predecessor to which full effect could not be given in the years when profits or losses of the predecessor fall to be considered in the hands of the successor cannot be allowed in subsequent years. The assessee, B. F. Mills Co., Ltd., took over E. F. Mills Co., Ltd., as a going concern on 26—4—1936. In the assessment of B. F. Mills Co. in the assessment year 1937-1938, as successor to the E. F. Mills Co., the whole of the unabsorbed depreciation of E. F. Mills Co. and current depreciation on the assets taken over from E. F. Mills Co. were allowed and the total unabsorbed depreciation stood at Rs. 77,060. In the assessment for the next year, 1938 1939, the Income-tax authorities refused to carry forward the unabsorbed depreciation of Rs. 77,060.

Held, the Income-tax authorities were correct in law in refusing to carry forward the sum of Rs 77,060 as unabsorbed depreciation into the 1938-1939 assessment of the assessee. (*Derbyshire, C. J. and Panckridge, J.*) BENGAL FLOUR MILLS CO., LTD. *In re*. **1941 I.T.R. 568.**

——**Ss. 10 (2) (vi), proviso (b) and 26 (2)**—*Accumulated unabsorbed depreciation allowance of owner of business—If available to successor.*

The depreciation allowance to which an owner of business is entitled to under S. 10 (2) (*vi*) of the Income Tax Act being a deduction permitted to him in respect of wear and tear of his plant and machinery

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based on its cost to him, against the profits he may make when carrying on his business, is a statutory privilege personal to him so long as he carries on his business. When he ceases to pay income-tax on his business profits through ceasing to carry on his business, the permission to deduct ceases; it is not a right which passes to his successor under the Act, nor is it a right which he can transfer by agreement. S. 26 (2) of the Act says nothing as to any right of the successor to take advantage of the unabsorbed depreciation his predecessor might have been entitled to. Its effect is simply to provide that as regards the year of assessment, where a succession has occurred in the ownership of the business in the previous year, the successor is made liable to pay income-tax for that year on the total profits actually earned by the business during the previous year (*i.e.*) the one in which the succession occurred —whether earned under the predecessor or the successor. (*Derbyshire, C.J. and Panckridge, J.*) *In the matter of* INDIAN IRON AND STEEL CO., LTD. **1941 I.T.R. 539=45 C.W.N. 681.**

——**S. 10 (2) (viii-a) and (ix)**—*Construction and scope—Payment out of profits on specified basis as remuneration for secretaries, treasurers and managers—It can be deducted as business expenditure—If profit sharing agreement.*

S. 10 (2) (viii-*a*) of the Income tax Act does not deal with employees of any particular class nor contemplates the exclusion of any class; the business of a company or a corporation does not become an agreement to share profits unless the expenditure incurred in remunerating them falls outside the scope of Cl. (*ix*) of S. 10 (2), as being either capital expenditure or not incurred for the purpose of earning profits or gains. The taxable profits or really net profits can only be discovered when every outlay has been provided for including expenditure out of income which has been incurred solely for the purpose of earning the profits or gains. Where an outlay incurred in earning the profits of an assessee company is the remuneration payable to the secretaries, treasurers and managers of that company, and it is not disputed that the assessee could not earn profits or gains without secretaries, treasurers or managers, such expenditure has to be deducted from the profits and gains. It is necessary to scrutinize with care the sense in which the word "profits" or even the phrase "net profits" is employed. A sum which is to be regarded as "net profits" for the purpose of ascertaining the remuneration of the agents of a firm or the secretaries, treasurers and managers of a company, is only "net profits" in the different sense of being taxable when such remuneration can be classed as outside the scope of expenditure from income which is incurred solely for the purpose of earning profits.

Dunkley, J.—When there is an agreement between the assessee corporation and the secretaries, treasurers and managers under which before ascertaining the divisible profits of the assessee at all, the secretaries, treasurers and managers are to receive upon a particular conventional basis a commission as remuneration for their services, there is no agreement for division of profits, because in order that it can be held to be an agreement for division of profits, there must be a sort of joint venture and there must be one single profit fund for all purposes, not two profit funds to be ascertained for different purposes. Where there is one profit fund which has to be ascertained for the purpose of calculating the remuneration of the secretaries, treasurers and managers, and another and quite distinct profit fund to be ascertained (after the remuneration of the said employees has been fixed) for the purpose of calculating the

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profits, divisible among the shareholders, there is no case for division of profits. In the second, the sum payable as such remuneration must of necessity appear as an expenditure or a "revenue charge". Such remuneration is clearly an expenditure incurred by the assessee solely for the purpose of earning such profits or gains, within Cl. (*x*) of S. 10 (2) of the Income-tax Act.

Basil Blagden, J.—In arriving at his "profits or gains" *i.e.*, assessable income, the subject is entitled to deduct from his gross revenue, among other things, expenditure solely incurred for the purpose of earning profits or gains; and no method of computing that expenditure can make its deduction unlawful. (*Roberts, C.J., Dunkley and Blagden, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* BOMBAY BURMA TRADING CORPORATION, LTD. **1941 Rang.L.R. 181 = 195 I.C. 523 = 12 R.R. 40 = 1941 I.T.R. 155 = A I.R. 1941 Rang. 145 (F.B.).**

——**S. 10 (2) (ix)**—*Allowance under—Expenses incurred in defending suit—Suit filed against assessee for rent and royalty as assignee of original grantee of mining lease.*

A suit for arrears of rent and royalty was brought by the superior landlord, and the assessees were joined as one of the defendants in the suit as assignees of the original grantees of the mining leases. They successfully defended the suit and incurred a considerable sum as costs which they contended was deductible from the income, profits and gains under S. 10 (2) (*ix*) of the Income-tax Act.

Held, that the costs incurred was not an expenditure allowable against profits under S. 10 (2) (*ix*) of the Income-tax Act inasmuch as the assessee's defence in the suit had nothing to do with the earning of any profits or gains in the year previous to assessment or in any year at all prior to the year of assessment, and the suit was fought and the expenditure was incurred to prevent a liability for rent and royalty arising in the future.

Per *Panckridge, J.*—The expenditure was of a capital nature and as such was not an allowance within S. 10 (2) (*ix*) of the Income-tax Act. (*Derbyshire, C.J. and Panckridge, J.*) MAGNIRAM BANGOR & CO., *In re*. **I.L.R (1941) 1 Cal. 572 = 1941 I.T.R. 573 = 46 C.W.N. 6.**

——**S. 10 (2) (ix)**—Construction — Money-lending business—Suit against money-lender for damages for breach of agreement to take over management of company and to finance—Dismissal of suit—Costs incurred by assessee in defending suit—Claim to deduction of. *See* 1940 Dig., Col. 707. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KAMESHWAR SINGH.
196 I.R. 656 = 8 B.R. 79 = A.I.R. 1941 Pat 197.

——**S. 10 (2) (ix)**—Deductions in respect of provident fund contributions—Extent. *See* INCOME TAX ACT, SS. 58-K (2) AND 10 (2) IX.
I.L.R. (1941) Nag. 240.

——**S. 10 (2) (xi)**—*Bad debts—Assessee holding two mortgages over same property—Amount due on 1st mortgage exceeding value of property mortgaged—Assessee suing on 1st mortgage and claiming only amount of value of property and giving up second mortgage—Claim to deduct amount of second mortgage as bad debt—Sustainability.*

The assessee held a mortgage for Rs. 40 000 and a second mortgage for Rs. 10,850, on the same property. In the year of assessment, when the principal and interest due on the first mortgage amounted to Rs. 71,220, the assessee filed a suit limiting his claim to Rs. 50,000 on the first mortgage and giving up his claim on the second mortgage, as the security was not worth more than Rs. 50,000. The assessee claimed from the Income-tax authorities a deduction of Rs. 10,850 (the amount of the second mortgage) from his profits as bad debt. The Income-tax department resisted the claim on the ground that the two mortgages were in substance one transaction and the suit must be deemed to be one for the recovery of the principal due under both the mortgages, and that therefore the claim for deduction was not tenable.

Held, that the assessee had in truth and fact incurred a loss of capital of Rs. 10,850 on the second transaction which he was entitled to have deducted as a bad debt. The substance of the matter as distinguished from the strict legal position cannot be regarded in revenue cases. (*Leach C.J., Somayya and Patanjali Sastri, JJ.*) CHOCKKALINGAM CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS
196 I.C 31 = 14 R.M. 241 = 53 L.W. 738 = 1941 M.W N. 623 = 1941 I.T.R. 278 = A I.R. 1941 Mad. 492 = 1941 1 M.L.J. 776 (F.B.).

——**S. 10 (2) (xi)**—*Bad debt—Debt—When becomes bad—Question of fact—Onus of proof.*

It is purely a question of fact as to when a debt becomes bad. The onus of proving that a debt has become bad and when it has become bad is on the assessee. (*Dalip Singh and Ram Lall, JJ.*) BANI MAL DALAL *v.* COMMISSIONER OF INCOME-TAX
1941 I.T.R. 222

——**S. 10 (2) (xi)**—*Bad debt—Debt—When becomes bad or irrecoverable—Insolvency of debtor—If debt becomes irrecoverable at once—Date on which it becomes bad*

It is not possible to argue that merely because a debtor had become insolvent therefore the debt was irrecoverable or to what extent it was so irrecoverable. This would be a matter which would turn on a variety of circumstances which would include the amount of property at the disposal of the insolvent, the skill with which the sale was conducted, which in the case of official auctions might be presumed, and on circumstances which nobody could entirely foresee in the future, such as the presence of bidders and the amount of property which could be attached and sold in insolvency proceedings which again might be a varying factor. The market value of a debt in 1933 could not be determined by the amount received as dividend in 1936. In 1923, a Hindu joint family loaned a certain sum of money to a firm *K*, which went insolvent in 1925. In 1933, the family dissolved, certain immovable property and certain debts were allocated to various members of the family, but certain joint debts due to the family, which carried on money-lending business, were taken over as they stood, by the members of the joint Hindu family. In other words, the debts were taken over at their book value by the new firm which consisted of the members of the disrupted joint family but which was obviously a separate person from the joint family which had dissolved itself in 1933. Insolvency proceedings against the debtor firm *K* were then pending. In 1931, a sum of Rs. 3161-14-0, had been paid as a dividend. In 1934 and 1935, other sums were paid, but on 11—6—1936, a final dividend was declared amounting to Rs. 151 12 6. The total amount received was thus Rs. 5210-15-6 out of the total loan of 18,000. The assessee claim the right to write off the difference namely, Rs. 12789 3 6, in the accounting period of 1936-1937. The Income-tax authorities rejected this claim, holding that the bad debt so far as it was a bad debt originally had been entered in the books of the new firm, and no bad debt was therefore deductible in the year of assessment.

Held, that the only date on which it could be said that the debt became finally bad would be 4-6-1936,

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when a final dividend was declared, and the assessee was therefore entitled to deduct the sum of Rs. 12,789-3-6 as a bad debt in the assessment year. (*Dalip Singh and Ram Lall, JJ.*) DEOKI NANDAN *v.* COMMISSIONER OF INCOME TAX, PUNJAB.

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——**S. 10 (2) (xi)**—*Bad debt—Proof—Debt written off in assessee's books—If sufficient.*

The mere fact that a debt had been written off in the books of the assessee does not prove that the debt is bad or irrecoverable. (*Dalip Singh and Ram Lall, JJ.*) SHYAM CHAMBERS, LTD. *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **1941 I.T.R 224.**

——**S. 10 (2) (xi)**—*Bad debts—Question as to—Decision on—If* res judicata—*Claim to deduction on bad debts disallowed as premature—Claim in succeeding year—Decision that debts had become bad long before—Legality—Finding of fact—Interference by High Court.*

In respect of the assessment for the year 1934-1935 the assessee made a claim to write off as bad debts, three debts. The Income-tax authorities came to the conclusion that these debts were not (had not become) bad and therefore held that the assessee's claim for deduction in respect of these debts was premature. In the following year 1935-1936, the assessee again claimed that these debts were bad debts. The Income-tax authorities now came to a different conclusion and held that the debts had become bad long before the accounting year and therefore no allowance could be made in respect of these debts in that year.

Held, (1) that though the Income-tax authorities were not bound by the rule of *res judicata* or estoppel by record yet they could reopen the matter of assessment only if fresh facts came to light which, on investigation, would entitle them to come to a conclusion different from that of their predecessors; (2) that as there were fresh materials placed on the second occasion, which were not shown to have been placed before the authorities on the former occasion, it could not be said as a matter of law that the Income-tax authorities were not entitled to come to a different conclusion; (3) that the question whether the debts had become bad long before was a question of fact, and when there was evidence to support it, the High Court could not disturb the finding of the Commissioner of Income-tax. (*Harries, C. J. and Fazl Ali, J.*) KANIRAM GANPAT RAI *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **194 I.C 464=7 B.R. 778= 13 R.P. 725=1941 I.T.R 332= A I.R. 1941 Pat. 527.**

——**S. 12**—"Income" from other sources—Periodical payment made to assessee as consideration for abstaining from doing particular act—Object of agreement not to secure income to assessee—If capital payment or taxable income. *See* INCOME TAX ACT, SS. 6 (*i*), (*iv*) AND (*vi*), 7, 10 AND 12. **1941 I.T.R 642**

——**S 13**—*Burden of proof—Accounts—Non-production—Assessee pleading non-maintenance of accounts—Onus—Income tax Officer—If can disbelieve improbable circumstances.*

In the case of an assessment under the Income-tax Act, the only person who has knowledge of all facts in regard to the maintenance of accounts is the assessee himself. The burden in the first instance is always on him to establish that accounts asked for are not maintained, and his attempt to prove that point may always be met by reliance on circumstances indicating that the evidence given or led by him cannot be relied upon The Income-tax Officer is entitled to disbelieve improbable statements and to ask for something more to be

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produced by the assessee which will satisfy him and the appellate authority that the accounts demanded are not, in fact, maintained. (*Yorke and Bennett, JJ.*) KANHAIYA LAL UMRAO SINGH *v.* COMMISSIONER OF INCOME-TAX C. AND U. P. **1941 I.T.R 225= A.I.R. 1941 Oudh 279.**

——**Ss. 13 and 24**—Relative applicability. *See* 1939 Dig., Col. 661. COMMISSIONER OF INCOME TAX, C. P. AND U. P. *v.* BADRIDAS. **I.L.R. (1941) Nag. 360.**

——**S. 13, Proviso**—*Application of—Notice to assessee—Necessity.*

An assessee whose businesss was to sell gold and silver was served with notices under S. 22 (4) and S. 23 (2) of the Act and the assessee's munib was specifically questioned in respect to the profits from the gold and silver transactions. The Income tax Officer applied proviso to S. 13 in respect of transactions in gold alone.

Held, that the Income-tax authorities were justified without giving any other kind of notice to the assessee, in applying the proviso to S. 13 in respect to transactions in gold while accepting the books of account in respect to transactions in silver. (*Collister and Baipai, JJ.*) GANESHI LAL CHHAPPAN LAL *v.* COMMISSIONER OF INCOME TAX **I.L.R. 1940) All. 805= 193 I.C 606=13 R A 429=1941 A.L.J. 79= 1941 A.W.R. (H C.) 61=1941 I.T.R 81= 1941 A.L W. 367=A.I.R 1941 All. 24.**

——**S. 13, Proviso**—*Exercise of discretion under—Interference by Court- When justified.*

The language of the proviso to S. 13 makes it clear that discretion is vested in the Income tax Officer; but obviously it was not the intention of the Legislature that such discretion should be arbitrary. What the Court has to con-ider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of accounts; if he did exercise his judgment and did not act arbitrarily, then having regard to the language of the proviso, his discretion cannot be interfered with. (*Collister and Baipai, JJ.*) GANESHI LAL CHHAPPAN LAL *v.* COMMISSIONER OF INCOME TAX

I L R. (1940) All 805=193 I C. 606= 13 R A 429=1941 A L J. 79= 1941 A.W.R. (H.C.) 61=1941 I.T.R. 81= 1941 A.L W 367=A.I R. 1941 All 24.

——**S. 14 (1)**—Exemption under—Hindu mother receiving maintenance Will making provision for it. *See* 1940 Dig., Col. 710. COMMISSIONER OF INCOME-TAX, C. P. AND U P. *v.* RUDH KUMARI.

16 Luck. 159=A.I.R. 1941 Oudh 22.

——**S. 14 (1)**—*Widow of a Hindu coparcenary—If a member of the undivided family—Maintenance paid under agreement between parties to such widow—Subsequent disruption of the family—Effect—Exemption from payment of tax if available.*

The widow of a Hindu coparcenary though not herself a member of the coparcenary body, may nevertheless be a member of the undivided Hindu family. Where in settlemen of disputes between such a widow and the other members, a sum is agreed to be paid to her monthly as maintenance for her life, and subsequently there is a disruption of the joint family, the widow thereafter continues to be a member of a Hindu undivided family with each of the entities into which the family disrupted, irrespective of whether any such entity consisted of one male member or of several male members Upon this view she will be exempted from payment of income-tax under S. 14 (1) of the Income-tax Act (*Collister and Baipai JJ.*) BHAGWATI *v*

INCOME-TAX ACT (1922), S. 14.

COMMISSIONER OF INCOME-TAX, U. P. AND C. P.
I.L.R. (1941) All. 43 = 193 I.C. 236 = 13 R.A. 418 = 1941 I.T.R. 31 = 1940 A.L.J. 848 = 1940 A.W.R. (H.C.) 664 = A.I.R. 1941 All. 83.

——**S. 14 (2) (b)**—Exemption under—Claim for—Facts to be shown. *See* 1940 Dig., Col. 710. KANHAIYA LAL GOENKA *v.* COMMISSIONER OF INCOME-TAX.
I.L.R. (1940) All. 795 = 192 I.C. 530 = 13 R.A. 333 = 1941 I.T.R. 70 = A.I.R. 1941 All. 15.

——**(as amended in 1937), S. 16 (3) (a) (ii)**—*Applicability—Hindu joint family—Father and sons and daughters—Partition—Shares of minor children made part of assets of partnership and minors admitted to benefits of partnership—Inclusion of minor children's income in father's total income—If justified.*

There is no warrant for holding that unless a minor is admitted to the benefits of a partnership without any contribution to the assets, S. 16 (3) (*a*) (*ii*) of the Income-tax Act (as amended by the Amending Act of 1937) has no application. There is nothing in the section which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets. The section can only be construed in accordance with the words used in it. The assessee, the head of a Hindu joint family, was a partner in two firms. The family (the assessee and his sons) became divided several years before 1937, and since then he was being assessed as an individual on his total income including his share of the profits in the two firms. The assessee's sons and daughters, some of whom were minors, were also partners in the two firms into which the family business was converted. In the year of account, 1939-1940, the Income-tax department applied S. 16 (3) (*a*) (*ii*) of the Income-tax Act which was inserted by the Amending Act of 1937 which came into force on 1—4—1937, and held that to the assessee's income should be added the partnership profits which were allocated in that year to his minor children. The assessee contended that this was contrary to the section on the ground that the minors were not admitted gratis into the firm, but owed their membership to the fact that they contributed to the assets their shares in the joint family property.

Held, that S. 16 (3) (*a*) (*ii*) was rightly applied to the case; the partition of the family put an end to the joint status and the family property ceased to exist as family assets. The assets devolved on the partnerships, and the minors were, under S. 30 of the Partnership Act, admitted to the benefits of the partnerships, and such benefits fell within the statutory provision, *viz.*, S. 16 (3) (*a*) (*ii*). (*Leach, C.J., Wadsworth and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* K.M.S. LAKSHMANIER.
1941 I.T.R. 668 = 54 L.W. 732 = 1941 M W.N. 1068 = A.I.R. 1941 Mad 924 = (1941) 2 M.L.J. 891 (S.B.).

——**as amended by Act IV of 1937), S. 16 (3) (iii)**—*Applicability—Transfer by husband to wife on account of natural love and affection—If one for "adequate consideration"—If falls under S.* 16 (3) (iii).

The word "consideration" in S. 17 (3) (*iii*) of the Income-tax Act, as amended in 1937, is used in its legal sense, and must be given a meaning similar to that which it has in the Contract Act. A transfer by a husband to his wife on account of natural love and affection only without any monetary consideration passing from the wife to her husband, cannot be held to be a transfer for consideration; and in any case it is not a transfer for

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"adequate consideration" within the meaning of S. 17 (3) (*iii*). Transfers by a husband to his wife of assets otherwise than for adequate consideration cover all transfers in the nature of gifts or transfers made purely on the ground of natural love and affection; and a transfer on the ground of natural love and affection falls under S. 16 (3) (*iii*). (*Harries, C. J. Fazl Ali and Manohar Lall, JJ.*) H. P. BANARJI *v.* COMMISSIONER OF INCOME-TAX, B. AND O.
20 Pat. 202 = 192 I.C. 204 = 13 R.P. 430 = 7 B.R. 346 = 1941 I.T.R. 137 = 21 Pat.L.T 1096 = 1940 P.W.N. 1016 = A.I.R. 1941 Pat. 59 (F.B.).

——**(as amended in 1937), Ss. 16 (3) and 26-A**—*Application for registration—Refusal on ground that partnership was brought about only for avoiding proper taxation—If justified—Partnership—Alteration of partners and shares in new partnership after introduction of S.* 16 (3)—*Finding that it is not genuine—If justifies refusal.*

The assessees were a firm carrying on business in the names of Central Talkies Circuit, in Bombay and until 14th July, 1937, the partners were (1) V. H. Desai, with 3 annas share, (2) his wife with 3 annas share, (3) his minor son with 2 annas, and (4) his major son with two annas, and two outside partners. After the amendment of S. 16 (3) of the Income-tax Act, by Act IV of 1937, a partnership deed was executed on 14—7—1937 under which the mother of V. H Desai was subtituted for his wife and minor son and she was given $4\frac{1}{2}$ annas. That is to say, the 5 annas which had previously been divided between the wife and the minor son were distributed as to $\frac{1}{2}$ anna for V.H. Desai and $4\frac{1}{2}$ annas for the mother, who thus became entitled to $4\frac{1}{2}$ annas, the largest share in the firm. The object of the alteration was to avoid the effect of S. 16 (3) of the amended Act. On an application to register the firm the Income-tax department refused registration on the ground that the partnership deed was one prepared only to avoid "proper taxation," that it was not a genuine partnership, inasmuch as a large cash balance of nearly a lakh and a half existed in the partnership in 1937, which made it unnecessary to secure a new financing partner; there was no evidence that the mother knew anything about the business or had assisted in the conduct of the business in any way.

Held, that there was evidence to justify the finding of the Income-tax authorities that the alleged partnership was not a genuine partnership, and the order refusing registration was therefore justified.

Per *Beaumont, C.J.*—That the partnership deed was one prepared only to avoid "proper taxation" would not be a good ground for refusing to register. Any one is entitled so to conduct his affairs within the law as to avoid the incidence of taxation, and if a man finds that he will suffer less in taxation by carrying on business in partnership with his mother rather than his wife, he is entitled to select his mother. But the partnership must be genuine partnership.

Kania, J.—If any subject could so manage his affairs as to pay the least tax which he might be liable for, he may do so provided the whole action is within the law. (*Beaumont, C.J. and Kania, J.*) CENTRAL TALKIES CIRCUIT, MATUNGA, *In re.*
I.L.R. (1941) Bom 384 = 195 I.C. 714 = 14 R.B. 70 = 1941 I.T.R. 44 = 43 Bom L.R. 258 = A.I.R. 1941 Bom. 205.

——**(as amended by Act IV of 1937), S 16 (3) (iii)**—*Construction and scope—Transfer by husband to wife—Validity—If affected.*

S. 16 (3) (*iii*) of the Income-tax Act, as amended in 1937, is not directed towards transactions between

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husband and wife and in no way invalidates such transactions. The transactions are assumed to be valid, and the income arising from the transferred assets is the income not of the husband but of the wife who received the assets from the husband by transfer. The section in no way affects the validity of the transfer, but only provides a method by which the income of the property transferred is to be assessed, and it provides that such income will be included in the husband's income for purposes of taxation and will not be taxed separately. (*Harries, C.J., Fazl Ali and Manohar Lai, JJ.*) H. P. BANARJI *v.* COMMISSIONER OF INCOME TAX B. AND O. **20 Pat. 202 = 192 I C. 204 = 13 R.P. 430 = 7 B R. 346 = 1941 I.T.R. 137 = 21 Pat.L.T. 1096 = 1940 P.W.N. 1016 = A.I.R. 1941 Pat. 59 (F.B).**

——**(as amended by Act IV of 1937), S. 16 (3) (iii)**—*Scope—Retrospective operation—Income from assets transferred before Amending Act—If covered.*

There is no reason why S. 16 (3) (*iii*) should not be held to apply to a wife's income arising from assets transferred to her by her husband before the Amending Act of 1937 came into force. The sub-section is to have effect in respect of any income chargeable to income-tax for any year subsequent to that date. The wording of the sub-section is wide enough to cover not only income from assets transferred by a husband to his wife after the passing of the Act but also income arising from such assets transferred before the passing of the Act. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) H. P. BANARJI *v.* COMMISSIONER OF INCOME-TAX, B. AND O. **20 Pat 202 = 192 I.C. 204 = 13 R.P. 430 = 7 B R. 346 = 1941 I T R 137 = 21 Pat L.T. 1096 = 1940 P.W.N. 1016 = A.I.R. 1941 Pat. 59 (F.B).**

——**S. 22 (2)**—Notice to assessee, an undivided Hindu family—Capacities other than the relevant one not scored out—Assessee not misled—Validity of notice *See* 1940 Dig., Col. 710. GOPAL DAS PARSHOTTAM DASS *v.* COMMISSIONER OF INCOME-TAX.

I.L.R. (1940) All. 841 = 192 I.C. 41 = 13 R.A. 286 = 1941 I.T.R. 130 and 372.

——**S. 23 (2)**—Notice under—Necessity—Assessee informing Income-tax Officer of omissions. *See* 1940 Dig., Col. 711. GOPAL DAS PARSHOTTAM DASS *v.* COMMISSIONER OF INCOME-TAX.

I.L.R. (1940) All. 841 = 192 I.C. 41 = 13 R.A. 286 = 1941 I.T.R. 130 and 372.

——**S. 23 (3)**—Issue of notice contemplated by—When assessment can be made under S. 23 (4). *See* 1940 Dig., Col. 711. GOPAL DAS PARSHOTTAM DASS *v.* COMMISSIONER OF INCOME-TAX.

I.L.R. (1940) All. 841 = 192 I C. 41 = 13 R.A. 286 = 1941 I.T.R. 130 and 372.

——**Ss. 23 (4) and 66 (2)**—*Assessment under S. 23 (4)—Question of law that can arise—Materials on which Court can come to a finding.*

In the case of an assessment under S. 23 (4) of the Income-tax Act the only question of law that could arise is whether there were any materials upon which the Income-tax Officer concerned could find that there was no sufficient cause excusing the assessee from complying with the requirements of law as prescribed by S. 27 of the Act. In cases of this kind the giving of positive evidence by the department about facts which are within the special knowledge of the opposite party is almost out of question, and the materials which come within the description of circumstantial evidence or general probabilities which would justify a presumption under S. 114 of the Evidence Act, are materials upon which the court can come to a finding just as properly as it could upon positive evidence. (*Yorke and Bennett, JJ.*) CHATURBHUJ *v.* COMMISSIONER OF INCOME-TAX, U. P. AND C. P. **1941 O.A. 500 = 1941 O.W.N. 757 = 1941 A.W.R. (C.C.) 203 = 1941 A.L.W. 595 = 1941 I.T.R. 286 = A.I.R. 1941 Oudh 445.**

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——**Ss. 23 (4), 30, 31 and 66 (2) and (3)**—Assessment under S. 23 (4)—Order of Assistant Commissioner rejecting appeal if an order under S. 31—Question of law referable under sub S. (2) or sub-S. (3) of S. 66—If exists. *See* 1940 Dig., Col. 712. SHEODUTT RAI *v.* COMMISSIONER OF INCOME TAX, U. P.

I.L.R. (1941) All. 1 = 192 I.C 614 = 13 R.A. 349 = 1941 A.L.J. 12 = 1941 I.T.R 118.

——**S. 24**—*Set-off—Assessee having three shops—One stopped in accounting year—Losses in same made up of bad debts interest and miscellaneous items of expenses—Right to set-off against profits of other shops—Bad debts—When to be wiped out.*

The assessee, a Hindu undivided family, carried on business in three shops in three places at Cawnpore, at *G. C.* and *H.* The first and third shops did business in cloth and spices on commission, and the second did business in grain on commission. In the assessment year 1937-1938, the accounts of the said year being from 19th August, 1935 to 21st August, 1936, it was found that the third shop at *H.* was closed within two months of the commencement of the account year, *i.e.*, on 17th October, 1935. The first two shops made a profit, but the third according to the assessee suffered a loss on account of interest and bad debts, etc., which the assessee sought to set off against the profits of the first two shops under S. 24 of the Income-tax Act. According to the accounts of the third shop, business was done for the first 10 days of the year, on which a small profit of Rs. 2-14 0 was made. The losses claimed were Rs. 10,947, made up of Rs. 1,084 on account of interest, Rs. 9 394 on account of bad debts and Rs. 469 on account of miscellaneous items of expenses. The entire loss of Rs. 10,947, was written in the books as having been incurred in the accounting year and none of the losses were accounted for in any year before the accounting year.

Held, (1) that the mere fact that the books showed entries on the credit side only for the first ten days did not necessarily prove that the shop was discontinued after 10 days, and that the business having been discontinued after two months of the accounting year, the benefit of such a state of affairs ought to go to the assessee and not to the Income-tax Department; (2) that bad debts were legacies of years that have gone before but became bad debts which had to be wiped out in a particular year when all hopes of their recovery were gone; and (3) that the assessee was therefore entitled to a set-off of his losses in the third shop against the profits made in the other two shops of the assessee. (*Collister and Bajpai, JJ.*) HULASILAL RAMDAYAL-*In re.* **1941 I.T.R. 635.**

——**S. 25-A (1) and (3)**—*Presumption under Cl. (3) when arises—Rebuttal.*

Where a business has permitted itself to be assessed once as a joint family business, under Cl. (3) of S. 25-A of Income-tax Act, it must be deemed to continue as a joint family business until an order under Cl. (1) of S. 25 A has been made. (*Bennett and Madeley, JJ.*) CHHEDI LAL NANDKISHORE *v.* COMMISSIONER OF INCOME-TAX, U P. & C.P. **1941 O.W.N. 1302 = 1941 A.L.W. 1101 = 1941 A.W.R. (C.C.) 387 = 1941 O.A. 985.**

——**Ss. 26 (2) and 10 (2) (vi), Proviso (b)**—Accumulated unabsorbed depreciation allowance of owner of business—If available to successor. *See*

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INCOME-TAX ACT, SS. 10 (2) (*vi*), PROVISO (*b*) AND 26 (2). **45 C.W.N. 681.**

——**Ss. 26 (2) and 44**—*Applicability—Partnership—Dissolution—One partner continuing business—If "succeeds" to business—Ex-partner—Assessed on share of profit—Fresh assessment on "successor"—If justified.*

A partner who continues the partnership business after dissolution of the partnership "succeeds" to the business within the meaning of S. 26 (2) of the Income-tax Act. S. 44 of the Act applies only when there has been a discontinuance of the business; where a partner retires and the remaining partner continues the business, the section which applies is S. 26 (2) and not S. 44. The assessee entered into a partnership with another in 1935 for the production and distribution of a cinema film. In May, 1936, the assessee's partner retired from the partnership receiving an amount of Rs. 9,524, which represented his share of the profits, and thereafter the assessee continued and carried on the business.

Held, that S. 26 (2) of the Act applied to the case and the assessee was liable to assessment on the sum of Rs. 9,524, representing the ex-partner's share of the profits of the film business.

Held also, that even if the ex-partner had been assessed on this amount, a fresh assessment could be levied on the assessee, and the tax recovered from the ex-partner might be refunded to him. (*Leach, C.J., King and Patanjali Sastri, JJ.*) KARUPPIAH PILLAI *v.* COMMISSIONER OF INCOME-TAX, MADRAS.

I L.R (1941) Mad. 220 = 194 I C. 118 = 13 R.M. 746 = 53 L W. 210 = 1941 M.W.N. 317 = 1941 A.L.W. 651 = 1941 I.T.R. 1 = A.I.R. 1941 Mad. 255 = (1941) 1 M.L.J. 120 (S.B.).

——**Ss. 26 (2) and 10 (2) (vi)**—Assessee succeeding to business in middle of previous year—Claim for depreciation—Basis of computation—Pre and post-succession periods. *See* INCOME-TAX ACT, SS. 10 (2) (*vi*) AND 26 (2). **45 C.W.N. 681.**

——**S. 26 (2)**—Facts giving rise to consequential question whether there is "succession" within meaning of S. 26 (2)—If a question of law. *See* 1940 Dig., Col. 713. COMMISSIONER OF INCOME TAX, BURMA *v.* A.L.V. R. P. FIRM. **1941 Rang.L.R. 45 = 192 I.C. 561 = 13 R R. 182**

——**S. 26 (2)**—When a person can be said to have "succeeded" under *See* 1940 Dig., Col. 714. COMMISSIONER OF INCOME-TAX, BURMA *v.* A. L V. R P. FIRM. **1941 Rang L R 45 = 13 R R. 182 = 192 I.C. 561.**

——**S. 26 (2), Proviso**—*Applicability—Requisites—"Cannot be found"—Meaning of.*

It cannot be held that a firm which has been dissolved "cannot be found" within the meaning of the proviso to S. 26 (2) of the Income-tax Act, notwithstanding that all the members of the firm are alive and can be found. Before the proviso can be brought into operation, it must be established that the person succeeded "cannot be found," that is, he must be dead or has disappeared. The proviso cannot be applied when the person succeeded is alive and his whereabouts are known or can be ascertained. (*Leach, C.J., Somayya and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* NATIONAL CYCLE IMPORTING CO.

I L.R. (1941) Mad. 868 = 196 I C. 635 = 1941 M W N. 880 = 1941 I.T R. 502 = 54 L.W. 90 = A.I R. 1941 Mad. 673 = (1941) 2 M.L.J. 152 (F.B.).

——**(as amended in 1939) S 26-A and Income-tax Rules, R. 4**—*Scope of inquiry into—Power of Income tax Officer to inquire whether partnership deed is genuine.*

INCOME-TAX ACT (1822), S. 30

Beaumont, C.J.—R. 4 (new) of the Rules under S. 26 A of the Income-tax Act as amended in 1939 does not alter the law as it previously existed; it only makes the true effect of R. 4 clearer than it was under the previous wording. Both under the old and the new rule, it is open to the Income-tax Officer to say that the shares which appear in the deed of partnership produced with an application for registration are not the true shares of the partners and therefore, there is no proper application by the requisite firm. If it were shown that one of the partners was only a nominee of a share allotted to him or another for another partner, the deed would not then specify correctly the individual shares. It must specify correctly the individual and beneficial shares.

Kania, J.—R. 4, as amended in terms, gives power to the Income-tax authorities to inquire and determine whether the deed put forward is genuine and also whether the partnership is constituted as stated in the deed. (*Beaumont, C.J. and Kania, J.*) CENTRAL TALKIES CIRCUIT, MATUNGA, *In re.*

I.L.R. (1941) Bom 384 = 195 I.C. 714 = 14 R.B 70 = 43 Bom L.R. 258 = 1941 I T.R. 44 = A.I.R. 1941 Bom. 205.

——**Ss. 27 and 66 (2) and (3)**—Existence of sufficient cause within meaning of S. 27—Reference under S 66 (2) or (3), if competent. *See* 1940 Dig., Col. 714. SHEODUTT RAI *v.* COMMISSIONER OF INCOME-TAX, U.P. **I L.R (1941) All. 1 = 192 I.C. 614 = 13 R A 349 = 1941 A.L J. 12 = 1941 I.T.R. 118.**

——**S. 29**—*Service of notice—Service on person authorised to receive postal articles under letter of authorisation — Sufficiency — Person discharged from service but letter of authority not cancelled—Effect.*

In a letter of authority dated 9—9—1937, which the assessee sent to a Sub-Postmaster, the assessee stated that he had given authority to *X*, who was his acting manager, to sign and take delivery of all postal articles addressed to the assessee. This letter of authorization was cancelled only in February, 1938; until that date *X* continued to receive postal articles addressed to the assessee. A notice of demand was sent by the Income-tax department and accepted by *X* on 14—12—1937. It was contended that the services of *X* as acting manager were dispensed with in October, 1937, and therefore the notice was not validly served on 14—12—1937.

Held, that since the letter of authorization was not cancelled until February, 938, *X* continued to be the assessee's representative for receiving postal communications for purposes of S. 29 of the Income-tax Act, and the service of notice effected on *X* on 14—12—1937 was validly effected and not illegal. (*Collister and Baipai, JJ.*) KISHORI LAL MAKUNDI LAL, *In re*

1941 I.T.R. 193.

——**S. 30**—Assessment under S. 23 (4) wrongly treated as under S. 23 (3)—Appeal—Test to determine. *See* 1940 Dig., Col. 715. COMMISSIONER OF INCOME-TAX, BOMBAY *v.* GANGARAM KANAYALAL & CO.

13 R.S. 139

—— **Ss. 30 64 (3) and 66**—*Decision as to place of assessment—Appeal, if lies—High Court if can deal with question under S. 66—Scope of proviso to S. 64 (3).*

Where an assessee questions the jurisdiction of the Income tax Officer of a particular place to deal with his assessment and the place of assessment is decided under the provisions of S. 64 (3) of the Act, after obtaining an affidavit from the party as to his objections and after the necessary correspondence with the Income-tax authorities concerned, and the Income tax Officer proceeds to make an assessment, the plea of jurisdiction cannot be raised before the Assistant Commissioner

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on appeal under S. 30, and the High Court cannot deal with the question under S. 66 of the Act. In such a case it cannot be said that the proviso to S. 64 (3) has been ignored, for the proviso only requires that the assessee should have had an opportunity of representing his views and not that he should have been formally heard on his objection. The filing of the affidavit represented the views of the assessee and he need not be heard after the department had come to a decision on the point. (*Collister and Baipai, JJ.*) KANHAIYA LAL GOENKA *v.* COMMISSIONER OF INCOME-TAX, U.P. **I.L.R. (1940) All. 785 = 193 I.C. 725 = 13 R.A. 445 = 1941 I.T.R. 25 = 1940 A.L.J. 855 = 1940 A W.R. (H.C.) 655 = A.I.R. 1941 All 129.**

——**S. 30**—*Scope—Partner of firm—Appeal against order assessing him personally—If can ask for re-opening of assessment of firm.*

An individual partner may appeal from the assessment of the firm of which he is a partner; but he cannot, in an appeal from an order assessing him personally, ask for a re-determination of the question of the assessment of the firm and the income which has come to his share according to that assessment. (*Dalip Singh and Ram Lall, JJ.*) SURAJ DEV KHANNA *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **1941 I.T R. 190.**

——**S. 30 (1)**—Order refusing registration under S. 26-A—Appeal prior to amendment of 1933. *See* 1940 Dig., Col. 715. COMMISSIONER OF INCOME TAX, BOMBAY *v.* BASSANTRAM. **1941 I.T.R. 254.**

—— **(as amended in 1933), S. 30 (1)**—Scope—Order refusing to register firm made prior to amendment—Appeal—Competency. *See* 1940 Dig., Col. 715. COMMISSIONER OF INCOME-TAX, BOMBAY *v.* GANGARAM KANAYALAL & CO. **13 R.S. 139**

——**S. 34**—Construction—"Escaped assessment"—Meaning of—Income not assessed to tax owing to mistake—Subsequent proceedings under S. 34—If justified—"Assessment"—Meaning of. *See* 1940 Dig, Col. 716. P. C. MALLICK AND D. C. AICH, *In re.* **191 I.C. 118**

——**S. 34**—Initiation of proceedings under—Prior quasi-judicial inquiry—If condition precedent. *See* 1940 Dig., Col. 717. COMMISSIONER OF INCOME-TAX, BENGAL *v.* MAHALIRAM RAMJIDAS. **I.L.R. (1940) Kar. (P.C.) 242.**

——**S 34**—*Jurisdiction—Conditions for exercise of power of re-assessment—Assessee—If to be heard before proceedings are decided upon.*

To enable the Income tax Officer to initiate proceedings under S. 34 of the Income-tax Act, it is enough that that officer on the information which he has before him and in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment or have been assessed at too low a rate. He is not required to convene the assessee, or to intimate to him the nature of the alleged escapement or to give him an opportunity of being heard before he decides to operate the powers conferred by S. 34. (*Collister and Baipai, JJ.*) INDIAN NATIONAL TANNERY. *In re.* **1941 I.T R. 618.**

——**Ss. 42 (1) and 43**—Business connection in relation to actual transactions in question—If necessary—'Agent'—Meaning of. *See* 1940 Dig., Col. 717. BANK OF CHETTINAD, LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **67 I.A. 394 = I.L.R. (1941) Mad. 89 = 1941 A L W. 76 = 1941 A.W.R (P.C.) 17 = 1941 O.A. 440 = 43 P.L.R. 281 = 73 C.L.J. 387 = I.L.R. (1940) Kar. (P.C) 371 = 1941 O.W.N. 74 = 43 Bom.L.R. 132 (P.C.).**

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——**S. 44**—Applicability—Partnership—Dissolution—Retirement of one partner and receipt by him of share of profits—Business continued by other partner—Liability of latter as 'successor' to assessment on such share of profits—S. 26 (2). *See* INCOME TAX ACT, SS. 26 (2) AND 44. **1941 I.T R. 1 (S.B.).**

——**S. 46**—*Recovery of tax—Remedy of Crown—Right of suit—Limitation.*

S. 46 of the Income-tax Act prescribes only a summary remedy and there is nothing in that section or in the other provisions of the Act to indicate that that is the only remedy by which income tax is recoverable. The time-limit prescribed in S. 46 (7) of the Act obviously applies to proceedings under that section. When income-tax is assessed, it becomes a debt due by the assessee to the Crown. The Crown as a creditor has the ordinary right of suit against the assessee. This is a right under the common law and there is nothing in the Act to take away this right. A suit for recovery of arrears of income tax would undoubtedly be a suit of a civil nature and such a suit would clearly be maintainable under the provisions of S. 9, C. P. Code, and would be governed by Art. 120, if not by Art. 149 of the Limitation Act. (*Harries, C.J. and Chatterji, J.*) INDERCHAND *v* THE SECRETARY OF STATE FOR INDIA. **14 R P. 188 = 8 B.R. 13 = 1941 I.T.R. 673 = 196 I.C. 228.**

——**S. 49 A**—*Right of set-off—If limited to amount of tax legally recoverable.*

The expression "remaining payable by the person" in S. 49-A of the Income-tax Act should not be read as meaning "legally recoverable from the person". If the Legislature had really intended that under S. 49-A the right of set-off was to be limited to an amount of tax legally recoverable, they could have expressly said so. (*Harries, C. J. and Chatterji, J.*) INDERCHAND *v.* THE SECRETARY OF STATE. **196 I.C. 228 = 14 R.P. 188 = 8 B.R. 13 = 1941 I T.R. 673.**

——**S 52**—"*Person*"—*Agent of firm sending false statement of income—Liability of.*

There is nothing in the Income-tax Act which suggests that it is essential that the act of sending an income-tax return under S. 22 of the Act should be done only by an assessee. It can be done equally by an agent or other person in charge of the assessee's business. The word "person" in S. 52 and in S. 22 (2) includes a person duly authorised. An agent who sends a false statement is therefore liable to be prosecuted under S. 52 of the Act. (*Horwill, J.*) INSPECTING ASSISTANT COMMISSIONER OF INCOME-TAX *v.* JAVERBHAI. **1941 I.T R. 604 = 1941 M W.N. 841 = 54 L W. 291 = A I.R. 1941 Mad. 941 = (1941) 2 M.L.J. 475.**

——**S. 54**—Scope—Certified copies of income-tax returns and profit and loss statement—Production by one party at the instance of other—Power of Court to compel. *See* C. P. CODE, O. 11, R. 14. **(1941) 1 M.L.J. 617.**

——**S 54 (1)**—*Scope—Mandatory character—Application in Court calling upon Income-tax Officer to produce books of firm deposited with him in income-tax proceedings—Maintainability.*

The wording of S. 54 (1) of the Income-tax Act is perfectly clear. It is emphatic in its language and mandatory in its provisions. Though, as a matter of practice, the Income-tax authorities may allow a partner to inspect the books of his firm which have been deposited with him that is in no way any departure or exception to the provisions of S. 54. No person, even if he is a partner in the firm whose books are in the possession of the Income-tax Officer is entitled to production or even to an examination as of right of the books,

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which that officer has, when the same has been produced before him in the course of proceedings under the Income-tax Act. If an application is taken out in a suit in Court by a partner of the firm to call upon the Income-tax Officer to produce the book, the Income-tax Officer is entitled to refuse to produce it. (*Gentle, J.*) RANGASWAMI NAICKER *v.* RAJU NAICKER.

1941 I.T.R. 693.

——**Ss 58 K (2) and 10 (2) (ix)**—*Interpretation of S. 58-K (2)—'Without addition of interest' and 'his share'—Meaning of—Scheme of the Act with reference to such deductions.*

The words 'without addition of interest' occurring in S. 58-K (2) of the Income-tax Act mean 'without taking into account the interest earned on the fund after it has been transferred to the trustees' and the words 'his share' mean, the employer's contributions and interest thereon up to the date of transfer. It seems to be the scheme of the Act that the employer is to have the advantage of the deductions in respect of money which he has contributed to the fund together with the increase to the fund which his money has earned prior to the time of the transfer of the fund to the trustees. He is not to have any benefit in respect of employee's contributions or interest thereon up to that time and he is not to have the benefit in respect of any interest that is earned by the fund after transfer. (*Stone, C.J. and Clarke, J.*) COMMISSIONER OF INCOME-TAX, C. AND U. P. *v.* CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING CO., LTD. **I.L.R. (1941) Nag. 240.**

——**S. 59**—*Income-tax Rules, R. 35—Assessment under—When permissible.*

The Income-tax Officer is authorised to have recourse to the method of computation provided by R. 35 of the Income tax Rules only "in the absence of more reliable data". When he has before him the quinquennial valuations and the actuarial reports of the assessee company in respect of their Indian Life Insurance business, he cannot reject them *in toto* and assess the company under the proportionate scheme of R 35, even if he questions the correctness of certain particulars in them. On the other hand, he must apply himself to the data before him and assess the profits and gains of the company in accordance with the methods customarily employed in estimating the profits of Life Assurance Companies. (*Derbyshire, C.J. and Panckridge, J.*) *In the matter of* ROYAL INSURANCE CO., LTD.

I.L.R. (1941) 1 Cal. 550 = 1941 I.T.R. 589 = 45 C.W.N. 694.

——**S. 60 (1)**—Notification No. 11, dated 4-4-1936—Applicability—Assessment levied for 1936-1937 in respect of income for 1935-1936—Law applicable. *See* 1940 Dig., Col. 718. COMMISSIONER OF INCOME-TAX, BOMBAY *v.* SIND HINDU PROVIDENT FUNDS SOCIETY. **196 I C. 143 = 14 R S 51 = A I.R. 1941 Sind 110.**

——**S. 64 (3)**—Proviso— Decision as to place of assessment—Appeal, if lies against— Scope of proviso. *See* INCOME-TAX ACT, SS. 30, 64 (3) AND 66.

1940 A.L.J. 855.

——**S. 66**—Powers of High Court—Decision as to place of assessment under S. 64 (3)—If can be dealt with under S 66. *See* INCOME TAX ACT, SS. 30, 64 (3) AND 66. **1940 A L.J. 855.**

——**S. 66**—Reference to High Court under—Function of the High Court. *See* 1940 Dig., Col. 718. RAJENDRA NARAYAN BHANJ DEO *v.* COMMISSIONER OF INCOME TAX, B. & O.

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——**S. 66 (2)**—*Abatement — Death of assessee at whose instance reference is made—Power of Court to deal with reference.*

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The mere death of an assessee at whose instance a reference was made does not preclude the High Court from answering the question or questions formulated by the Commissioner of Income-Tax. (*Collister and Baipai, JJ.*) KISHORI LAL MAKUNDI LAL, *In re.*

1941 I.T.R. 193.

——**S. 66 (2)**—Application under—Pleader filing—Vakalat for all purposes and all sections—Withdrawal of application by pleader on getting taxable amount reduced in revision—Repudiation by client and application for statement of case—Maintainability. *See* 1940 Dig., Col. 719. HASHEN BANU BIBI *v.* COMMISSIONER OF INCOME-TAX, BENGAL. **A.I.R. 1941 Cal. 183.**

——**Ss. 66 (2) and (3) and 23 (4)**—Assessment under S. 23 (4)—S. 66 (2) and (3) if apply. *See* 1940 Dig., Col. 719. LAKSHMI PAT MAHADEVI *v.* COMMISSIONER OF INCOME-TAX, C.P. & U P **15 Luck. 723.**

——**Ss. 66 (2) and 6**—*Bad debt—Questions as to—Questions of fact.*

The questions whether a debt is bad, the point of time at which it became bad and its extent are questions of fact to be decided by the Income-tax authorities. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* HAJEE ABDUL GANNY. **1941 Rang L R. 529 = 14 R.R. 53 = 1941 I.T.R. 339 = A.I.R. 1941 Rang. 185 (S.B.).**

——**S. 66 (2)**—*Finding that deposits in names of partners of firm are profits from unknown source—Sufficiency of evidence to justify.*

In the assessment year 1937-1938, the deposits in the personal accounts of the partners of a firm were in exact proportions to their shares in the business, and when these were included in the assessable profits, the assessee firm submitted to the assessment. In the next assessment year, 1938-1939, the items credited in the personal accounts of the partners were not in proportion to their shares in the business and when the firm was called upon to prove that these items did not come from an undisclosed source of profit, it was unable to produce any sort of account in support of its plea that the same represented capital privately held by each partner. The Income-tax authorities were further satisfied that on the days on which these items were credited, the business was not in need of any moneys from outside.

Held that it could not, under the circumstances, be possibly said that there was no material before the Income-tax authorities which was capable of supporting their finding that the deposits in the personal accounts of the partners were profits from some unknown source. (*Collister and Baipai, JJ.*) MAHOMED AYUB MAHOMED JAMIL, *In re.* **1941 I.T.R. 610.**

——**S. 66 (2)**—Question of fact to be decided on findings of Commissioner—Proof required of assessee. *See* 1940 Dig., Col. 719. PUNJAB CO OPERATIVE BANK, LTD. *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **67 I.A. 464 = I.L.R. (1940) Lah 685 = I.L R. (1940) Kar 447 (P.C) = 191 I.C. 548 = 13 R.P.C. 130 = 7 B.R 309 = 1940 M.W.N. 1275 = 22 Pat.L.T. 1 = 45 C.W N. 232 = 1941 P.W.N. 54 = 1941 O.L.R. 42 = 43 P.L R. 168 = 73 C L.J. 302 = 43 Bom.L R 372 = (1941) 1 M.L.J. 130 (P.C.).**

——**S 66 (2)**—Question of law—Assessment under S. 23 (4) *See* INCOME-TAX ACT, SS. 23 (4) AND 66 (2). **1941 O W.N. 757.**

——**S. 66 (2)**—*Question of law—Existence of materials for Assistant Commissioner's finding about the presence of a head office account—Proof of such existence—Procedure.*

Where an Assistant Commissioner found that there should have been a head office account and on its not

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being produced even on demand proceeded to apply S. 23 (4) of the Income-tax Act, the question whether there were any materials upon which the Assistant Commissioner could find that a head office account, was in existence, is a question of law. There need not be positive evidence to prove their existence. Where the giving of positive evidence by the Department about facts which are in the special knowledge of the assessee is almost out of question, materials which come within the description of circumstantial evidence or general probabilities such as are to be regarded under the provisions of S. 114, Evidence Act, are evidence or materials upon which the Court can come to a finding just as properly as it could upon positive evidence. (*Yorke and Bennett, JJ.*) COMMISSIONER OF INCOME-TAX, C.P. AND U. P. *v.* KANHAIYA LAL. **16 Lnck. 579=192 I.C. 609=13 R O. 370=1941 O.L.R. 188=1941 O.W.N. 68=1941 O.A. 38.**

——**S. 66 (2)**—Question of law—Loss if a capital loss or trading loss—Book debts taken over turning out to be irrecoverable. *See* INCOME-TAX ACT, SS. 10 AND 66 (2). **A.I.R. 1941 Rang. 273 (S.B.).**

——**S. 66 (2)**—*Question of law—Sufficiency of evidence.*

The sufficiency of evidence is a question of fact, but the question whether there is evidence at all from which an inference could be drawn is a question of law. (*Yorke and Bennett, JJ.*) KANHAIYA LAL UMRAO SINGH *v.* COMMISSIONER OF INCOME-TAX, C. AND U. P. **1941 I.T.R. 225=A.I.R. 1941 Oudh 279.**

——**S. 66 (2)**—*Question of law—Validity of assessment made by Income-tax Officer—If can be raised.*

The question whether an assessment made by an Income-tax Officer under S. 23 (4) of the Income-tax Act is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner under S. 27 now S. 31 of the Act, and therefore such a question cannot be raised in a reference under S. 66 (2) arising out of the order of the Commissioner under S. 27. (*Yorke and Bennett, JJ.*) KANHAIYA LAL UMRAO SINGH *v.* COMMISSIONER OF INCOME-TAX C. & U. P. **1941 I T.R. 225=A.I.R. 1941 Oudh 279.**

——**S. 66 (2) and (3)**—*Reference—Competency—Assessment to the best of judgment under S. 23 (4)—Appeal—Rejection on ground that assessment has been properly made—Reference or application for reference—If competent.*

A reference under S. 66 (2) or an application under S. 66 (3) of the Income-tax Act will not be competent unless it can be shown that the order of the Assistant Commissioner out of which the alleged questions of law arise or said to arise was an order "disposing of the appeal" passed under S. 31 of the Act. Where an assessment has been made, not in form only but in fact, not ostensibly but actually in good faith, under S. 23 (4) of the Income-tax Act, and where the Assistant Commissioner, upon consideration of the facts has found that the assessment was properly so made, the proviso to S. 30 of the Act bars an appeal; and the order of the Assistant Commissioner rejecting the appeal is not an order under S. 31 inasmuch as he has not "disposed of" the appeal. In such a case there can be no question of law referable to the High Court under S. 66 (2) or 66 (3) of the Act. (*Collister and Bajpai, JJ.*) BHIKHI RAM RAMDEO *v.* COMMISSIONER OF INCOME TAX, C. P. & U. P. **1941 I.T.R. 306.**

——**S. 66 (2)**—*Scope—Question not referred to High Court—If can be decided.*

It is not competent to the High Court in a reference under S. 66 (2) of the Income-tax Act to decide a question which has not been referred to the High Court by the Commissioner, though it may be open to the assessee to apply under S. 66 (3). (*Collister and Bajpai, JJ.*) INDIAN NATIONAL TANNERY, *In re.* **1941 I.T.R. 618.**

——**S. 66 (2) and (3)**—Settled question of law—Reference if can be ordered. *See* 1940 Dig., Col. 721. LAKSHMI PAT MAHADEVI *v.* COMMISSIONER OF INCOME TAX, C.P. & U.P. **15 Luck. 723.**

——**S. 66 (3)**—*Appeal to Privy Council—Competency—Order summarily rejecting application for reference—Application for leave to appeal—Competency—C. P. Code, S. 110—Letters Patent (Patna), Cl. 31.*

A right of appeal must be given by express enactment and cannot be implied. The function of the High Court in cases referred to it under S. 66 of the Income-tax Act is advisory only, and is confined to considering and answering the actual questions referred to it. An application under S. 66 (3) for an order directing the Commissioner to state a case was summarily rejected by the High Court and the assessee thereupon applied under Cl. 31 of the Letters Patent and S. 110, C. P. Code, for leave to appeal to His Majesty in Council.

Held, (1) that the order of the High Court under S. 66 (3) was not a final judgment, decree or order, as required by Cl. 31 of the Letters Patent, and therefore there was no right of appeal to His Majesty in Council; (2) that the assessee had no right to invoke the jurisdiction of the High Court under S. 110, C. P. Code; (3) that the mere fact that the question was a serious one was no ground for the High Court to grant a certificate of leave to appeal to His Majesty in Council when the High Court was satisfied that there was no right of appeal to the Privy Council from any order, preliminary or final, passed by the Court while acting under S. 66 of the Income-tax Act. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) HARIHAR GIR *v.* COMMISSIONER OF INCOME-TAX, B. & O. **20 Pat. 561=195 I.C. 589=14 R.P. 133=7 B.R. 951=22 Pat.L.T. 341=1941 I.T.R. 246=1941 P.W.N. 267=A.I.R. 1941 Pat. 225.**

——**S. 66 (3)**—Question of fact—Decision that debt had become bad long before—Interference. *See* INCOME-TAX ACT, S. 10 (2) (*xi*). **1941 I.T.R. 332.**

——**S. 66 (3)**—*Question of fact—Interference—If justified.*

Where a matter is one of fact, the High Court, though it might differ from the view of the Commissioner if the matter were before it as an appellate Court, cannot interfere with the order of the Commissioner merely on the ground that finding of fact arrived at by him was wrong. (*Dalip Singh and Ram Lall, JJ.*) SURAJ DEV KHANNA *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **1941 I.T.R. 190.**

——**Ss. 66 (3) and 25-A**—*Question of fact—Question whether Hindu family is divided.*

The question whether a Hindu family is divided or undivided is a question of fact which is not within the competence of the High Court to decide. (*Almond, J.C.*) GANESHDAS RAM SINGH, *In re.* **195 I.C. 685=14 R. Pesh. 18=1941 I.T R. 311=A.I R. 1941 Pesh. 64.**

——**S. 66 (3)**—*Question of law—Application of S. 13—Discretion of Income-tax Officer—Interference by High Court.*

The Income-tax Officer is empowered to apply the proviso to S. 13 of the Income tax Act if the method employed for accounting by the assessee is in the opinion of the officer such that the income, profits and gains cannot properly be deduced therefrom. It is a matter entirely for the Income-tax Officer to determine whether

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the accounts kept by the assessee are such that the income profits and gains cannot be properly deduced therefrom; the High Court would not interfere with any finding of an Income-tax Officer on such a point unless the decision is arbitrary or capricious. There is no question of law involved in such case so as to justify an order for reference under S. 66 (3) of the Act. (*Almond, J.C.*) MAKHAN MAL RAM CHAND *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **1941 I.T.R. 330.**

——**S. 66 (3)**—*Question of law—Assessment on estimate—Assessee's book not reflecting correct state of account—Application for reference—Competency.*

Where in a case the Income-tax Deparment finds that there are not only irregularities in the method of keeping accounts but that the books produced by the assessee do not reflect a correct state of his accounts, the Income-tax authorities are entitled to make an assessment by estimate under S. 23 (4) of the Income-tax Act. In such a case there is no question of law on which the Department can be required to state a case to the High Court. (*Dalip Singh and Ram Lall, JJ.*) GANESHI LAL RAMCHAND *v.* COMMISSIONER OF INCOME TAX. **1941 I.T.R. 241.**

——**S. 66 (3)**—*Question of law—Deposits entered in accounts, if income, or profits or capital.*

The question whether certain cash deposits on various dates entered in the khata of the assessee, is income or profits assessable to tax or is capital, is not a question of law, but one of fact and therefore cannot be considered in an application under S. 66 (3) of the Income-tax Act. (*Yorke and Bennett, JJ.*) CHATURBHUJ *v.* COMMISSIONER OF INCOME-TAX, U. P. AND C. P.

1941 O A. 500 = 1941 O.W N. 757 = 1941 A.W R. (C.C.) 203 = 1941 A L.W. 595 = 1941 I.T.R. 286 = A I.R. 1941 Oudh 445.

——**S. 66 (3)**—*Question of law—Finding on accounts that amount entered therein represents profits—Reference on—Competency.*

Where on the account books of the assessee himself and on the statements made by him, the Income-tax authorities come to the conclusion that a particular sum of money entered in the books represented the profits of the assessee for the year in question, there is no question of law involved, the question being purely one of fact. (*Collister and Baipai, JJ.*) GANGA PRASAD *v.* COMMISSIONER OF INCOME-TAX, U. P. **1941 I.T.R. 373.**

——**S. 66 (3)**—*Question of law—Finding that person is not partner in firm—Power to call for statement of case.*

It is quite obvious that the question whether a certain person is a member of a partnership or not is a question of fact, and if there is evidence on which the Income-tax Commissioner can come to a finding that a person is not a member of a firm but that the firm is a joint Hindu family firm, there is no ground for calling upon him to state a case under S. 66 (3) of the Income-tax Act. (*Almond, J. C.*) HUKAM CHAND DUNI CHAND *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **1941 I.T.R. 616.**

——**S. 66 (3)**—*Question of law — Question under S. 25-A, as to whether a Hindu family was divided—Reference on—Maintainability.*

The question whether a separation of the members of a Hindu family has taken place and the joint family property has been partitioned among the various members or groups of members in definite shares under S. 25 A of the Income-tax Act is purely one of fact which is not within the competence of the High Court to decide. An application to refer such a case under S.66 (3) of the Income-tax Act is therefore incompetent.

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(*Almond, J.C.*) GANESH DAS RAM SINGH, *In re.* **195 I.C. 685 = 14 R. Pesh 18 = 1941 I.T.R. 311 = A.I.R. 1941 Pesh 64.**

——**S. 66 (3)**—*Powers of High Court under—Power to direct reference on ground of new evidence produced in High Court.*

The assessee's claim for deduction of a bad debt was disallowed by the Income-tax department on the ground that it was not proved that the debt had become bad or irrecoverable. In an application under S. 66 (3) of the Income-tax Act for a reference, the assessee produced two letters which, if genuine, would show that the debt could no longer be recovered from the debtor.

Held, that it was not open to the High Court, not being an appellate Court, to hold that the order of the Income tax Commissioner was incorrect on the ground that this evidence was not produced before him should now be taken into consideration by him. The Commissioner could still review his order if he considered the letters genuine and could give the assessee the relief claimed, if he was of opinion that it was justly due. (*Dalip Singh and Ram Lall, JJ.*) SHYAM CHAMBERS, LTD. *v.* COMMISSIONER OF INCOME TAX, PUNJAB **1941 I.T.R. 224.**

——**S. 67**—*Jurisdiction of Civil Court—Question if claim for refund was validly discharged.*

A suit in which the only question is whether the plaintiff's claim for a refund was validly discharged by the Income-tax department, and no question of setting aside or modifying any assessment made under the Act arises, does not fall within the terms of S. 67 of the Income-tax Act and is, therefore, not barred. (*Harries, C. J. and Chatterji, J.*) INDERCHAND *v* THE SECRETARY OF STATE FOR INDIA. **196 I.C. 228 = 14 R.P. 188 = 8 B.R. 13 = 1941 I.T.R. 673.**

INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (1926)—*Cruelty—What may not amount to.*

Where during the honeymoon the wife was struck on the face which necessitated a doctor's attendance but did no bodily harm to her and where the husband persisted in writing letters to his wife expressing his doubts as to paternity of the child of his wife, it was held that these did not amount to legal cruelty which would enable her to obtain a divorce under the Indian Colonial Divorce Jurisdiction Act. (*Sharpe, J.*) H USSHER *v.* T. USSHER. **1941 Rang.L.R. 290 = 196 I.C. 270 = 14 R.R. 73 = A.I.R. 1941 Rang. 221.**

——**S. 1**—Jurisdiction under—Parties to marriage last residing in Lahore—Wife living in Bombay before and at time of petition for divorce—Husband living in Lahore—Petition by wife in Bombay High Court—Maintainability—Rule 24 under S. 1 (4)—Construction. *See* 1940 Dig., Col 723. P. C. CARROLL *v.* C. J. CARROLL. **I.L.R. (1941) Bom. 183 = 192 I.C. 767 = 13 R B. 289 = A.I.R. 1941 Bom. 61.**

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See (1) C. P. CODE, O. 39

(2) SPECIFIC RELIEF ACT, SS. 42 AND 54.

——Grant of—Discretion of Court—Exercise of—Principle—Mortgagor and mortgagee—Suit by mortgagor for injunction to restrain sale by mortgagee after debt has become due—Maintainability. *See* MORTGAGE—POWER OF SALE **43 Bom.L.R. 890.**

——*Grant of, when should be refused.*

The granting of an injunction is a discretionary matter and if the defendant has given an assurance that he would refrain from any action to the prejudice of the plaintiff, the Court should be loath to consider that circumstances could make it desirable to grant an injunc-

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tion in such a case. (*Roberts, C.J. and Dunkley, J.*) U LUN *v.* U CHIT HLAING. **1941 Rang L.R. 101 = 193 I.C. 114 = 13 R.R. 228 = 4 F.L J. (H C.) 114 = A.I.R. 1941 Rang. 49.**

———*Injunction interfering with working of Government departments—If can be granted.*

An injunction cannot be given to interfere with the working of Government departments. (*Beckett, J.*) SYED MAZAFFAR HUSSAIN *v.* ADMINISTRATOR OF THE LAHORE MUNICIPALITY. **A.I.R. 1941 Lah. 453.**

———Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court on ground of convenience—Power to issue. *See* C. P. CODE, S. 10. **I.L.R. (1941) 1 Cal. 373.**

———Jurisdiction of High Court—Injunction restraining defendant from litigating in another Court—Power to grant. *See* C. P. CODE, SS 10 AND 151. **I.L.R. (1941) 1 Cal. 490.**

———*Right to—Defendant opening door towards lane belonging to plaintiff.*

The opening of a door by the defendant towards a lane belonging to the plaintiff would be an invasion of the well-established right of ownership vested in the plaintiff, and the plaintiff would be well within his right to ask for an injunction restraining the defendant from opening that door towards the lane belonging to him. (*Rachhpal Singh and Wazir, JJ.*) SURJAN *v.* GANPATIDASS. **43 P.L.R. J. & K. 122.**

INSOLVENCY.

See also (1) PRESIDENCY TOWNS INSOLVENCY ACT.
(2) PROVINCIAL INSOLVENCY ACT.

———Acknowledgment of pre-partition debt by Hindu father in his schedule—If keeps debt alive against his sons. *See* HINDU LAW—DEBTS. **(1941) 2 M.L.J. 311 (F.B.).**

———Fraudulent preference—Insolvent borrowing loan with permission of Official Assignee and authorising creditor to collect part of his salary from employer every month—Official Assignee permitting creditor to collect salary—Effect of—If voluntary payment—Right to recover back. *See* 1940 Dig., Col. 725. OFFICIAL ASSIGNEE *v.* SECRETARY, M. & S. M. RAILWAY EMPLOYEE'S CO OPERATIVE URBAN BANK, LTD. **I.L.R. (1941) Mad. 61 = 194 I C. 318 = 13 R M. 748 = 53 L W. 662 = A.I.R. 1941 Mad 297 = (1941) 1 M.L.J. 703.**

———*Official Assignee or Official Receiver—Position of—Liability for costs of proceedings in Civil Court—Personal liability—Costs as between him and the estate represented by him—Direction as to—Jurisdiction of Civil Court to make.*

The Official Assignee in a Presidency Town or the Official Receiver in the mofussil is an officer of Court discharging his function to the best of his ability. He ought not to be made personally liable for costs as between him and the estate which he represents unless he is guilty of gross misconduct in taking the action which he takes. Where the Official Assignee or the Official Receiver is a defendant or a respondent and appears in the proceedings, the usual rule, when he is not guilty of gross misconduct in the conduct of his defence, ought to be that the costs should come out of the estate. In such a case, there is no justification for the Court to make him personally liable to the plaintiff or applicant. In any case the Court before which the suit or application comes on has no jurisdiction to say whether the Official Assignee or the Official Receiver should or should not debit the costs against the estate which he represents. That is a matter for the Insolvency Court of which he is the

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officer. In cases where he is a defendant and he does not appear, no costs ought to be given against him personally. (*Somayya, J.*) RAMASWAMY CHETTY, *In the matter of.* **1941 M W N. 341 = 53 L.W. 680 (2) = A.I.R. 1941 Mad. 632 = (1941) 2 M.L.J. 110.**

———Policy of insolvency law. *See* 1940 Dig., Col. 725. KHUPCHAND *v.* RAJESHWAR. **192 I.C. 572 = 13 R.N. 270.**

———*Receiver—Sale by—Subsequent invitation to creditors for higher offers—Propriety of.*

A sale held by the Official Receiver should be final. It is not proper for the Official Receiver after an auction is held to circularise the other creditors inviting higher bids from them. Such a system is objectionable, because persons will not come forward and bid for the property at a public auction if the highest bid is not accepted. (*Burn and Horwill, JJ.*) RAMASWAMI REDDIAR *v.* OFFICIAL RECEIVER OF SOUTH ARCOT **54 L.W. 215 = 1941 M W.N. 1016 = A.I.R. 1941 Mad. 827 = (1941) 9 M.L.J. 382.**

INSURANCE— Fire insurance—Onus of proof—Agreement between parties. *See* 1940 Dig., Col. 726. SAMUEL *v.* ASSICURAZIONI GENERALI. **7 B.R. 194.**

———Fire insurance—Policy—"Civil commotion"—Meaning. *See* 1940 Dig., Col. 726. SAMUEL *v.* ASSICURAZIONI GENERALI. **7 B.R. 194.**

———*Fire, marine and life—Contract of re-insurance—If one of indemnity—Cause of action, when arises—Contract Act, Ss. 124 and 125 (3).*

The words 'contract of indemnity' in S. 124 have been used in a narrow sense and the general law about contracts of indemnity is much wider than the contracts of indemnity as defined in the Contract Act. A contract of fire insurance or marine insurance is always a contract of indemnity though under the Contract Act it would more properly come under S. 31 defining contingent contracts. A contract of re-insurance of a fire or a marine insurance is therefore always a contract of indemnity whether the re-insurance is an insurance of the liability incurred by the original insurer or whether it is an independent insurance of the thing originally insured. In the case of life assurance, the contract originally is not one of indemnity. Therefore, it depends on the terms of the re-insurance policy as to whether the contract of re-insurance is a contract of indemnity of the risk incurred by the original insurer or whether it is an independent contract insuring the same life for the same sum or some portion of that sum for which it was originally insured. The document embodying the terms of a re-insurance guarantee policy ran "The Zenith Company re-insures the Tropical Company to the extent of Rs. 10,000 in part of its risk upon the life insured under its policy. It is subject to all the terms and conditions including that of settlement of claim contained in the original policy".

Held, that the terms of re-insurance did not amount to an insurance of the original life insured but were an insurance of the risk incurred by the original insurer, that is, the Tropical Insurance Company, and therefore the re-insurance was a contract of indemnity and consequently cause of action did not accrue to the original company until it had paid the policyholder.

Held further, that the contract of re-insurance did not fall within the terms of S. 124, Contract Act, and therefore S. 125 (3) did not apply or govern it. (*Dalip Singh and Sale, JJ.*) TROPICAL INSURANCE CO. *v* ZENITH LIFE ASSURANCE CO. **196 I.C. 198 = 14 R.L 143 = A.I.R. 1941 Lah. 68.**

———*Life—Contract of re-insurance amounting to contract of indemnity—Power of indemnified to compromise.*

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In the case of a contract of re-insurance amounting to a contract of indemnity the indemnified can compromise a case against the orders of the indemnifier and provided the compromise is made *bona fide* the indemnifier would be liable to re-imburse the indemnified proportionately for the loss incurred. (*Dalip Singh and Sale, JJ.*) TROPICAL INSURANCE CO. *v.* ZENITH LIFE ASSURANCE CO. **196 I.C. 198=14 R.L. 143= A.I.R. 1941 Lah. 68.**

———*Life insurance — "Insurable interest" —One relation effecting insurance on life of another—Contract Act, Ss. 23 and 30.*

Relationship *per se* does not create an insurable interest when one relation effects an insurance on the life of another. To give the person effecting the insurance an insurable interest in the life of the person insured, there must be actual dependence of the person effecting the insurance on the person whose life is insured and a reasonable expectation of benefit from the continued existence of such person. An insurance on the life of a person in which the person effecting the insurance has no interest is against public policy and is also a wagering contract under the provisions of Ss. 23 and 30 of the Contract Act. (*Abdul Rashid, J.*) MANI SHANKAR SOMESHWAR PANDYA *v.* ALLIANZA UND STUTTAGARTER LABENS VERSICHERUNGS BANK. **193 I.C. 155=13 R.L. 429=42 P.L.R. 801= A.I.R. 1941 Lah. 33.**

———*Life insurance policy—Non-disclosure by assured of rejection of previous proposal—Company in possession of rejection card—Waiver.*

Where when a life insurance policy was issued the insurance company had in their possession a card sent by the Indian Life Assurance Offices Association which informed them of the rejection of a previous proposal made by the assured to another company, the possession of the card is sufficient ground for holding that they waived the right to object to the fact that the assured had not disclosed the rejection of the previous proposal. (*Panckridge, J.*) ASIMA SARKAR *v.* WESTERN INDIA INSURANCE CO. LTD. **45 C.W.N. 623.**

———*Marine—Loss by perils of seas—Ventilators of ship closed to prevent incursion of sea water—Closing of ventilators causing rice cargo to heat and ferment and thus damaging it—Damage, if recoverable.*

Causa proxima in insurance law does not necessarily mean the cause last in time but what is "in substance" the cause, or the cause "to be determined by commonsense principles." Where the ventilators of a ship during voyage are closed to prevent incursion of sea water and the closing of the ventilators damages the rice cargo by causing it to heat and ferment, the damage is recoverable as a loss by perils of the seas. (*Lord Wright.*) CANADA RICE MILLS, LTD *v.* UNION MARINE AND GENERAL INSURANCE CO., LTD. **A.I.R. 1941 P.C. 68.**

———*Marine—Perils of seas—Meaning of.*

Where there is an accidental incursion of sea water into a vessel at a part of the vessel and in a manner where sea water is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings It is the fortuitous entry of the sea water which is the peril of the sea in such cases. (*Lord Wright.*) CANADA RICE MILLS, LTD. *v.* UNION MARINE AND GENERAL INSURANCE CO. LTD. **A.I.R. 1941 P.C. 68.**

INSURANCE ACT (1938), S. 53.

———*Policy of insurance—Construction—Clause that receipt by agent for payment of premia was only interim receipt and that formal receipt to be issued by company only—Assured to intimate to Head Office in case of non receipt of formal receipt within 30 days—If disclaimer of agent.*

One of the terms of a policy of insurance was to this effect. "The receipts issued by agents are only interim receipts, and the formal receipt can be issued by the Head Office only. If any policy holder making payment to an agent of the company does not receive the formal receipt from Head Office within 30 days, he should immediately draw the attention of the Head Office to this fact for necessary action."

Held, payment by an agent was good, and a receipt of premium by the agent was receipt by the company, and that the clause in the policy was not a disclaimer of the authority of agents, but was only a provision for the benefit of the company in order that it may be afforded a check on remittances of its agents. (*Davis, C.J. and Weston, J.*) HUNDRAJ TOLOMAL *v.* LAXMI. **I.L.R. (1941) Kar. 409. = A.I.R. 1941 Sind 209.**

———*Policy of insurance—Non forfeiture clause—Construction—Surrender value exhausted by adjustment towards premia due- Subsequent premia—Days of grace—If available.*

A policy of insurance which as usual allowed 30 days of grace for payment of the premia contained *inter alia*, a non-forfeiture clause, which provided "If any premium due is not received in time, the policy does not lapse at once, but will be kept in force automatically for as long as the cash surrender value is enough to cover the premia to be paid."

Held; that it could not be held that as soon as the surrender value was exhausted by adjustment towards premia due which were not paid, the policy would automatically lapse on default of payment of a subsequent instalment falling due on the due date without reference to the days of grace. On a reasonable construction of the clause, it must be held that the policy would not lapse forthwith, but that the assured had the usual days of grace to pay the next premium falling due after the cash surrender value has been exhausted by adjustment. (*Davis, C.J. and Weston, J.*) HUNDRAJ TOLOMAL *v.* LAXMI. **I.L.R. (1941) Kar. 409= A.I.R. 1941 Sind 209.**

INSURANCE ACT (IV OF 1938), S. 7 (3) and (7) —Deposits made under old Act—Appropriation according to instalments. *See* 1940 Dig., Col. **726.** GENUINE INSURANCE CO. LTD., *In re.* **191 I.C. 374=13 R.C. 238.**

———**S. 9**—*Refund of deposit—Creation of new company in place of old—Scheme under S. 153 of Companies Act.*

Where under a scheme of compromise under S. 153 of Companies Act it is proposed not to change one kind of company into another kind of company, but, in the process of reconstruction, to put an end to the old company which was limited by shares and to create a new mutual company, the provisions of S. 9 of the Insurance Act with regard to refund of deposit will come into force. (*Lort Williams, J.*) LIGHT OF ASIA INSURANCE CO., LTD., *In re.* **45 C.W.N. 979.**

———**S. 53 (1)**—*'Court'—Province of Ajmer-Merwara.*

The word 'Court' has been defined in the Insurance Act as the principal Court of original jurisdiction and in the Province of Ajmer-Merwara, that is the District

INSURANCE ACT (1938), S. 110.

Court. Hence a District Court has jurisdiction to hear an application instituted under S. 53 of the Insurance Act and not any particular Judge of that Court. (*Davis.*) GUARANTEED SECURITY INSURANCE CO. LTD., AJMER *v.* SUPERINTENDENT OF INSURANCE.
1940 A.M.L.J. 86.

——**S. 110**—Appeals under—Procedure. *See* 1940 Dig., Col. 727. GENUINE INSURANCE CO., LTD., *In re.* **191 I.C. 374=13 R.C. 238**

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See also (1) C. P. CODE, S. 34.
(2) CONTRACT ACT, SS. 73 AND 74.
(3) INTEREST ACT.
(4) USURIOUS LOANS ACT.

——*Claim for—Basis—Practice of a particular shop, if amounts to usage—Bills stating that interest at a particular rate would be charged, if amounts to contract.*

A creditor can claim interest (1) on the ground of agreement, (2) on the basis of statute, and (3) on the ground of usage. The practice of a particular creditor's shop cannot amount to usage. Nor would the mere writing on the bills that interest at 1 per cent. will be charged, amount to a contract. (*Yorke and Agarwal, JJ.*) DEPUTY COMMISSIONER, KHERI *v.* RAM KUMAR SAXENA. **16 Luck. 701=192 I.C. 885=13 R.O. 421=1941 A.W.R. (C.C.) 70=1941 O.L.R. 245=1941 O.W.N. 108=1941 O.A. 142=A.I.R. 1941 Oudh 254**

——*Liability of purchaser to pay on getting possession without payment of price—Applicability of principle to compulsory purchases.*

If in cases where Courts of equity would grant specific performance the purchaser obtains possession of the subject-matter of contract before the payment of the price, he must in the absence of express agreement to the contrary pay interest on his purchase-money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money. The principle of payment of interest on the purchase-money from the date of the purchase to the date of payment, applies to compulsory purchases also. (*Lord Luxmoore.*) INTERNATIONAL RAILWAY CO. *v.* NIAGANA PARKS COMMISSION.
197 I.C. 186=1941 O.A. 901=1941 A.W.R. (P.C.) 76=A.I.R. 1941 P.C. 114.

INTEREST ACT (XXXII OF 1839), S. 1—*Applicability—Notice—Necessity*

The Interest Act is applicable only when a notice is given that interest will be claimed from the date of demand till date of payment. In the absence of such a notice interest cannot be claimed under the Act. (*Yorke and Agarwal, JJ.*) DEPUTY COMMISSIONER, KHERI *v.* RAM KUMAR SAXENA.
16 Luck. 701=192 I.C. 885=13 R.O. 421=1941 A.W.R. (C.C.) 70=1941 O.L.R. 245=1941 O.W.N. 108=1941 O.A. 142=A.I.R. 1941 Oudh 254.

INTERPRETATION OF STATUTES—*Acts ousting Jurisdiction—Strict construction.*

Acts which oust the Jurisdiction of the Court or interfere with the common law rights of a subject are to be strictly construed. (*Stone, C.J. and Bose J.*) MANAGER, COUET OF WARDS *v.* SETH MOOLCHAND.
I.L.R. (1941) Nag. 279=1941 N.L.J. 351=A.I.R. 1941 Nag 226

——Acts in *pari materia. See* 1940 Dig., Col. 728. BIJAYNAGAR TEA CO., LTD. *v.* INDIAN TEA LICENSING COMMITTEE. **191 I.C. 387=13 R.C. 228.**

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——Addition or subtraction of words—Justification. *See* 1940 Dig., Col. 728. RAM CHANDRA *v.* RAM LAL.
I.L.R. (1940) All. 681=191 I.C. 745=13 R.A. 266.

——*Clear language—Duty of Courts.*

While interpreting a statute it is the duty of a Judge to infer the intention of the Legislature from the actual words used in the statute. It is improper, apart from the wording of the statute, to attempt to imagine what the intention of the Legislature was. Where the words of the statute are clear, it is improper to suppose that the Legislature really meant something else. (*Davis.*) KANWALNAIN *v.* SHAIKH AHMED HUSSAIN.
1940 A.M.L.J. 81

——Clear language—Duty of Court. *See* 1940 Dig., Col. 728. GANGA SAGAR *v.* REOTI PRASAD.
I.L.R. (1940) All. 771=191 I.C. 365=13 R.A. 226=1941 A.L.W. 7.

——Clear language—Duty of Courts. *See* 1940 Dig., Col. 729. RAMJATAN PANDEY *v.* SOMESHWARI PRASAD DUBE. **I.L.R. (1941) All. 127=192 I.C. 818=13 R.A. 366=1941 A.L.J. 60=1941 R.D. 178=1941 O.W.N. 386=1941 A.L.W. 275=A.I.R. 1941 All. 68.**

——*Construction of section as whole—Straining language—Impropriety.*

In order to interpret the section one has to read it as a whole and if it is clear what the intention of the Legislature is, and that meaning is the plain meaning of the words used, then it is improper to strain the language so as to endeavour to make it mean something else. (*Clarke, J.*) MUNICIPAL COMMITTEE, BILASPUR *v.* WAMANRAO VINAYAKRAO. **1941 N.L.J. 403=A.I.R. 1941 Nag. 292.**

——*Contemporary state of law—If can be referred to.*

It is not out of place, when construing the Act, to consider the state of the law existing at the time it came into force. (*Dunkley and Sharpe, JJ.*) U AYE *v.* U CHIT HLAING. **1941 Rang.L.R. 321=196 I.C. 372=14 R.R. 78=4 F.L.J. (H.C.) 129=A.I.R. 1941 Rang. 151.**

——*Decisions under English Act—Relevancy of.*

To construe an Indian Act in the light of cases decided under an English Act differently worded is much more likely to cause confusion than to render assistance. There is no justification for incorporating into the administration of the Indian Act difficulties arising on the construction of the English Act. (*Beaumont, C.J., Wassoodew and Sen, JJ.*) BAI KOKILABAI *v.* KESHAVLAL MANGALDAS & CO.
43 Bom L.R. 985 (F.B.).

——*Declaratory statute—Retrospective effect.*

A declaratory statute has a retrospective effect. (*Din Mahomed, J.*) FAZAL BEGUM *v.* HAKIM ALI.
193 I.C. 327=13 R.L. 451=A.I.R. 1941 Lah. 22.

——*Definitions in another Act—Reference to—Permissibility.*

An enactment has a particular object in view and definitions are provided in it for the purposes of shortening words to be used in the enactment and for the purpose of avoiding repetition. Unless, therefore, there be two Acts which may have been enacted for the same object in view, it is not only useless but dangerous to read one enactment by the provisions of another. GIAN CHAND *v.* MADAN LAL. **43 P.L.R. J and K. 58.**

——*Duty of Court—Language of Act to be taken as it is—Construction to fit in with pre-conceived idea as to intention of Legislature—If justified—Intention to be gathered from Act as a whole.*

INTERPRETATION OF STATUTES.

It is wrong for a Court, in construing an Act of the Legislature, to make up its mind, apart from the Act, as to what was the intention of the Legislature in passing the Act and construe the Act so as to give effect to its pre-conceived idea as to the Legislature's intention. That is not the way to construe an Act. The Court has to take the language as it finds it, although, of course, it has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole Act to be the intention of the Legislature. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* MAHOMED KASSAM PANWALLA. **43 Bom.L.R. 952.**

———*Duty of Courts—Policy of Legislature—Enquiry into.*

It is not within the province of the Court to criticise the policy of the Legislature; its duty is to construe and apply the enactments made by the Legislature. It is not open to the Court to go behind what has been enacted by the Legislature, and to enquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by some one on whom reliance was placed by it. The Court must accept the enactment as the law unless and until the Legislature itself alters such enactment on being persuaded of its error. (*Lord Chancellor.*) HOANI TE HEUHEN TUKINO *v.* AOTEA DISTRICT MAORI LAND BOARD. **196 I.C. 567=14 R.P.C. 45=1941 P.W.N. 522=1941 O.L.R. 753=8 B.R. 102=1941 A.W.R. (P.C.) 42=1941 O.A. 594=A.I.R. 1941 P.C. 109 (P.C.).**

———*Duty of Court to adhere to—Departure—When justified.*

Per *Iqbal Ahmad, Ag. C. J.*—It is the duty of a Court of law to primarily adhere to the strict literal interpretation of the words used, and the substitution of conjunctions should not be made without sufficient reason. But if such adherence is destructive of the object of the enactment and leads to anomalies and absurdities, it is fair to assume that the Legislature did not use the words in that sense and in such a case the conversion of 'and' into the disjunctive 'or' is permissible. (*Iqbal Ahmad Ag. C.J., Baipai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI. **I.L.R. (1941) All 471=195 I.C. 791=14 R.A. 84=1941 A.W.R. (Rev.) 704=1941 O.A. (Supp.) 636=1941 A.L.W. 693=1941 R.D. 611=A.I.R. 1941 All. 243 (F.B.).**

———*Duty of Court to give effect to grammatical meaning of words—Remedying of lacuna.*

If there is a lacuna in a statute, it is not the function of the Court to remedy it. The Court has simply to ascertain the grammatical meaning of the words and expression used and give effect to the same. (*Krishnaswami Aiyangar, J.*) SURYANARAYANA MURTHI *v.* MUNICIPAL COUNCIL, COCANADA. **1941 M.W.N. 772=54 L.W. 392 (2)=A.I.R. 1941 Mad. 877=(1941) 2 M.L.J. 338.**

———*English decisions—Resort to—Matter expressly provided in the Evidence Act.*

Per *Iqbal Ahmad, C.J.*—Even though a matter has been expressly provided for by the Evidence Act, recourse may be had to English decisions in order to interpret particular provisions of the Act when they are of doubtful import owing to the obscurity of the language in which they have been enacted. (*Iqbal Ahmad, C. J., Collister, Allsop, Baipai, Ismail, Braund, Mulla, JJ.*) PARBHOO *v.* EMPEROR. **1941 A.W.R. (H.C.) 320=1941 A.L.W. 1037=1941 A.Cr.C. 267=1941 O.A. (Supp.) 885 (1)=1941 A.L.J. 619=A.I.R. 1941 All. 402 (F.B.).**

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———Fiscal Act—Benefit of doubt to subject. *See* 1940 Dig., Col. 730. PREMALABAI *v.* PRIYAKUMARI. **191 I.C. 731=13 R.N. 207**

———*Fiscal statute.*

A fiscal statute should be construed strictly and where there is a doubt, the doubt should be resolved in favour of the subject. (*Ba U, J.*) U KYAW ZAN *v.* U TUN HLA U. **1941 Rang L.R. 54=194 I.C. 70=13 R.R. 273=A.I.R. 1941 Rang. 126.**

———Fiscal statute. *See* 1940 Dig., Col. 729. BANK OF CHETTINAD, LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **67 I.A. 394=I.L.R. (1941) Mad. 89=1941 A.L.W. 76=1941 A.W.R. (P.C.) 17=1941 O.A. 440=43 P.L.R. 281=73 C.L.J. 387=I.L.R. (1940) Kar. (P.C.) 371=1941 O.W.N. 74=43 Bom.L.R. 132 (P.C.).**

———*General and Special Acts—Earlier special enactment—Later general enactment—Implied repeal of former—Presumption.*

Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided by the special Act. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases provided for by the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* RAJESHWAR. **43 P.L.R. 457=A.I.R. 1941 Lah. 364.**

———General and special provision in conflict with each other—Rule in such cases. *See* 1940 Dig., Col. 730. JOY KRISHNA MAHANTY *v.* EMPEROR. **7 B.R. 139=42 Cr.L.J. 72.**

———*General words following specific words—Object of the Act, it can affect rule of interpretation.*

Per *Iqbal Ahmad, C. J.*—It is a well recognised cannon of interpretation that the general words which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words it is to be read as comprehending only things of the same kind as those designated by them unless, of course, there is something to show that a wider sense was intended. But the general object of the Act to be construed may sometimes require that the final generic word shall not be so restricted in meaning by its predecessors. (*Iqbal Ahmad, C. J. Allsop and Yorke, JJ.*) U. P. GOVERNMENT *v.* MANMOHAN DAS. **196 I.C. 425=14 R.A. 161=1941 A.W.R. (H.C.) 269=1941 A.L.J. 518=1941 O.A. (Supp.) 727=1941 A.L.W. 880=A.I.R. 1941 All. 345 (F.B.).**

———*General words—Restriction to purposes within Legislature's powers—Act, when and when not valid.*

If the restriction of the general words in a statute to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then the Act as a whole must be held invalid. If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself", (*Gwyer, C.J. Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, *In the matter of.*

I.L.R (1941) Kar. (F.C.) 148=194 I.C. 357=13 R.F.C. 70=1941 M W.N. 556=73 C L.J 415=54 L W 22=1941 P.W N. 401=1941 O.W.N. 880=7 B.R. 788=1941 O.A 661=1941 A.W R. (Rev.) 648=1941 A L.W. 774=45 C.W.N. (F R.) 81=22 P.L.T. 469=4 F.L.J. 1=A I R. 1941 F.C. 72=(1941) 2 M.L J. 12.

———*Implied repeal—Duty of Court—Onus.*

A repeal by implication is never to be favoured. If it is possible to read the later Act in such a way as to make it consistent with the law as it was before the later Act came into operation, then that is the way in which the Court ought to read it. The burden is on those who assert there is an implied repeal to show that the two statutes cannot stand consistently the one with the other and that there is some strong reason for saying that the earlier of two Acts was impliedly repealed by the later one. (*Sharpe, J.*) MARTIN *v.* WELLINGTON. **1941 Rang L.R. 615.**

———Income-tax Act—English decisions—Value of. *See* 1940 Dig., Col. 731. COMMISSIONER OF INCOME TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13=191 I.C 340=13 R.P. 295=1940 P.W.N. 1044=7 B.R 172.**

———*Intention of Legislature—Ascertainment—Rule—Reference to scheme of Act—When justified.*

The primary rule by which Courts should be guided in the construction of a statute is to consider first the words employed and ascertain their ordinary grammatical meaning. It is only where the words are ambiguous that it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) CHANDU *v.* SANKARAN. **53 L.W. 506=1941 M W.N. 440=A.I.R 1941 Mad. 558=(1941) 1 M.L.J. 573.**

———Interpretative Act—If takes away existing rights. *See* 1940 Dig., Col. 731. RAM SARAN *v.* SETH BALKISAN. **191 I C. 124=13 R.N. 161.**

———Jurisdiction of Civil Courts—Exclusion. *See* 1940 Dig., Col. 731. SECRETARY OF STATE *v.* MASK & CO. **I.L.R. (1940) Kar. (P.C.) 194=(1940) 2 M.L.J. 140 (P.C.).**

———*Language capable of two interpretations—Duty of Courts.*

Per *Iqbal Ahmed, J.*—When the phraseology of an enactment is clear and unambiguous and capable of one and only one interpretation, it is not open to the Courts to give a go-by to that interpretation simply with a view to carry out what is supposed to be the intention of the Legislature. But if the phraseology used is capable of two interpretations, that interpretation which is consistent with the object of the enactment is to be preferred to the interpretation that would nullify that object. Though a Court cannot, while interpreting a statute, assume the functions of the Legislature to legislate, it is nevertheless its duty to put a commonsense interpretation on statutory enactments in preference to a literal interpretation that is destructive of the object of the enactment. (*Iqbal Ahmad, Bajpai and Verma, JJ.*) HOTI LAL *v.* CHATURA PRASAD.

I.L.R. (1941) All. 77=194 I.C. 276=13 R A. 477=1941 A.W.R. (H.C.) 96=1941 O.A. (Supp.) 169=1941 A.L J. 137=A.I.R. 1941 All. 110 (F.B.).

———*Limitation Act—Plain meaning of language used—Considerations of hardship—Relevancy.*

A Limitation Act ought to receive such a construction as the language in its plain meaning imports. Great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. (*Viscount Maugham.*) GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD. *v.* JANMAHOMED ABDUL RAHIM. **67 I.A. 416=I.L.R. (1941) Bom 202=I L.R. (1941) Kar. (P.C.) 11=7 B.R. 660=193 I.C 225=13 R.P.C. 149=72 C.L.J. 497=1941 O A. 303=43 P.L R. 138=53 L.W. 212=1941 A.W.R (P.C.) 11=1941 M.W.N. 321=43 Bom.L.R. 346=45 C.W N. 429=1941 A.L W. 37=1941 P.W.N. 271=1941 O.L.R. 336=1941 O W.N. 4=A I.R. 1941 P.C. 6=(1941) 1 M.L.J. 88 (P.C.).**

———Machinery provisions. *See* 1940 Dig., Col. 732 COMMISSIONER OF INCOME-TAX, BENGAL *v.* MAHA LIRAM RAMJIDAS. **I.L.R. (1940) Kar. (P.C.) 242 (P.C.).**

———Mandatory enactments—If directory or obligatory. *See* 1940 Dig., Col. 732. GURDIT SINGH *v.* COMMITTEE OF MANAGEMENT, GURDWARA NAVIN PADSHAHI. **I.L.R (1940) Lah. 649.**

———*Mandatory or directory—Use of "shall".*

The word "shall" as used in an Act of the Legislature does not always mean that compliance with the condition is obligatory. No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. (*Tek Chand, J.*) MAHOMED IKHTIYAR *v.* KHANA. **196 I C. 400=14 R.L. 153=43 P.L R. 429=A.I.R. 1941 Lah. 310.**

———Marginal notes—Reference to. *See* 1940 Dig., Col. 732. BRIJ MOHAN SING *v.* TUISIRAM. **193 I.C. 75=13 R.N. 291.**

———Marginal notes—Use of to clear ambiguity *See* 1940 Dig., Col. 732. EMPEROR *v.* FULABHAI BHULABHAI. **42 Cr.L.J. 62.**

———*Meaning of same words used.*

It is a well known rule of construction of laws that the Legislature uses the same word in the same sense when it enacts a law. (*Niyogi and Clarke, JJ.*) CAWASHAH BOMANJI *v.* PRAFULLA NATH **A.I R. 1941 Nag. 364.**

———*Meaning of words clear—Duty of Court to give effect to—Hardship or injustice—Relevancy.*

If the language of an Act of Parliament is sufficiently clear, the Court can only give effect to it, however inequitable or unjust the result of such a construction may seem to the Court to be. But if the Court can avoid construing an Act of Parliament so as to cause what the Court regards as injustice it certainly ought to do so (*Beaumont, C.J. and Macklin, J.*) JAMIYATRAM GAURISHANKAR *v.* UMIYASHANKAR PRANSHANKAR. **196 I.C. 595=43 Bom L R. 699=A I R. 1941 Bom. 355.**

INTERPRETATION OF STATUTES.

———*Meaning of words—Income-tax Act—Words used in English Act—Relevancy.*

Where an Indian enactment such as the Income-tax Act is expressed in the English language the words used in it must be given the same meaning as is given in the construction of similar statutes in England. (*Leach, C.J., Somayya and Patanjali Sastri, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* JAMAL MAHOMED SAHIB. **I.L.R. (1941) Mad. 862 = 196 I.C. 13 = 14 R.M. 253 = 1941 I.T.R. 375 = 54 L.W. 167 = 1941 M.W.N. 690 = A.I.R. 1941 Mad. 535 = (1941) 2 M.L.J. 148 (S.B.).**

——— *Meaning of words—Natural or restricted meaning.*

(*Harries, C.J.*).—The words appearing in a statute must be given their natural meaning whenever possible but a restricted meaning must be given in cases where it is clear that such restricted meaning was intended. (*Harries, C.J. and Manohar Lall, J.*) MON MOHAN SINGH *v.* RAGHU NANDAN SINGH. **20 Pat 280 = 194 I.C. 23 = 7 B.R. 703 = 13 R.P. 666 = A.I.R. 1941 Pat. 465.**

———*New statute—Retrospective operation—Principles.*

Per *Sulaiman, J.*—An act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognised rule that statutes should as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation.

Per *Varadachariar, J.*—The presumption against retrospective operation is said to be so strong that it has been recognized that even in construing an act or a section which is to a certain extent retrospective, it ought not to be given a larger retrospective operation than the words clearly involve. Where it is intended to make a new law applicable even to pending actions, it is common to find the Legislature using language expressly referring to pending actions. (*Gwyer, C J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM. **I.L.R. 1941 Kar. (F.C) 72 = 192 I.C. 138 = 13 R.F.C. 15 = 72 C.L.J. 550 = 1941 A.L.J 170 = 1941 R.D. 121 = 1941 O.L.R. 121 = 3 F.L.J. 97 = 7 B.R 433 = 53 L.W 397 = 1941 A.L.W. 201 = 1941 M.W.N. 581 = 22 P.L.T 578 = 45 C.W.N. (F.R.) 27 = 1941 A.W.R. (Rev.) 109 = 1941 O.A. 159 = 1941 O.W.N. 297 = 1941 A.W.R. (F.C.) 3 = A.I.R. 1941 F.C. 16 = (1941) 2 M.L.J. (Supp.) 65.**

———*Preamble—Relevancy.*

A preamble does not override the plain provisions of a statute. It is a key to an Act. (*Davis, C.J. and Weston, J.*) EMPEROR *v.* DHOLARAM HOLARAM **I.L.R. (1941) Kar. 431 = A.I.R. 1941 Sind 221.**

———*Proceedings of Legislature—Reference—Permissibility.*

In construing an Act, the Court is not entitled to call in aid the proceedings of the Legislature. (*Derbyshire, C.J. and Panckridge, J.*) MAHALAKSHMI RAKHIT *v.* SHAMRANGINI. **I.L.R. (1941) 1 Cal 499 = 73 C.L.J. 344 = 45 C.W.N. 526 = A.I.R. 1941 Cal. 673.**

———Promotion of object of rule. *See* 1940 Dig., Col. 734 MUNNALAL *v.* GOPILAL. **I.L.R. (1941) Nag. 150 = 191 I.C. 217 = 13 R.N. 190.**

———*Punctuation.*

A statute must be interpreted without regard to punctuation. (*Tek Chand and Dalip Singh, JJ.*) BHOLO SINGH *v.* RAMAN LAL. **193 I.C. 312 = 13 R.L. 446 = 43 P.L.R. 352 = A.I.R. 1941 Lah. 28.**

———Question of hardship and inconvenience—Relevancy. *See* 1940 Dig., Col. 734. THANWERDAS KALUMAL, *In re.* **192 I.C. 721 = 13 R.S. 199 = A.I.R. 1941 Sind 1.**

———*Reference to previous law—When justified.*

Per *Blagden, J.*—Where the language of an Act of Parliament leads one to no clear conclusion between two possible meanings, one is often helped by considering what the law was before the Act was passed. Frequently it was defective, and one can infer that the Legislature intended to remedy the defect and construe the Act accordingly. (*Sharpe and Blagden, JJ.*) MA TIN TIN *v.* MAUNG AYE. **1941 Rang.L.R. 65 = 195 I.C. 190 = 14 R.R. 24 = 42 Cr.L.J. 690 = A.I.R. 1941 Rang. 135.**

———*Reference to proceedings of Legislature—Grammatical construction—When to be departed from.*

It is a most salutary principle of construction of statutes that in arriving at the meaning of an Act not to try to see from the proceedings of the Legislature or from any facts prior to the passing of the Act what was intended. Its grammatical meaning alone must be considered and if it leads to an impossible, that is unworkable construction, to see what variation will do the least violence to the grammatical meaning and still make the provision work. (*Stone, C.J. and Bose, J.*) HIRALAL ADKU *v.* PARASRAM SAO. **I.L.R. (1941) Nag. 541 = 1941 N.L.J 480.**

———Rejection of words—Statutory rules. *See* 1940 Dig. Col. 734. BIJAYNAGAR TEA CO., LTD. *v.* INDIAN TEA LICENSING COMMITTEE. **191 I.C. 387 = 13 R.C. 228.**

———*Remedial Act—Prejudice in some cases to those whom it is intended to help.*

Even if an Act intended to be remedial is found in a small minority of cases to prejudice rather than to benefit those whom it is intended to help, the Court should adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature. (*Gwyer, C.J. Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, *In the matter of.* **I.L.R. (1941) Kar. (F.C.) 148 = 194 I.C. 357 = 13 R.F.C. 70 = 1941 M.W.N. 556 = 73 C.L.J. 415 = 54 L.W. 22 = 1941 P.W.N. 401 = 1941 O.W.N. 880 = 7 B.R 788 = 1941 O.A 661 = 1941 A.W.R (Rev.) 648 = 1941 A.L.W 774 = 45 C.W.N. (F.R.) 81 = 22 P.L.T. 469 = 4 F.L.J. 1. A.I.R. 1941 F.C 72 = (1941) 2 M.L.J. 12.**

———*Retrospective effect.*

No statute is retrospective unless the statute itself expressly states that it is to be so. (*Dunkley and Blagden, JJ.*) SHWE HLA U *v.* EMPEROR. **1941 Rang L.R 58 = 194 I.C. 720 = 14 R.R. 9 = 42 Cr.L.J. 615 = A.I.R. 1941 Rang. 149.**

———Retrospective effect—Act altering procedure. *See* 1940 Dig., Col. 734. DHIRENDRA NATH ROY *v.* IJJETALI MIAH. **194 I.C. 511 = 13 R.C. 514.**

INTERPRETATION OF STATUTES.

——*Retrospective effect—New legislation if affects vested rights.*

New legislation cannot take away accrued rights unless such intention is manifest and clear from the terms of legislation Unless the plain words of a section compel a Court to hold that it has retrospective effect, no such effect will be given. (*Harries, C.J. and Fazl Ali, J.*) JAGMOHAN SINGH *v.* RAMANANDAN PRASAD NARAYAN SINGH 20 Pat. 556=13 R P. 526= 1941 P.W.N. 295= 192 I.C. 851=7 B R. 493= 22 Pat.L.T. 219=A.I R. 1941 Pat. 253.

——*Retrospective effect—Presumption —Declaratory Act.*

The general rule is that retrospective effect is not given to a statute; there is a presumption against retrospective effect: in the case of a declaratory Act there is no such presumption: if the meaning of words used indicates an intention that the Act is to have retrospective operation, then no matter what the consequences this operation must be given to the provisions: it does not follow that a meaning is to be given to the words of the statute, which according to ordinary usage they could not carry. so as to give to the provisions retrospective operation. (*Monree, J.*) RASHID BIBI *v.* TUFAIL MAHOMED. 196 I C 127= 14 R.L. 126=A.I.R. 1941 Lah. 291.

——Retrospective operation — Amending Act—If governs pending cases—Vested right in procedure. *See* 1940 Dig., Col. 735. BIGAN SINGH *v.* SYED SHAH ZAFFAR HUSSAIN. 191 I.C. 436=13 R.P. 319= 7 B.R. 214.

——*Retrospective operation—Rules of construction.*

A section giving retrospective effect should be interpreted very strictly and no more retrospective effect should be given to it than is absolutely warranted by the literal interpretation of the words actually used in the section. (*Harper, S. M. and Sathe, J. M.*) TIRKHA *v.* NAZEER BEGAM. 1941 A L.J. (Supp.) 19= 1941 A.W.R. (Rev.) 185=1941 O.A. (Supp.) 129= 1941 R.D. 105.

——Rules. *See* 1940 Dig., Col. 735. MUNNALAL *v.* GOPILAL. I.L.R. (1941) Nag. 150= 191 I C. 217=13 R N. 190

——*Rules made under Act—Meaning of words—If to have same meaning as the words in the Act.*

It is usually a sound rule of construction to give the same meaning to words used in rules made under an act as the words have in the Act itself. (*Broomfield and Waosoodew, JJ.*) EMPEROR *v.* RAGHUNATH RAMCHANDRA. 194 I.C. 554=13 R B. 374= 42 Cr L.J. 588=43 Bom L.R. 99= A I R 1941 Bom. 100.

——*Scheduled forms—Reference to.*

Scheduled forms are always dangerous guides to the meaning of a statute. (*Sharpe and Blagden, JJ.*) MA TIN TIN *v.* MAUNG AYE. 1941 Rang.L.R. 65= 195 I C. 190=14 R.R. 24=42 Cr L.J. 690= A.I.R. 1941 Rang. 135.

——*Similar Acts—Same words in—Construction in the same way.*

(Per *Broomfield, J.*)—When the same or exactly similar words are used in statutory provisions which appear to have a similar object, it is very difficult to say that they should not be interpreted in the same way. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* VISHNU TATAJABA. I.L.R. (1941) Bom. 191= 193 I C. 229=13 R B. 323=42 Cr.L J 441= 42 Bom. L.R. 1193=A.I.R. 1941 Bom 85.

——Special Acts—One, if can interfere with another. *See* COURT-FEES ACT, S. 17 AND T. P. ACT. S. 67-A. 1940 Rang.L.R. 767.

INTERPRETATION OF STATUTES.

——*Special remedy provided by statute—Separate suit—Maintainability.*

Where a right is given by a special statute and a remedy is provided for the violation of the right in that very statute, ordinarily the person whose right is violated is bound to follow the remedy provided in the Act, and a separate suit is barred. (*Somayya, J.*) RAMI NAIDU *v.* SECRETARY OF STATE FOR INDIA. 1941 M.W.N. 883=54 L.W. 405= (1941) 2 M.L.J. 577.

——*Statute conferring exceptional powers on single person—Principle of construction—Construction in favour of subject.*

In interpreting a statute which confers exceptional powers on an individual officer and takes away from all Courts the right to entertain any objection on any ground whatsoever except on the ground of want of jurisdiction, a doubtful question must be answered in favour of the subject and it must be held that the exceptional power was given only where it is abundantly clear that it was the intention of the Legislature to give it. (*Middleton.*) RAMAUTAR MAHTON *v.* CENTRAL CO OPERATIVE BANK. 7 B.R. 686.

——*Unambiguous language—Duty of Court.*

Where a rule is couched in unambiguous language, it is not open to the Court to alter it merely because, in the Court's opinion, it might produce a somewhat harsh result. Where the language is clear, it is the Court's duty to give effect to it. (*Braund, J.*) SECRETARY OF STATE *v.* GOMTI KUNWARI. 195 I.C. 246=14 R.A 23=1941 O.A. (Supp.) 327= 1941 A.W.R. (H.C.) 162=1941 A L W. 404= 1941 A.L.J. 253=A.I R. 1941 All 221.

——*Validity of Act—Competence of Legislature—Crucial date—Change of powers of Legislature during passage of Bill from Legislative Assembly to Council of State.*

It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both chambers of the Legislature before it received the Governor-General's assent. But the form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either chamber of the Legislature is a matter with which a Court of law is not concerned. The question whether either chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the chamber, as interpreted by its Speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. The only function of a Court is to pronounce upon the Bill after it has become an Act. Consequently it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other. (*Gwyer C.J., Varadachariar and Beaumont, JJ.*) HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, *In the matter of.* I.L.R (1941) Kar.(F.C.) 148=194 I C. 357= 13 R F.C. 70=1941 M.W N. 556=73 C.L J. 415= 54 L W. 22=7 B.R. 788=1941 P.W N. 401= 1941 O.W.N. 880=1941 O.A. 661= 1941 A.W R. (Rev) 648=1941 A.L.W 774= 45 C.W.N. (F.R.) 81=22 P.L.T. 469=4 F.L.J. 1= A.I.R. 1941 (F.C.) 72=(1941) 2 M.L.J. 12.

INTERPRETATION OF STATUTES.

———*Words—Meaning of—Same meaning to be given to words in Act or section, wherever they appear.*

It is an elementary rule of construction that a word must be given the same meaning wherever it occurs in the same enactments, and *a fortiori* in the same section of an enactment, unless the context forbids it. (*Broomfield and Macklin, JJ.*) GANPAT KINUSHET SONAR *v.* VITHAL BHIKAN. **43 Bom.L.R. 976**

———*Words to be taken in their context.*

The words of a statute must be construed in relation to their context. They cannot be taken out of the provisions of the statute in which they occur. (*Davis, C J. and Weston, J.*) EMPEROR *v.* DHOLARAM HOLARAM. **I.L.R (1941) Kar. 431 = A.I.R 1941 Sind 221.**

JAMMU AND KASHMIR—*High Court—Powers of—Appeal to His Highness against order of District Judge of Chenani disposed of—Second appeal to High Court—If competent.*

Where an appeal filed under the old law to His Highness the Maharaja Bahadur against an appellate order of the District Judge of Chenani has been disposed of, the High Court has absolutely no power to say that the order of disposal was not in accordance with law. If the High Court entertains a second appeal it would be overriding the decision of His Highness which it is wholly incompetent to do. (*Rachhpal Singh and Janki Nath Wazir J.*) AJAB SINGH *v.* SHIB SARAN. **43 P.L.R. J & K., 242.**

———*State subject certificate—Cancellation of certificate of father—If bars grant of certificate to son—Presumption - Rebuttal.*

The cancellation of the State subject certificate of the father is no bar to the grant of a fresh certificate to his son in case he can establish by proper evidence that he is entitled to it by possessing the necessary qualifications, but will raise a presumption against him. It will be for him to rebut that presumption by bringing cogent evidence to prove that his father's application failed for want of reliable evidence, which though it did exist, the father failed to produce. MUKAND LAL, *In re.* **43 P.L.R. J. & K., 160.**

———*State subject certificate—Grant or revocation—Power of Revenue Minister and Revenue Commissioner.*

The grant or revocation of a State subject certificate is an act of Government and a proceeding of an executive authority, and the powers relating to it can be exercised by the Government or a person or persons to whom this power is delegated by the Government expressly or by necessary implications. Therefore, the Revenue Minister or the Revenue Commissioner, in their capacity as Revenue Officers, cannot exercise any revisional jurisdiction in proceedings arising out of grant or cancellation of a State subject certificate. But the Revenue Minister as member of Government has power to do so. MUKAND LAL, *In re.* **43 P.L.R. J. & K. 160.**

———*State subject—Definition — Notification No. 1-L/84 dated 20th April, 1927—Interpretation.*

The words "who have since been permanently residing there" occurring at the end of "class" in the definition of a state subject in the Notification of 1927 govern only the sentence immediately preceding it (*i.e.*) "and also persons who settled therein before the commencement of samvat year 1942." and not also the first portion of definition, *viz.* "All persons born and residing within the state before the commencement of the reign of His Highness the late Maharaja Sahib Bahadur". A. K. WATAL, *In re.* **43 P.L.R. J. & K. 166.**

———*State subject—Emigrant—Who is—Notification No. 13 L, dated 27th June, 1932.*

J. & K. C. P. CODE, S. 42.

Notification No. 13-L dated 27th June, 1932, deals specifically with the position of 'emigrants from the Jammu and Kashmir State to foreign territories". Every person who goes abroad and resides there for considerable length of time is not necessarily an emigrant. A person is said to emigrate from his ancestral abode to another if he abandons the former and adopts the latter as his permanent residence. In each case it is a question of fact. A. K WATAL, *In re.* **43 P.L.R. J. & K 166.**

———*State subject—Migration of—Status of descendants—Notification No. 1-L/84 dated 20th April, 1927 and Notification No. 13 L, dated 27th June, 1932.*

Notification No. 13-L dated 27th June, 1932, should be taken to deal specifically with the question of emigrants, while Notification No. 1-L/84 dated 20th April, 1927, defines generally the term "state subject." Note 11 appended to the latter merely makes clear that the status of the descendants of a "State subject" is also that of a "State subject". In case a State subject emigrates he and his descendants for two generations will be entitled to the limited privileges therein mentioned. A. K. WATAL, *In re.* **43 P.L.R. J & K. 166.**

JAMMU AND KASHMIR AGRICULTURISTS' RELIEF ACT, S. 8—*Entries in account books—Proof—Evidence Act, Ss. 34, 67 and 68.*

Under the provisions of the Agriculturists' Relief Act, each and every one of the entries in the account books need not be individually taken up and proved in conformity with the provisions of Ss. 67 and 68 of the Evidence Act. Value such as is permissible under S. 34 of the Evidence Act with regard to the relevancy of entries in account books, kept in the ordinary course of business, can be attached to them. (*Masud Hasan J.*) AKBAR ALI *v.* DUKAN. **43 P.L.R. J. & K. 105.**

JAMMU AND KASHMIR APPEAL TO HIS HIGHNESS ACT (XVI OF 1996)—*Retrospective effect.*

Act XVI of 1996 has not retrospective effect and it applies only to those cases which have been decided by the High Court after the Act came into force. (*Rachhpal Singh, C.J., Janki Nath Wazir and M. Hassan, JJ.*) BHAGAT RADHAKISHAN *v.* LLOYDS BANK, LTD. **43 P.L.R. J. & K. 7.**

———**S. 11**—*Appeal in criminal case—Grant of leave—Sufficient grounds.*

The mere fact that a conviction is based on circumstantial evidence is, by itself, no sufficient ground to grant leave to appeal to His Highness. Circumstantial evidence which is of a satisfactory character is as good as direct evidence and the conviction based on such circumstantial evidence is perfectly legal. Again, the mere fact that a confession originally made by the accused was subsequently retracted by him is not a sufficient ground to declare the case as a fit one for appeal to His Highness. (*Abdul Qayoom, C J. and Kichlu, J.*) BASHIR AHMAD *v.* STATE. **43 P L R. J. and K. 88.**

JAMMU AND KASHMIR CIVIL PROCEDURE CODE, S 11—*Doctrine of* res judicata.

Res judicata is a definite legal doctrine with defined and well marked delineations. It is not every matter which may have been adumbrated in a previous suit that may become *res judicata* for the purposes of the trial of a later suit. The requirements of S. 11, C.P Code, must be fulfilled. (*Kazi Masud Hasan, J.*) RANSI DAT *v.* RUGHNATH SINGH. **43 P.L.R J. & K. 127.**

———**S. 42**—*Enquiry under O. 20, R. 50—Power of transferee Court.*

By S 42, C. P. Code, the Court to which a decree is transferred for execution is for the purpose of O. 21

J. & K. C. P. CODE, S. 60.

R. 50 (2) "the Court which passed the decree" and is competent fo determine the question whether a certain person is a member of a firm. (*Rachhpal Singh, C.J. and Wazir, J.*) AMAR NATH *v.* PUNJAB NATIONAL BANK, LTD. **43 P.L.R. J. & K. 153.**

——**S. 60**—*Land exempted from attachment—Trees on such land—If also exempted.*

If the land under the trees is incapable of being attached and sold under S. 60, C. P. Code, the position with respect to the trees cannot be different. The trees are also exempt from attachment and sale. GIAN CHAND *v.* MADAN LAL. **43 P.L.R. J. & K. 58.**

——**S. 60**— *Mortgage of agricultural land—Waiver of privilege—If only in mortgagee's favour.*

An owner who mortgages his agricultural land waives the privilege given to him by S. 60, C. P. Code, only in favour of the mortgagee and not in favour of any body else. A creditor, in execution of a simple money decree cannot get that land attached or sold on the ground that it has been mortgaged with some one else. (*Wazir, J.*) GULAB DIN *v.* AKBAR.

42 P.L.R. J. & K. 409.

——**S. 60 (as amended)**—*Retrospective effect.*

The amendment of S. 60, C. P. Code, by which even the agricultural land cultivated by the tenants became not liable to attachment or sale, does not have retrospective operation. It does not, therefore, affect execution proceedings which were pending at the time the amendment came into existence. (*Rachhpal Singh, C.J. and J. N. Wazir, J.*) KASHMIRI LAL *v.* SHAMI SHAH.

43 P.L.R. J. & K. 181.

——**O. 9, R. 13**—*Application for setting aside* ex parte *decree filed more than* 30 *days after decree—Proof of knowledge of decree within* 30 *days—Onus.*

If a defendant files an application for setting aside an *ex parte* decree more than 30 days after the date of the decree, the onus lies on him of proving that his application is presented within 30 days of his having knowledge of the decree. (*Wazir, J.*) ABDULA BICHU *v.* GHULAMRASOOL DANDROO.

43 P.L.R. J. & K. 266.

——**O. 17, Rr. 2 and 3**—*File consigned to record room for default—Order, if* res judicata.

The principle of *res judicata* cannot be invoked where no order is passed on the merits in terms of O. 17, R. 3, C. P. Code, but the file is merely consigned to the record room for default under O. 17, R. 2. (*Wazir and Hasan, JJ.*) PUNJAB SINGH *v.* TEJU.

43 P.L.R. J. & K. 139.

——**O. 32, R. 7**—*Compliance with provision—Proof required.*

In regard to consent given to a decree on behalf of a minor, the mandatory provisions of law contained in O. 32, R. 7, C. P. Code, have to be strictly complied with. In such a case, it is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt, that the leave of the Court was obtained. (*Abdul Qayoom, C.J. and Kichlu, J.*) ABDULLA *v.* REHMAN.

43 P.L.R. J. & K. 81.

——**O. 46. R. 1 and S. 113**—*Reference to High Court—When may be made.*

Under O. 46, R. 1, C. P. Code, a reference can only be made in those cases in which the decree which may be passed is not subject to an appeal and where the Court making the reference entertains any doubt about any point involved in the case. It is where these two indispensable conditions are fulfilled that a lower Court can draw a statement of facts of the case and the point on which doubt is entertained and then refer the matter to the High Court. A reference is incompetent if the Court is quite satisfied that its own view on a particular matter is correct. (*Rachhpal Singh, C.J., Janki Nath Wazir and Masud Hasan, JJ.*) JAWAHAR SINGH *v.* COLLECTOR, JAMMU. **43 P.L.R. J. & K. 177.**

JAMMU AND KASHMIR COURT-FEES ACT, S. 7 (xi) (cc)—*Suit by landlord against tenant for possession—Tenant denying landlord's title—Court-fee.*

S. 7, Cl.(*xi*) (*cc*) of the Court-Fees Act is not confined to cases where the defendant is clearly estopped from denying the plaintiff's title. If a landlord sues a tenant for the possession of immovable property, the Court-fee must be assessed under S. 7, Cl. (*xi*)(*cc*). It is then open to the defendant to deny that the relationship of landlord and tenant exists between him and the plaintiff. If he succeeds, the plaintiff will be nonsuited. If the defendant fails to establish his contention, the landlord will be entitled to his remedy. (*Masud Hasan, J.*) ABDUL GHANI *v.* FAQIRA. **43 P.L.R. J. & K. 233.**

JAMMU AND KASHMIR CRIMINAL PROCEDURE CODE, S. 9—*Appointment of special Sessions Judge—Powers of.*

A Sessions Judge subordinate to the High Court is not competent to pass an order appointing a Magistrate of the first class to act as a special Sessions Judge for any particular case. Under S. 9, Cr. P. Code, his Highness' "Government" alone can establish Courts of Session. (*Rachhpal Singh, C. J.*) AMAR CHAND *v.* STATE.

43 P.L.R. J. & K. 34.

——**S. 110**—*Proof required.*

S. 110, Cr. P. Code, is a preventive section and is not intended to be used to punish accused persons for offences that have been committed but the section is intended to prevent the accused persons from committing offences which by their habit they are likely to commit in future. It must be proved by aggregate of facts that the accused has a tendency to repeat certain offences referred to in the section. The evidence must be specific and relate to particular instances within the knowledge of the witnesses. Mere hearsay evidence is not enough. (*Wazir, J.*) MST. MASAN *v.* STATE. **43 P.L.R.J. & K. 76.**

——**S. 164**—*Provisions not complied with—Defect, if remediable by Magistrate's statement.*

If the mandatory provisions of S. 164, Cr. P. Code, are not complied with, the statement of a Magistrate saying that he complied with a particular provision of law though such fact is not recorded in the statement itself, is absolutely of no avail. The statement recorded by the Magistrate itself must show that all necessary precautions were taken and the defect or defects, if any, cannot be remedied by producing the Magistrate to show that he had really complied with all the provisions of the section. (*Rachhpal Singh, C. J.*) NATHU RAM *v.* STATE. **43 P.L.R. J. & K. 22.**

——**S. 164**—*Recording of accused's statement, immediately on production—Advisability.*

It is the duty of Magistrates that if they consider advisable then the statement of an accused person under S. 164, Cr. P. Code, should not be recorded as soon as the man is produced. Courts of law will not attach any importance to a confession where there is reason to suspect that the police was anxious to have the statement of an accused recorded immediately. (*Rachhpal Singh, C. J.*) NATHU RAM *v.* STATE. **43 P.L.R. J. & K. 22.**

——**S. 164**—*Statement of accused—Record of, during trial—Permissibility.*

The statement of an accused person can be recorded under S. 164, Cr. P. Code, before the commencement of the trial of the case and not during the trial.

J. & K. CR. P. CODE, S 195.

(*Abdul Qayoom, C.J.*) STATE *v.* QADIR KAKRU.
42 P.L.R. J. & K. 415.

——**S. 195 (1) (a)**—*Complaint under S.* 182, *Ranbir Penal Code—By whom to be made.*

Under S. 195 (1) (*a*), Cr. P. Code, no Court can take cognisance of an offence under S. 182 of the Ranbir Penal Code except when the complaint is in writing of the public servant concerned or of some public servant to whom he is subordinate. (*Abdul Qayoom, C.J.*) BINDRU *v.* STATE. **42 P.L.R. J. & K. 406.**

——**S. 238**—*Charge for dacoity—Conviction for rioting—Legality.*

An offence of rioting under S. 147 of the Ranbir Penal Code is not a minor offence to that of dacoity under S. 395 of that Code. Consequently a person who was charged with an offence of dacoity cannot be convicted for an offence of rioting. (*Rachhpal Singh, C.J.*) ALI SUFI *v.* STATE. **43 P.L.R. J. & K. 50**

——**S. 250**—*Applicability—Sessions case.*

Action under S. 250, Cr. P. Code, can only be taken in regard to a case which is triable by a Magistrate. An order awarding compensation under that section in a case exclusively triable by a Court of Sessions is illegal. (*Abdul Qayoom, C.J.*) NIKU *v.* ANANTA.
42 P.L.R. J. & K. 414.

——**S. 288**—*Statement of witness before committing Magistrate—Power of Sessions Judge to rely on.*

The object of S. 288, Cr. P. Code, is to provide for the contingency that may arise when a witness before a Court of Session resiles from his statement which he had made before the committing Magistrate. The Sessions Judge has been given power to treat the statement before the committing Magistrate as a piece of substantive evidence on which he may base a conviction if he believes that evidence. The whole object of this section was to give powers to a Sessions Judge to decide which of the two statements made by a witness (one before the committing Magistrate and the other before the Sessions Judge) was true. If after a due consideration he is of opinion that the evidence given by the witness before the committing Magistrate was true he has every power to admit that evidence and treat it as substantive evidence. (*Rachhpal Singh, C.J. and Wazir, J.*) ABLI MOCHI *v.* STATE.
43 P.L.R. J. & K. 142.

——**S. 342**—*Recording of statement in narrative form—Permissibility.*

According to S. 342, Cr. P. Code, where an accused is examined, questions should be put to him by the trial Magistrate and the answers given by the accused should be recorded. The statement of the accused should be in the form of questions and answers and not in the form of a narrative. (*Abdul Qayoom, C. J.*) ISA KHAN *v.* STATE. **43 P.L.R. J. & K. 47.**

——**Ss. 367 and 424**—*Judgment of appellate Court—Contents.*

Under S. 424 read with S. 367, Cr. P. Code, the judgment of an appellate Court must, among other matters, contain the point or points for decision, the decision thereon, and the reasons for the decision. (*Abdul Qayoom, C.J.*) NABIR SODAGAR *v.* STATE.
43 P.L.R. J. & K. 98.

——**Ss. 417, 418 and 423**—*Appeal from acquittal—Points for consideration.*

The High Court hearing a case in an appeal against an order of acquittal should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused; (3) the right of the accused to benefit of doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. (*Rachhpal Singh, C.J. and Janki Nath Wazir, J.*) STATE *v.* SALAM BADU. **43 P.L.R. J. & K. 254.**

J. & K. EVIDENCE REG., S. 45.

——**Ss. 488 (3) and 386 (1) (b)**—*Attachment and sale of immovable property—Procedure*

If a Magistrate acting under S. 488 (3), Cr. P. Code, wants to proceed against any immovable property belonging to the defaulter, he cannot direct the attachment and sale of that property himself. The only course open to him is to issue a warrant to the Collector of the District according to S. 386 (1) (*b*), Cr. P. Code, authorising him to realise the amount by execution according to civil process against the immovable property of the defaulter. (*Abdul Qayoom, C.J.*) AMAR NATH *v.* MST. GOMTI. **43 P.L.R. J. & K. 96.**

——**S. 488 (3) proviso**—*Offer by husband to maintain wife*—Bona fides *of offer—Enquiry into—Duty of Magistrate.*

Where the husband offers to receive the wife in his house and maintain her according to his means, it is the duty of the Magistrate under S. 488 (3), proviso, Cr. P. Code, to enquire into the *bona fides* of the offer, and if the woman refuses to live with the husband the grounds of her refusal should be considered by the Magistrate. (*Abdul Qayoom, C.J.*) MOHI-UD-DIN *v.* MST. ASHA BIBI. **43 P.L.R. J. & K. 83.**

——**S. 514**—*Forfeiture of bond—Surety's responsibility.*

The fact that the surety had no control over the accused as he belonged to the Punjab, does not absolve the surety from his responsibility. (*Abdul Qayoom, C. J.*) DALIP SINGH *v.* STATE.
42 P.L.R. J. & K. 408.

——**S. 533**—*Recording of confession—Defects, when curable.*

Under S. 533, Cr. P. Code, a defect in form is curable but not a defect in substance. Where a confession was duly recorded after necessary warning but the Magistrate somehow failed to embody that fact in his memorandum, such a defect is certainly curable. It is where the mandatory provisions of S. 164 are not complied with that the defect will be incurable. In such a case, if any warning has not been given the confession should not be held to have been duly made and S. 533 will be wholly inapplicable. The Court should first look into the question whether the defect is purely formal or whether it is a defect in substance. If it is a defect in substance then the confession cannot be admitted in evidence and the provision of S. 533 cannot come to the aid of the prosecution. But if it is a defect purely of a formal nature then the provisions of S. 533 would be applicable by the production of the Magistrate or some other evidence which would remove the formal defect. (*Rachhpal Singh, C. J.*) GAFFARDAR *v.* STATE.
43 P.L.R. J. & K. 245.

JAMMU AND KASHMIR EVIDENCE REGULATION, S. 25—*Chowkidar—If Police Officer.*

A chowkidar is a Police Officer. (*Rachhpal Singh, C. J. and Janki Nath Wazir, J.*) KALA *v.* STATE.
43 P.L.R. J. & K. 37.

——**S. 45**—*Lawyers as experts—Practice condemned.*

It is a very reprehensible practice on the part of the lawyers to appear in the role of experts in Courts. (*Masud Hasan, J.*) HASSAN *v.* NAND SINGH.
43 P.L.R. J. & K. 70.

——**S. 45**—*Opinion of expert—Value of—Expert not examined as witness.*

The opinion of an expert obtained by means of a letter has no evidentiary value, when no statement is recorded of the expert. The opinion of an expert can

J. & K. EVIDENCE REG., S. 45.

only be admitted in evidence when the expert has properly been examined. (*Abdul Qayoom, C.J. and Wazir, J.*) GHULAM MOHAMMAD KHAN *v.* KHUDA BAKHSH. **43 P.L.R. J. & K. 85.**

——**S. 45**—*Report of expert—Mode of proof.*

The report of an expert is by itself a legally inadmissible document. It should be proved by his oral evidence. (*Masud Hasan, J.*) HASSAN *v.* NAND SINGH. **43 P.L.R. J. & K. 70.**

——**S. 74**—'*Public document*'—*Muster sheet of road coolies.*

A muster sheet of road coolies is not a public document within the meaning of S. 74 of the Evidence Regulation. A man may be a public servant but every register maintained by him does not *ipso facto* become a public document. (*Abdul Qayoom, C.J. and Wazir, J.*) STATE *v.* DHARMUN AND HAYAT ALI. **43 P.L.R. J. & K. 99.**

JAMMU AND KASHMIR EXCISE ACT, S. 38—*Power of Deputy Inspector of Customs to search.*

By virtue of S. 38 of the Excise Act a Deputy Inspector of Customs is entitled to search any cart or pack animal or any other means of conveyance provided he has reason to believe that smuggled goods is being carried thereby. (*Abdul Qayoom, C.J.*) RAMZAN RATHER *v.* STATE. **43 P.L.R. J. & K. 102.**

JAMMU AND KASHMIR HIGH COURT CONSTITUTION ACT, Para. 23—*Royal prerogative—When may be invoked.*

The Royal prerogative is meant to be exercised only in extraordinary circumstances. It cannot be invoked simply because according to an applicant the High Court had committed an error or was utterly wrong in its interpretation of a rule of law or in weighing evidence in any particular case. (*Rachhpal Singh, C.J., Janki Nath Wazir and M. Hassan, JJ.*) BHAGAT RADHAKISHAN *v.* LLOYDS BANK, LTD. **43 P.L.R. J. & K. 7.**

JAMMU AND KASHMIR HIGH COURT RULES AND ORDERS, Chap. X, R. 6 (before amendment)—*Realisation of stamp dues in pauper suits—Procedure—Attachment of property of stranger—Right of latter to file suit.*

Prior to the amendment of Rule 6 of Chap. X of the Rules and Orders which did not come into force till the 19th of *Har* 1993, state stamp dues in pauper suits were not recoverable as arrears of land revenue. The words "as arrears of land revenue" were added by the Legislature in the amended rules. The position prior to these amended rules was that these dues were realised by having recourse to an application for the execution of decrees in the ordinary course (*i e.*) under O. 21, C. P. Code. If a property belonging to a stranger was attached, he was competent to object to the attachment under O 21, R. 58 and institute a civil suit under O. 21, R. 63, if the objection was overruled. (*Rachhpal Singh, C.J., Wazir and Masud Hasan, JJ.*) DURGA DAS *v.* HON'BLE JUDICIAL MINISTER. **43 P.L.R. J. & K. 62.**

JAMMU AND KASHMIR INCOME-TAX ACT, S. 10—*Bad debt—Deduction on account of—Debt becoming bad in previous year.*

There is no bar under the rules that a debt which became bad in the previous year, and which was not shown in that year could not be shown in the next year. Where the circumstances reveal that the delay is such as would not reasonably debar the assessee under the law from claiming this deduction, he should be allowed to do so. (*Kazi Masud Hasan, J.*) UTTAM SINGH *v.* KHURRANA OF JAMMU. **43 P.L.R. J. & K. 237.**

J. & K. RIGHT OF PRIOR PURCHASE ACT, S. 2.

JAMMU AND KASHMIR LAND REVENUE ACT, S. 81—*Applicability—Strangers.*

Per *Masud Hasan, J.*—S. 81 of the Land Revenue Act affords remedy to "the person denying his liability". A defaulter is not a person denying his liability. He is a person refusing or omitting to pay. The section applies to a stranger and not a defaulter. (*Rachhpal Singh, C.J., Wazir and Masud Hasan, JJ.*) DURGA DAS *v.* HON'BLE JUDICIAL MINISTER. **43 P.L.R. J. & K. 62.**

JAMMU AND KASHMIR LIMITATION REGULATION, S. 5—*Applicability—No right of appeal at time of order—Such right conferred by subsequent enactment.*

S. 5 of the Limitation Regulation presupposes that the applicant claiming the benefit of that section was entitled to file an appeal at the time when the order was passed. If at that time he had no right of filing any appeal but such right was only conferred by a subsequent enactment, he cannot invoke the aid of the section. (*Rachhpal Singh, C.J., Janki Nath Wazir and M. Hassan, JJ.*) BHAGAT RADHAKISHAN *v.* LLOYDS BANK, LTD. **43 P.L.R. J. & K. 7.**

——**S. 20**—*General payment—If saves limitation—Agriculturists' Relief Act, S. 9 (2) (c)—Effect of.*

A general payment by a debtor without specifying whether it is towards interest or towards principal, does not save limitation under S. 20 of the Limitation Act. S. 9 (2) (*c*) of the Agriculturists' Relief Act does not in any manner affect the "provisions of S. 20 of the Limitation Act." It merely enacts a method in which accounts are to be taken when it becomes necessary to do so. There is no reason for holding that a suit which is barred by limitation because S. 20 of the Limitation Act does not cover it, becomes a suit within limitation because under S. 9 of the Agriculturists' Relief Act a particular method is enacted under which account has to be taken of the payments made by the debtor when that becomes necessary. (*Rachhpal Singh, C.J., Wazir and Masud Hasan, JJ.*) NETAR *v.* DUKAN ANANT RAM MANSA RAM. **43 P.L.R. J. & K. 276 (F.B.).**

——**Art. 182 (2)**—*Applicability—Civil revision petitions.*

An order passed In the exercise of revisional powers is an order on an appeal within the meaning of Art. 182 (2) of the Limitation Regulation so as to create a fresh starting point for the calculation of limitation. (*Wazir, J.*) BHUPA *v.* MANSINGH. **42 P.L.R. J. & K. 411.**

JAMMU AND KASHMIR MOTOR VEHICLE RULES, R. 2, Cls. (14) and (15)—*Lorry let on hire to selected customer—If public motor vehicle.*

A lorry let on hire to a selected customer in accordance with a specific contract does not become a public motor vehicle, when it is not exhibited for hire at any public place and is not available to every member of the public for hire. (*Abdul Qayoom, C.J. and Kichlu, J.*) STATE *v.* MAN SINGH. **43 P.L.R. J. & K. 86.**

JAMMU AND KASHMIR REGISTRATION OF ARMS ACT, S. 2—'*Arms*'—*Gun out of repair*

A gun comes within the definition of "arms" under S. 2 of the Registration of Arms Act, although the nail holding the trigger is missing from it. Surely such an arm cannot be said to have become unfit. It is capable of being repaired and can immediately be used. (*Rachhpal Singh, C.J.*) BHAGWAN DASS *v.* STATE. **43 P.L.R. J. & K. 120.**

JAMMU AND KASHMIR RIGHT OF PRIOR PURCHASE ACT, S. 2 (2)—*Effect of—Landlord not*

J. & K. SP. RELIEF ACT (1977), S. 9.

exercising right under S. 60 of Tenancy Act—Right of others to enforce pre-emptory rights.

What S. 2 (2) of the Prior Purchase Act means is that in spite of passing of that Act the provisions of S. 60 of the Tenancy Act will be binding. In other words in respect of the Act whenever an occupancy tenant wishes to sell, mortgage, or gift away his rights of occupancy he must follow the provisions of S. 60. If the landlord elects to purchase the occupancy rights under that section then there is no further right of prior purchase. But if the landlord fails to do so, the other persons having a right of pre-emption are entitled to institute a suit to enforce their pre-emptory rights. (*Rachhpal Singh, C.J. and Masud Hasan, J.*) SANTU *v.* SUKHU. **43 P.L.R. J. & K. 93.**

JAMMU AND KASHMIR SPECIFIC RELIEF ACT (XXXVII OF 1977), S. 9—*Omission to sue under—If bars suit based on possessory title.*

A party who has been in possession for a number of years, though short of statutory period of 12 years, has a right to institute a suit for possession and S. 9 of the Specific Relief Act is no bar to such a suit. A person may institute a suit under this section if he so desires, but mere omission to institute such a suit is no bar to suit for possession. It is open to a party to come to Court and ask that he should be put in possession of the land from which he has been dispossessed by producing evidence that he has been in possession for 11 years and some months as against a person who is not a true owner and who has no better title. (*Rachhpal Singh, C.J. and Masud Hasan, J.*) BELI RAM *v.* SAMUN. **43 P.L.R. J. & K. 227.**

JAMMU AND KASHMIR TOWN AREA ACT (IV OF 1990), Ss. 22 and 19—*Validity of tax—Power of Magistrate to go into—Appeal not preferred against levy of tax.*

Under S. 19 of the Town Area Act, there are two cases in which appeals could be preferred, one against the assessment and the other against the levy of any tax. If a person did not avail himself of his remedy, he cannot be heard by the Magistrate acting under S. 22 of the Act to go into the question as to whether or not the levy made by the Town Area Committee was legal or correct. It is not within the competence of the Magistrate to go into the question of validity of the tax. (*Rachhpal Singh, C.J. and Hasan, J.*) SOHAN LAL *v.* TOWN AREA COMMITTEE, UDHAMPUR. **43 P.L.R. J. & K. 205.**

JAMMU AND KASHMIR TRANSFER OF PROPERTY ACT—*Transfer of immovable property—Property in possession of another person—Second vendee making no enquiries—Liability to equities in favour of that person.*

When the second vendee is aware of the possession of any other person on the land other than the owners of that land and he makes no enquiries about the nature of possession of that person, he will be liable to all equities in favour of that person. (*Abdul Qayoom, C. J. and Kichlu, J.*) JAGDISH *v.* BADRI. **42 P.L.R. J. & K. 402.**

———*Transfer of immovable property—Unregistered ale-deed—Effect of.*

An unregistered document will certainly not be sufficient to effect a valid transfer of immovable property in favour of the vendee, but any valid charge existing on the property will not be destroyed by the mere fact that the document was not registered. (*Abdul Qayoom, C. J. and Kichlu, J.*) JAGDISH *v.* BADRI. **42 P.L.R. J. & K 402.**

JURISDICTION.

JURISDICTION—Civil Court—Disputes as to temple ritual—Legislation as to exclusion from Civil Courts—Desirability of. *See* LIMITATION ACT, ART. 120. **(1941) 1 M.L.J. 322.**

———*Civil Court—Exclusion of jurisdiction of.*

To exclude the jurisdiction of the Civil Courts the exclusion must be explicitly expressed or clearly implied. Where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute. (*Leach, C.J., Wadsworth and Somayya, JJ.*) SECRETARY OF STATE *v.* JAGANNADHAM. **I.L.R. (1941) Mad. 850 = 196 I.C. 353 = 14 R M. 289 = 1941 M.W.N. 644 = 54 L.W. 7 = A.I R. 1941 Mad. 530 = (1941) 2 M L J. 47 (F.B.).**

———Civil Court—Failure of licensee to supply electric energy—Consumer's remedy—Civil suit, if barred. *See* ELECTRICITY ACT, S. 22. **1941 O.W N. 606.**

———*Civil Court—Interference with body created by statute—Powers.*

If a body is constituted by statute to exercise certain functions, then a Civil Court cannot either interfere with those functions or treat an act done by the body as a nullity unless the Civil Court has got some special supervising power for example by appeal, or unless the body has acted, while doing this act, outside its powers. In the latter case it is as though the act has been done by a mere man-in-the-street. (*Stone, C.J. and Bose, J.*) MANAGER, COURT OF WARDS *v.* SETH MOOLCHAND. **I.L.R. (1941) Nag. 279 = 1941 N.L.J. 351 = A.I.R. 1941 Nag. 226.**

———*Civil Court—Partitioning of tenancy property—Civil suit for partition—Preliminary decree in respect of all property except tenancy property—Subsequent arbitration award with reference thereto—Final decree thereupon—If with jurisdiction.*

Where in a civil suit for partition of both zamindari and tenancy joint family property, the Civil Court passes a preliminary decree with regard to all property except tenancy property and by a subsequent arbitration award that property is also divided and a final decree is passed incorporating also the tenancy property, such a partitioning is not beyond the jurisdiction of the Civil Court. Though it went beyond the preliminary decree it was with the consent of the parties. (*Shirreff, J.M.*) SHEO SHANKAR *v.* RAM PRASAD MAL. **1941 R.D. 882 = 1941 O.A. (Supp.) 758 = 1941 A.W.R. (Rev.) 857.**

———*Civil Courts and Courts of special jurisdiction—Powers of.*

The powers of a tribunal of special jurisdiction are circumscribed by the statute under which it is constituted. Such tribunal must act within its powers and so long as it does so, its orders whether right or wrong, cannot be challenged. But where and in so far as its actions are in excess or in contravention of the powers conferred on it, they are *ultra vires* and of no legal effect. Whenever the question arises whether the Court of special jurisdiction has or has not jurisdiction to try a particular cause, then the Court of general jurisdiction, that is the Civil Court, is always the final authority as to whether the cause is or is not within the special jurisdiction of the special tribunal. This principle is, of course, without prejudice to the general principle that all Courts must have inherent jurisdiction to decide whether a certain cause is or is not within their jurisdiction to try. But a Court cannot merely by a wrong exercise of discretion or by a wrong construction of law confer jurisdiction upon itself to try a cause and hence when the question arises as between the special Court and the Court of general jurisdiction as to whether a cause is within the

jurisdiction of the special Court or the jurisdiction of the Court of general jurisdiction then the decision of the Court of general jurisdiction must override the decision of the Court of special jurisdiction. (*Dalip Singh, Monroe and Sale, JJ.*) K. L. GAUBA *v.* PUNJAB COTTON PRESS CO., LTD. **I.L.R. (1941) Lah. 524 = 43 P.L.R. 383 = A.I.R 1941 Lah. 234 (F.B.).**

——Civil Court—Society or association—Disputes between members and management—Suit in Civil Court—Maintainability. *See* 1940 Dig., Col. 749, SURYA NARAYANA RAO *v.* SUBRAMANYAN.

194 I.C. 760 = 14 R.M. 57 = (1940) 2 M.L.J. 330.

——Civil Court—Suit for declaration as to whether a party is a muafidar or not. *See* OUDH RENT ACT, S. 108—BAR OF CIVIL SUIT. **195 I C. 1101 = 1941 R.D. 851 = 1941 O.A. 805.**

——Civil and Revenue Courts—Darkhast grant by tahsildar of communal land—Interference by Collector—Suit in Civil Court to challenge—Maintainability. *See* MADRAS BOARD OF REVENUE STANDING ORDERS, O. 15 (18). **(1941) 2 M.L.J. 564.**

——*Consent or waiver if can confer.*

An incompetent appeal is not rendered valid by being heard *ex parte* because no consent or waiver can confer on the Court a jurisdiction which it does not possess. (*Roberts, C J. and Dunkley, J.*) U BA SAN *v.* U YA.

195 I C. 551 = 14 R.R. 45 = A I.R. 1941 Rang. 199.

——Court having no jurisdiction to entertain suit—Powers of to pass orders in such suit—Limits. *See* 1940 Dig., Col. 749. CHANDRAYYA *v.* SEETHANNA.

194 I.C. 646 = 14 R.M. 28 = (1940) 1 M.L.J. 590.

——*Criminal jurisdiction—Mewar—Deoli Agency.*

In default of conquest or a treaty to the contrary criminal jurisdiction cannot be assumed. With reference to an offence in the Deoli Agency area the only Court of Session lawfully empowered to decide sessions cases or High Court to hear appeals from the Court of Session are the Courts of the Mewar Durbar. The Court of Session at Ajmer has no jurisdiction to try such a case nor has the Court of the Judicial Commissioner any jurisdiction to hear the appeal. (*Davies.*) AHMAD HUSAIN *v.* EMPEROR. **1941 A.M.L.J. 7.**

——Existence and exercise of—Distinction between—Wrong decision—Finality—Omission to take proper steps to set right—Effect—Subsequent suit to set aside—Competency. *See* 1940 Dig., Col. 749. CENTRAL CO-OPERATIVE BANK, LTD., BARH *v.* DASARATH PANDEY. **1940 P.W.N 1032.**

——*Judicial Commissioner, Ajmer—Competency to revise order of Political Agent.*

Where an order as to succession certificate is passed by the Political Agent acting solely in his capacity as Political Agent in Eastern Rajputana States, the Court of the Judicial Commissioner, Ajmer Merwara, which is purely a British Indian Court cannot exercise any revisional jurisdiction over the acts of the Political Agent, in respect of such order. (*Davies.*) DHAI MAJI KAMAL KAUR *v.* GIRDHAR KAUR. **1941 A.M.L.J. 28.**

——*Lack of and wrong exercise of—Distinction.*

A statutory body like a Municipality acting under a statute must keep strictly within its statutory powers. The lack of jurisdiction must be distinguished from the wrong exercise of jurisdiction. While an act done without any power to do so is null and void, an act done in erroneous exercise of that jurisdiction is voidable, that is rectifiable by a superior authority. Where the decision of the statutory body is wrong as distinguished from being beyond its power, the question would arise whether the Civil Court could rectify the wrong. (*Niyogi and Clarke, JJ.*) CAWASHAH BOMANJI *v.* PRAFULLA NATH. **A.I.R. 1941 Nag. 364.**

——Objection to—Omission to raise—Effect—Execution petition—Court having jurisdiction but deciding wrongly—Effect—Result of execution—If can be ignored as nullity. *See* 1940 Dig., Col. 750. CENTRAL CO-OPERATIVE BANK, LTD., BARH *v.* DASARATH PANDEY. **1940 P.W.N. 1032.**

——*Special tribunal—Exclusive jurisdiction.*

Per *Costello, J.*—If a special tribunal is appointed by any Act of the Legislature, or for that matter by any rules made under any Act of the Legislature, for the purpose of determining questions as to rights which are the creation of the Act itself then except in so far as it may be expressly provided or necessarily implied in that Act, the jurisdiction of the tribunal which is appointed on those questions is an exclusive jurisdiction and if a special tribunal is set up to determine questions arising in connection with election disputes no other Court has any jurisdiction whatever to entertain further proceedings whatsoever in regard thereto. (*Derbyshire, C.J. and Costello, J.*) DHIRENDRA KUMAR *v.* A. LATIFF. **45 C W.N 181.**

——Special tribunal—Orders in excess of powers—Jurisdiction of Civil Court. *See* 1940 Dig., Col 750. LACHHMAN SINGH *v.* NATHA SINGH.

I.L R. (1941) Lah. 71 = 191 I C. 583 = 13 R.L. 300.

—— *Territorial—If can be waived by submission.*

The rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits can be validly waived by submission. (*Stone, C J. Grille, Niyogi, Gruer and Bose, JJ.*) JAGNI RAM *v.* GANPATI. **I.L R. (1941) Nag. 1 = 1941 N.L J. 1 = A.I.R. 1941 Nag. 36.**

KACHIN HILL TRIBES REGULATION (I OF 1895), Ss. 1 (3), 2 (1) and (2) and 31—*Political Department Notification No. 49 of 1935—Hill tribe—Extent of applicability of notification—Kachin found in possession of opium—Offence—Jurisdiction.*

The expression 'hill tribe' is a racial designation. The Kachin Hill Tribes Regulation is made applicable by Political Department Notification No. 49 of 1935 to certain hill tribes in the hill tracts in the Bhamo District (*e.g.*) Kachins, the emphasis being on the race of the persons in question. Permanent residence in the hill tracts is not necessary in the case of such tribes. Where a Kachin from China temporarily residing in these hill tracts is found in possession of opium of nearly 25 tolas, he could not be charged, with an offence under the Opium Act but should be charged if at all, with an offence under S. 31 of the Kachin Hill Tribe Regulation. The Rangoon High Court has no jurisdiction in revision to deal with such case, the High Court being the Commissioner of the division. (*Mosely, J.*) THE KING *v.* N'HKUM NAW. **1941 Rang L.R. 400 = A.I.R. 1941 Rang 348.**

——**S. 9**—Applicability—Accused not a member of hill tribe—Application by him for transfer—Powers of High Court—Burma (Frontier Districts) Criminal Justice Regulation, Sch. cl.(ii). *See* 1939 Dig., Col. 698. MAUNG BA KU *v.* THE KING. **192 I.C. 250 = 13 R.R. 175 = 42 Cr.L.J. 261 = A.I.R. 1941 Rang. 31.**

KARACHI SMALL CAUSES COURTS ACT (IV OF 1929), S. 14—Scope—Suit against Governor-General—Claim arising out of contractual obligation of Government Railway—Jurisdiction of Small Causes Court. *See* SIND COURTS ACT, S. 37.

I.L.R. (1941) Kar. 238.

KUMAUN—*General and Special Rules for Criminal Civil and Revenue Courts, Rr. 8, 14 and 23—Order excluding one from post of Thokdar—Appealability.*

KUMAUN.

An appeal lies from an order excluding a person from the post of a thokdar. (*Harper, S.M. and Sathe, J.M.*) MANGAL SINGH *v.* HIRA SINGH.

1941 O.A. (Supp.) 557 = 1941 R.D. 893 = 1941 A W.R. (Rev.) 603.

———Pucca *Khaikari village—Succession—General body of khaikars and non-co-sharing collaterals—Preference.*

In a *pucca* Khaikari village, a collateral though he be a non-co-sharing collateral is entitled to succeed and the succession cannot in such a case go to the general body of khaikars. (*Harper, S.M. and Sathe, J.M.*) BHAGOT SINGH *v.* JASOD SINGH.

1941 R D. 761 = 1941 O.A. (Supp.) 693 = 1941 A.L.J. (Supp.) 109 = 1941 A.W.R. (Rev.) 641.

———*Thokdar—Appointment—Rule as to.*

The succession to the office of a thokdar goes by primogeniture but if the eldest son is not available the natural claimant is the next son. (*Harper, S.M. and Sathe, J.M.*) MANGAL SINGH v. HIRA SINGH.

1941 A.W.R. (Rev.) 603 = 1941 O.A. (Supp.) 557 = 1941 R.D 893.

LAHORE HIGH COURT RULES AND ORDERS, Vol. 1, Chap. 12-L, R. 12– Sale set aside at instance of judgment-debtor—Liability of decree-holder for auctioneer's commission. *See* 1940 Dig., Col 752. MAHOMED ALI *v.* KUCKEREJA, LTD., SIALKOT.

I L.R. (1941) Lah. 405 = 191 I.C. 297 = 13 R.L. 281.

LAMBARDAR—*Appointment —Hereditary right—When may be passed over—Land Revenue Rule* 17 (*ii*), *proviso* (*c*).

Under Land Revenue Rule 17 (*ii*) the heirs of the deceased lambardar in order of primogeniture have a definite hereditary right to succeed to the office unless there are circumstances which justify the Collector in passing over the heirs under proviso (*c*) to that sub-rule. The Collector is justified in passing over an heir under that proviso if there is little prospect of his residing in the village and if the Collector holds that the case is one in which the appointment of a substitute would not be appropriate. (*Alan Mitchell, F.C.*) PIR BAKHSH *v.* RAM NARAIN. **20 Lah.L.T. 35.**

———*Appointment — Military chaks —Seniority in military rank—When predominant factor.*

The theory that seniority in military rank must be the predominant factor in making appointments of lambardars in military chaks applies only when other considerations are approximately equal and when colony officers have to select lambardars from among a newly settled chak of military grantees. (*Mitcheli, F.C.*) ABDUL HAKIM KHAN *v.* MUHAMMAD KHAN. **20 Lah.L.T. 153.**

———*Appointment—Non-resident candidate.*

An absentee must not be appointed Lambardar when a suitable resident candidate is available. (*Mitchell, F.C.*) ABDUL HAKIM KHAN *v.* MUHAMMAD KHAN. **20 Lah.L.T. 153.**

———*Mule-breeding square—If attached to office.*

A lambardari square held on mule-breeding terms is attached to the particular post of lambardar. Therefore on the death of the lambardar it must automatically be conferred on his successor. (*Mitchell, F.C.*) INDER SINGH *v.* LACHMAN SINGH. **20 Lah.L.T. 188.**

———*Mule-breeding square held by non-lambardar—Latter subsequently appointed lambardar—Square, if becomes lambardari square.*

If a non-lambardar holding a mule-breeding square is subsequently appointed a lambardar, the mule-breeding square in his possession automatically passes into the class of lambardari squares. (*Mitchell, F.C.*) INDER SINGH *v.* LACHMAN SINGH. **20 Lah L T. 188.**

LAND ACQUISITION ACT (1894), S. 18.

———*Removal — Applying under U. P. Encumbered Estates Act, if a ground.*

Where though a lambardar had applied under the U. P. Encumbered Estates Act, has been paying profits to co-sharers regularly and there is no alternative arrangement possible, he need not be removed from his office. (*Sathe, J.M.*) FAKHRUDDIN *v.* MAHABALI PRASAD. **1941 R.D. 320 = 1941 O.A. (Supp.) 271 = 1941 A.W.R. (Rev.) 357.**

———*Succession—Adopted son and his son—Right to succeed to lambardari in natural family.*

An adopted son does not by the fact of his adoption lose his right to succeed to the post of lambardar held by his natural family. If an adopted son does not lose that right still less would the son of an adopted son. (*Garbett, F.C.*) RALLA SINGH *alias* RAM SINGH *v.* RATTAN SINGH. **20 Lah.L.T. 26.**

———*Succession—Surrender of claim by elder in favour of younger brother—Agreement between them for reversion of lambardari on younger brother's death.*

If on the death of a lambardar his eldest son surrenders his claim in favour of his younger brother, the appointment passes entirely into the family of the younger brother and it is his heirs who have the prior right to the appointment and not the heirs of the elder brother, although there is a written agreement between the two brothers that on the death of the younger the right to hold the lambardari should revert to the line of the elder. (*Mitchell, F.C.*) AHMAD DIN *v.* MAHOMED DIN. **20 Lah L.T. 186.**

LAND ACQUISITION ACT (I OF 1894), Ss. 11 and 31 (4)—Supplementary award—Powers of Collector—Compromise with claimant pending reference by extra payment—Award statement showing such payment—Admissibility in evidence. *See* 1939 Dig., Col. 703. PROVINCE OF BENGAL *v.* SATISH CHANDRA DE. **73 C.L.J. 595.**

———**Ss. 18 and 30**—*Application for reference received after presribed time—Collector forwarding reference —Presumption.*

The Collector must refer a question of title if required to do so by an application received within the prescribed time, but if an application is received after that time, he then has the option of referring the matter to the District Judge or refusing to do so and if the Collector, while forwarding the reference himself mentions that the application is received after the prescribed time, it is to be presumed that he is intentionally making a reference under S. 30 of the Land Acquisition Act. (*Tek Chand and Beckett, JJ.*) NANAK CHAND *v.* PIRAN DITTA. **43 P.L.R. 153 = A.I.R. 1941 Lah. 268.**

———**Ss. 18 and 30**—*Distinction between.*

The three main points of distinction between Ss. 18 and 30 of Land Acquisition Act are that S. 30 leaves the Collector with a power of discretion in the matter, which he does not possess under S. 18 ; that the subject-matter of reference under S. 30 is limited to cases in which Government is not directly interested and that S. 18 alone contains a definite provision for limitation. (*Tek Chand and Beckett, JJ.*) NANAK CHAND *v.* PIRAN DITTA. **43 P.L.R. 153 = A.I.R. 1941 Lah. 268.**

———**Ss. 18 and 31**—*Jurisdiction—Reference to Court—Scope of inquiry—Amount of compensation due to party not applying for reference—Jurisdiction of Court to deal with or increase.*

On a reference made to the Court under S. 18 or S. 31 of the Land Acquisition Act, it is not open to the Court to decide the amount of compensation payable to a party who never asked for a reference and to give him a decree for anything more than what was awarded by the Land Acquisition Officer, in the absence of a refe-

LAND ACQUISITION ACT (1894), S. 18.

rence made to the Court by the Land Acquisition Officer at the instance of such person. On a reference under S. 18, the jurisdiction of the Court is confined to considering and pronouncing upon the objection which has been raised in the written application for the reference. (*Pandrang Row and Somayya, JJ.*) NARAYANA GAJAPATI RAJU BAHADUR GARU *v.* ANNAPURNAMMA GARU. **I.L.R. (1941) Mad. 753 = 1941 M.W.N. 346 = 53 L.W. 463 = A.I.R. 1941 Mad. 660 = (1941) 1 M.L.J. 527**

——**S. 18**—*New point—Claim for not made in reply to notice under S. 9, if open for first time in proceedings on reference—Claim for compensation for injurious affection—Omission to make in pursuance of notice—Effect.*

If a claim for compensation for injurious affection on account of severance under the item thirdly in S. 23 of the Land Acquisition Act, has not been made in reply to a notice under S. 9 of the Act, such a claim cannot be made or allowed for the first time in a reference to the Court under S. 18 of the Act. (*Davies, C.J.*) SPECIAL LAND ACQUISITION OFFICER, KARACHI *v.* HIRANAND. **I.L.R. (1941) Kar. 217 = 196 I.C 285 = 14 R.S 59 = A.I.R. 1941 Sind 152.**

——**S. 18**—Order of Collector—Revision—C.P. Code S. 115. *See* 1940 Dig., Col. 755. AMARNATH *v.* GOVERNOR GENERAL IN COUNCIL. **I.L.R. (1941) Lah. 100 = 43 P.L.R. 408**

——**S 18**—*Order refusing reference— Revision—Jurisdiction of High Court.*

The High Court has jurisdiction to interfere in revision with an order of a Collector refusing to make a reference under S. 18 of the Land Acquisition Act. 12 C.W.N. 241, Foll. (*Henderson, J.*) UPENDRA NATH RAI *v.* PROVINCE OF BENGAL. **45 C.W N. 792.**

——**S. 18, proviso**—*References barred under.*

References which become absolutely barred by the proviso to S. 18 of the Land Acquisition Act will only be those to which Government is a party. (*Tek Chand and Beckett, JJ.*) NANAK CHAND *v.* PIRAN DITTA. **43 P.L.R. 153 = A I.R. 1941 Lah. 268.**

——**S. 23**—*Land with building—Assessment of valuation—Principles of calculating profits.*

It has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. In arriving at the proper value of a site with building thereon for the purpose of awarding compensation under the Land Acquisition Act, the compulsory acquisition being at a time when the interest obtainable on Government securities is 3 per cent. the proper and correct course would be to capitalise the annual rental value of the property at $33\frac{1}{3}$ years' purchase. (*King and Patanjali Sastri, JJ.*) LAND ACQUISITION OFFICER, CALICUT *v.* SUBBA RAO. **1941 M.W.N. 718 = 54 L.W. 724 = A.I.R. 1941 Mad. 684 = (1941) 2 M.L.J. 75.**

——**S. 23**—*Market value—Lease money in vicinity.*

It is wrong to say that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The market value of the acquired land is to be ascertained from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity. 34 Cal. 599, Foll. (*Almond, J.C. and Mir Ahmad, J.*) MST. MADARA *v.* SECRETARY OF STATE. **193 I.C. 215 = 13 R.Pesh. 58 = A.I.R. 1941 Pesh. 13.**

——**S. 23**—*Market value—Matters for consideration—Sale prices after notification and potential user.*

LAND ACQUISITION ACT (1894), S. 30.

Under S. 23 in determining the market value of the land to be acquired the sale prices of similar types of land in similar position in the past as well as after the notification under S. 4 (1) of the Act ; the fact that the land was at the time of determining its value being used for building purposes ; a proposal to convert the subdivision in which the land was situate into a district resulting in acceleration of high price for the land, can all be taken into account even though the aforesaid factors have come into being after the notification under S. 4 (1) of the Act. (*Almond, J C. and Mir Ahmed, J.*) SECRETARY OF STATE *v.* MAHOMED SAIFOR KHAN. **194 I.C. 212 = 13 R, Pesh. 75 = A.I R. 1941 Pesh. 32.**

——**S 23**—*Tenant and landlord—Principles governing apportionment of compensation between.*

In cases of apportionment of the compensation amount between the landlord and the tenant, it is almos impossible to lay down any rigid rule of universal appli cation. In vast majority of cases the apportionment is bound to appear arbitrary. The ratio of apportionmen between them may be different in different cases and would depend on the particular facts admitted or proved. Where there is no evidence one way or the other it has to be made only on general considerations—namely to divide it according to the relative value of the interest of the landlord and tenant. It was *held*, that the ratio of ten to six as between landlord and tenant was fair (*Niyogi, J.*) LAXMANRAO *v.* JAGANNATH. **1941 N.L.J. 620.**

——**S. 23 (1) and Works of Defence Act (1903), S. 23**—*Compensation—Market value—Relevant date—Earlier and later notifications.*

Where some time after the publication of a notification under S. 4 (1) of the Land Acquisition Act a second notification was issued on a later date which was wider than the first one, and embraced not only the land covered by it but more land of the claimant in addition and the earlier notification was neither cancelled nor superseded it was *held* that as regards the proceedings under the Act, the market value of the property must be taken as from the date of the first notification in respect of land covered by it and not as from the date of the subsequent notification. But where under the Works of Defence Act an earlier declaration was cancelled by a later one, it was *held* that it was the date of the second notification which must be taken into consideration as regards the market value of the property concerned. (*Mya Bu and Mosely, JJ.*) COLLECTOR HANTHAWADDY *v* SULAIMAN ADAMJEE. **1941 Rang. L.R 40 = A.I.R. 1941 Rang. 225.**

——**S. 27 (1)**—Construction and scope—If limits or conflicts with S. 35, C. P. Code—"Persons"—If confined to actual parties to proceedings—Trustee of Devasthanam making extravagant claim on behalf of Devasthanam—Order for costs to be paid by him personally—Jurisdiction of Court. *See* 1940 Dig., Col. 757. SEVUGAN CHETTIAR *v.* REVENUE DIVISIONAL OFFICER, DEVAKOTTAI. **A.I.R 1941 Mad. 198 = (1940) 2 M.L.J 753.**

——**S. 28**—Interest under—Nature of—Awarding, if mandatory—Such interest if chargeable to income-tax. *See* INCOME-TAX ACT, S. 6—TAXABLE INCOME. **1940 A.L.J. 860 = A.I.R. 1941 All. 135.**

——**Ss. 30 and 18**—Application for reference received after prescribed time—Collector forwarding reference—Presumption. *See* LAND ACQUISITION ACT, SS. 18 AND 30. **43 P.L.R. 153.**

——**Ss. 30 and 18**—Distinction between. *See* LAND ACQUISITION ACT, SS. 18 AND 30. **43 P.L.R. 153.**

——**S. 30**—*Jurisdiction of Court—Addition of party—Person not party before Collector raising question not covered by reference—If can be added as party.*

LAND ACQUISITION ACT (1894), S. 30.

The jurisdiction of the Court dealing with a reference under S. 30 of the Land Acquisition Act is confined to a consideration of the dispute that is expressly referred to it by the Collector. An addition of parties may indeed be made when the persons who desire to be added as parties do not raise any new dispute but want to place other materials before the Court in connection with the dispute that is referred to it by the Collector. But it cannot be permitted in a case where the question sought to be raised is entirely a new one and is not covered by the reference made by the Collector. (*Mukherjea and Roxburgh, JJ.*) INDU MATI DEBI *v.* TULSI THAKURANI. **I.L.R.** (1941) 2 **Cal.** 394 = 45 **C.W.N.** 912.

——**S. 30**—*Res judicata*—Decision as to title to property acquired—If *res judicata* in subsequent civil suit. *See* C. P. CODE, S. 11. **(1941) 1 M.L.J. 408.**

——**S. 31**—Jurisdiction—Party not applying for reference—Compensation payable to—Power of Court to deal with or increase. *See* LAND ACQUISITION ACT, SS 18 AND 31. **(1941) 1 M.L.J. 527.**

——**S. 31 (2)**—*Acquisition of joint property—One co-sharer receiving entire compensation money - Suit by others for their share—Nature of.*

In law all the co-sharers are entitled to enjoy and possess the common property jointly, and if one of them asserts an exclusive title to any portion of such property and ousts his co-sharers from enjoyment or possession of the same, the latter can certainly institute a suit for recovery of joint possession in respect of that particular item without being obliged to sue for partition of the entire joint estate. When a joint property is acquired under the Land Acquisition Act, the enjoyment, which the co-owners are entitled to under the Act, is to get proportionate shares of the compensation money that is given by the award. Consequently, if one co-sharer receives anything in excess of his share or the whole amount of the compensation money he is bound to refund it to the true owners, and this is a right which is recognized by the proviso to S. 31 (2). A suit by a co-sharer for his share of the compensation money falls under S. 31 (2) and cannot be regarded as a partition suit. (*Mukherjea and Biswas, JJ.*) HEMANTA KUMAR BANERJEE *v.* SATISH CHANDRA BANERJEE. **A.I.R. 1941 Cal. 635.**

——**S. 31 (2), last proviso**—*If creates a right.*

S. 31 (2), last proviso, apparently contemplates a civil suit. It does not create a right to get a refund of the money but simply recognizes the right which exists independently of the section. (*Mukherjea and Biswas, JJ.*) HEMANTA KUMAR BANERJEE *v.* SATISH CHANDRA BANERJEE. **A.I.R. 1941 Cal. 635.**

——**S. 32 (1) (b) (ii)**—*Applicability.*

S. 32 (1) (*b*) (*ii*) contemplates a case where the disability has ceased or the estate vests absolutely in a full owner after the termination of the limited estate. It presupposes a valid deposit under S. 32 (1) and cannot have any reference to a case where the property is found not to belong either wholly or in part to the person in whose favour the award is made and in whose name the money lies deposited ; but is found to belong to some other person who is not a party to the award at all. (*Mukherjea and Biswas, JJ.*) HEMANTA KUMAR BANERJEE *v.* SATISH CHANDRA BANERJEE. **A.I.R. 1941 Cal. 635.**

——**S. 49**—*Right under—When available.*

S. 49 of the Land Acquisition Act requires that the claimant should be "owner" of the land to be acquired as well as of the house, manufactory or building of which he maintains it to be a part. Unity of ownership is a necessary pre-requisite. (*Khundkar and Lodge, JJ.*)

LAND ACQUISITION (MINES) ACT, S. 3.

PROVINCE OF BENGAL *v.* MAHES MISSER.
45 C.W.N. 370 = A.I.R. 1941 Cal. 625.

——**S. 49 (1) and (2)**—*Applicability and scope—Acquisition of part of building or manufactory or house—Option of Government.*

It cannot be held that S. 49 (2) of the Land Acquisition Act only applies to houses or buildings. S. 49 (1) applies to acquiring a part of a house, manufactory or other building, and compels the Local Government to acquire the whole of the same if the owner desires it. It does not give them the option which under S. 49 (2) they possess in the case of an open plot of land. (*Davis, C. J.*) SPECIAL LAND ACQUISITION OFFICER, KARACHI *v.* HIRANAND LILARAM.
I.L.R. (1941) **Kar.** 217 = **196 I.C.** 285 = **14 R.S.** 59 = **A.I.R. 1941 Sind 152.**

——**S. 49 (1)**—*"Owner"—Meaning of.*

The expression "owner" which occurs in S. 49 of the Land Acquisition Act is no where defined in the Act, and though the expression "person interested" as explained in S. 3 (*b*) must obviously include "owner," the connotation of the two terms are by no means coincident. A "person interested" who can not be strictly considered an owner, cannot avail himself of the rights conferred by S. 49. The rights of a zamindar, a tenure-holder, the holder of a building lease, an occupancy raiyat, may conceivably fulfil the conception of ownership within the meaning of S. 49 in certain circumstances. But each case must depend upon its own special facts. (*Khundkar and Lodge, JJ.*) PROVINCE OF BENGAL *v.* MAHES MISSER. **45 C W.N. 370 = A.I.R 1941 Cal. 625.**

——**S. 54**—*Appeal—Order of Assistant Judge apportioning compensation money deposited in Court—Appealability—Subject-matter not exceeding Rs.* 5,000 *—Forum—Sind Courts Act.*

It does not follow because an order apportioning compensation among disputing claimants is not an award or part of an award within the meaning of S. 54 of the Land Acquisition Act that no appeal lies. An appeal would lie though not to the High Court. Where a reference in Land Acquisition proceedings relating to a dispute as to the apportionment of compensation deposited by the Collector under S. 30 of the Land Acquisition Act is transferred by the District Judge to the Assistant Judge under the Sind Courts Act for disposal, the order passed in the case by the Assistant Judge is appealable to the District Judge when the subject-matter of the order does not exceed Rs. 5,000. The High Court has no jurisdiction to deal with the appeal. (*Davis, C.J. and Lobo, J.*) MANGATRAM *v.* HUNDOMAL. **I.L.R.** (1941) **Kar.** 133 = **195 I.C.** 711 = **14 R.S.** 46 = **A.I.R. 1941 Sind 100.**

——**S. 54**—*Decision on reference under S.* 31 (2)—*Appeal, if lies.*

A reference under S. 31 (2) of the Land Acquisition Act is made under S. 18 of the Act. When such reference is made, the Court makes an award under S. 26 and it has the force of a decree. It is an award of Court and appealable under S. 54 of the Act. (*Agarwal and Madeley, JJ.*) MAHABIR PRASAD *v.* DHARMA.
1941 O.W.N. 1325 = 1941 A.W.R. (C.C.) 391 = 1941 O.A. 1005.

LAND ACQUISITION (MINES) ACT, S. 3 (1)—*Acquisition with reservation of minerals—Minerals, if include laterite—"Common rock" and "vernacular" tests—Meaning and mode of application—Such tests, if alternative or cumulative.*

Certain lands were compulsorily acquired for the railway for the purpose of constructing a branch line, and the declaration under **S. 6 of the Land Acquisition Act**

LAND ACQUISITION (MINES) ACT, S. 3.

contained a reservation of "mines of coal, iron-stone, slate and other minerals" in terms of S. 3 (1) of the Land Acquisition (Mines) Act. During the period of construction the railway contractors removed materials including laterite stone and laterite *kankar* or moorum from the acquired lands, and the owner of the lands filed a suit for compensation for their wrongful removal contending that the materials in suit were minerals within the meaning of the reservation contained in the declaration.

Held, that in order to decide whether or not laterite was a mineral within the meaning of the reservation a double test had to be applied (*a*) the negative "common rock" test (*b*) the positive "relevant vernacular" test, that the two tests were not alternative but cumulative, that the common rock test had first to be applied and that the plaintiff could not succeed even if he established the vernacular title of laterite to be a mineral if it did not satisfy the "common rock" test. According to the negative "common rock" test, the substance should not be the ordinary rock of the district but should be exceptional in use, character or value. In order to be excluded from the reservation by the common rock test, it is not necessary that there should be an uninterrupted expanse of the substance extending overthe whole length of the acquired land. If within such land there are substances, however extensive, distinct and distinguishable from the other strata or horizons, this might well exclude such substances from the common rock category. But the mere fact of the ground being in different horizons, distinct as against each other, is not decisive. But depth may be extremely important. The distinction between surface soil and the rock below it, cannot be relied upon to make it exceptional. The "vernacular" test is not really whether the substance can be conveniently or properly dealt with under the heading of "mineral substances" or resources or "minerals" for short. The test is "if you ask any one" whether he will say that the substance comes under the description "mines of coal" etc. and "other minerals"; ' ,any one" being afterwards limited to certain classes in this case to tenantry, land-owners the Crown and the railway (*Ameer Ali, J.*) MIDNAPUR ZAMINDARI CO., LTD. *v.* BENGAL NAGPUR RY. CO., LTD.

I.L.R. (1941) 1 Cal. 189 = 196 I.C. 305 = 45 C.W.N. 553 = 14 R.C. 207 = A.I.R. 1941 Cal. 465.

——**S. 3 (1)**—*Exception to reservation—Construction.*

The words 'except only such parts as it may be necessary to dig . . . . . in the construction of the work, for the purpose of which the land is being acquired" in S. 3 (1) of the Land Acquisition (Mines) Act, should be narrowly constructed so as to include only such parts of the minerals as may be actually necessary to dig in constructing the work. (*Ameer Ali, J.*) MIDNAPORE ZEMINDARI CO., LTD. *v.* BENGAL NAGPUR RY. CO., LTD. **I.L.R. (1941) 1 Cal. 189 = 196 I.C. 305 = 14 R.C. 207 = 45 C.W.N. 553 = A.I.R 1941 Cal. 465.**

LAND IMPROVEMENTS LOANS ACT (XIX OF 1883), S. 7, proviso—*Construction—Sale under S. 7 (1) (c)—Mortgage by borrower before loan—If extinguished.*

The words of the proviso to S. 7 of the Land Improvements Loans Act clearly mean that the interests of third parties (*e.g.*, the rights of an occupancy tenant) are protected, but that the interest of the borrower and the interest of a mortgagee or charge holder from the mortgagor with regard to the property would be extinguished by a sale under S. 7 (1) (*c*) even though the mortgage may have been created before the date of the loan. (*Broomfield and Divatia, JJ.*) MAHALINGAPPA

LANDLORD AND TENANT.

CHANMALLAPPA *v.* SHANKARAYYA GURUSHANTAYYA
195 I.C. 849 = 14 R.B. 83 = 43 Bom.L.R. 600 = A.I.R. 1941 Bom. 300.

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See also (i) VARIOUS TENANCY ACTS.
(ii) LAND TENURE.
(iii) MADRAS ESTATES LAND ACT.
(iv) T. P. ACT, SS. 105-117.

——Abadi—Ryot's right to build dwelling house. *See* 1940 Dig., Col. 757. BADRI LONIA *v.* DWARKA PRASAD. **193 I.C. 785 = 13 R.A, 454.**

——Abandonment—Land given to riyaya for residential purposes—Execution by him of wakf deed in respect of that land—Effect of—Easements Act, S. 62 (*f*). *See* 1940 Dig., Col. 758. KANHAIYA LAL *v.* HAMID ALI. **15 Luck. 619.**

——Abwab—Tangiana—Money charged by landlord on sales of articles sold in gala in land--If tax or duty—Recoverability. *See* 1940 Dig., Col. 758. MASOOD AHMAD *v.* BIKAN MAHURI. **A.I.R. 1941 Pat. 6.**

——*Admission by all lessees except one—Lease found invalid--If invalid against all.*

Where the lessees admit a lease but only one of them pleads that the lease deed is inadmissible for want of registration and the lease is found to be invalid it is invalid against all the lessees. (*Mya Bu and Mosely, JJ.*) U MIN SIN *v.* KO KYE. **194 I.C. 31 = 13 R.R. 274 = A.I.R. 1941 Rang. 117.**

——*Admission to tenancy—Acceptance of rent—Misdescription in prior proceedings.*

Mere acceptance of rent does not amount to admission to tenancy. The wrong description of a party as sub tenant in prior infructuous proceedings for ejectment is no proof of admission to tenancy. (*Sathe, J.M.*) CHIRANJIN *v.* CHANDRA DHAR.
1941 A.W.R. (Rev.) 686 = 1941 O.W.N. 1009 = 1941 O.A. (Supp.) 626 = 1941 R.D. 744.

——*Agreement to surrender to Government— No rights to be considered to have been acquired in the interval—Agreement falling through—Effect.*

Where an agreement with Government is entered into by the plaintiff's tenants, under Sind Sagar Doab Colonisation Act whereby among other things it was agreed that from the date of the agreement up to the date of the surrender no one should acquire or be considered to be entitled to either proprietary or occupancy tenancy rights in the said lands and the Act is subsequently repealed, the tenants cannot claim revival of their rights as it existed on the date of the agreement. (*Lord Atkin.*) MAHOMED IKHTIAR *v.* HIMTU RAM.
193 I.C. 684 = 7 B.R. 697 = 1941 O.L.R. 382 = 13 R.P.C. 179 = 1941 O.A. 388 = 1941 A.W.R. (Rev.) 334 = A.I.R. 1941 P.C. 34 (P.C.).

——Agricultural lease—Oral agreement without delivery of possession—Sufficiency. *See* T. P. ACT, S. 107. **1941 P.W.N 38.**

——Ahata given to indigo manufacturers—Status of lessees and their successors—Original grant, if nullified by bringing land under cultivation—Origin of tenancy unknown—Inference of permanent character—Circumstances. *See* 1940 Dig., Col. 767. RAM DAUR RAI *v.* LACHHMI PRASAD.
I.L.R. (1941) All. 27 = 193 I.C. 407 = 13 R.A. 408 = 1941 A.L.J. 7 = 1941 O.A. (Supp.) 103 = A.I.R. 1941 All. 51.

——Compensation for improvements—Building lease—Provision for payment of market value of building before surrender of possession on expiry of lease—Market value—Assessment—Depreciation allowance—Right of landlord to deduction—Special letting value or

constructional value—If to be taken into account, *See* LEASE—CONSTRUCTION. **(1941) 2 M.L.J. 711.**

———*Co-tenants—Joint Hindu family holding—Absence of one brother from village—Name not appearing in the record—Rights, if lost.*

Where in the case of a joint Hindu family holding one of the co-tenants is living in another village and his name does not appear in the records that cannot extinguish his rights. (*Shirreff, J.M*) SAHDEI *v.* SARJU.

1941 O.A. (Supp.) 822 = 1941 A.W.R. (Rev.) 978.

———*Creation of tenancy—Order of Court—Requisites—Partition proceedings—Recording of one as a tenant—Effect.*

An order of Court which might create or establish a tenancy must be an order of a competent Court, Civil or Revenue, which has power to decide the factum or existence of tenancy, as a matter of title between parties and not on the basis of possession alone. In partition proceedings a dispute whether a person is holding the property as a tenant, does not properly arise and the mere fact that a person has been recorded in partition proceedings as a tenant will not make him a tenant in the eye of the law if in fact such a relationship did not arise between the parties. (*Dar, J.*) BHAGWATI PRASAD *v.* CHANDRIKA PRASAD. **196 I.C. 817 = 1941 A.W.R. (Rev.) 610 = 1941 R.D. 566 = 1941 A.L.W. 655 = 1941 O.A. (Supp.) 595 = 1941 A.L.J. 410 = A.I.R. 1941 All. 339.**

———Customary dues—Haq-e-chaharum — Recovery from auction-purchaser. *See* CUSTOM—HAQ-E-CHAHARUM. **1941 A.W.R. (Rev.) 866.**

———*Ejectment—Burden of proof—Failure to prove lease set up—Effect—If entails dismissal of suit—Defendant pleading permanent tenancy but not proving it—Plaintiff's right to decree for possession.*

In a suit for ejectment of a tenant, the burden of proving the lease is on the plaintiff landlord; but the failure of the plaintiff to prove the specific lease set up does not necessarily entail the dismissal of the suit. The plaintiff would nevertheless be entitled to possession if the tenant defendant pleads permanent tenancy but fails to establish his plea of permanent tenancy. (*Nagesvara Iyer and Venkataranga Iyengar, JJ.*) THIRUPATHI BHATRACHAR *v.* VENKATARAYAPPA.

19 Mys L.J. 86 = 46 Mys. H.C.R. 79.

———*Ejectment*—Dakhal dihani—*Landlord's actions subsequent thereto—Effect.*

Nothing that a zamindar does after the *dakhal dihani* is carried out, can affect its legality or validity. (*Sathe, A.M.*) BALRAJI *v.* SPECIAL MANAGER, COURT OF WARDS, AMETHI. **1941 A.W.R. (Rev.) 1040 = 1941 O.A. (Supp.) 849 = 1941 A.L.J. (Supp.) 140.**

———*Ejectment from encroached land—Onus.*

Where a landlord wishes to eject a tenant from land which was not included in the contract of tenancy, the burden of proof lies upon the landlord to show that the land from which he wishes to eject the tenant lies outside the contract. (*Drake Brockman, S.M. and Knox, J.M.*) MUKUND LAL *v.* OUDH NARAIN SINGH.

1941 O.A. (Supp.) 573 = 1941 A.W.R. (Rev.) 616 = 1941 R.D. 597 (2).

———Ejectment—Notice to quit—Necessity—Tenant setting up adverse title on expiry of lease. *See* 1940 Dig., Col. 758. RAHMAT ULLAH *v.* MAHOMED HUSSAIN. **191 I.C. 223 = 13 R.A. 224.**

———Ejectment—Service tenure holder — Refusal to perform services—Right of landlord to eject—Acceptance of quit rent—If a bar to ejectment—If creates occupancy tenancy. *See* 1940 Dig., Col. 759. SANKAR MALIK *v.* RAJA BRAJA SUNDER DEB. **7 B.R. 141 = 22 Pat.L.T. 216.**

———*Forfeiture—Right of re-entry given to lessor in default of payment of rent—Determination of tenancy—Law in Punjab—Limitation Act, Arts.* 110, 139 *and* 143.

A right of re-entry given to lessor in default of payment of rent by the lessee does not *ipso facto* determine the tenancy. Notwithstanding the cause of forfeiture, the tenancy continues until the lessor does some act which shows his intention to determine it. If the lessor does nothing, there is no forfeiture or determination of the tenancy, and neither Art. 139 nor Art. 143 of the Limitation Act applies. The tenancy still subsists and under Art. 110 the lessor has a right to recover rent for the three years immediately preceding the suit. (*Tek Chand and Beckett, JJ*) PANNA LAL *v.* UTTAM CHAND. **197 I.C. 58 = 43 P.L.R. 261 = A.I.R. 1941 Lah. 248.**

———Grove—Land let under agreement—Tenant when commits breach. *See* 1940 Dig., Col. 760. BANSIDHAR MISRA *v.* BINDESHWARI DATT. **16 Luck. 209.**

———Haq-e-chaharum—Liability of auction purchaser—Interest on—Right to. *See* CUSTOM—HAQ-E-CHAHARUM. **1941 A.W.R. (Rev.) 963.**

———*Joint Hindu family—Lease to a member of—Nature of right taken—Inference—Circumstances.*

Where a lease is given to one of the members of a joint Hindu family, but his name is never entered in the papers and it is only the name of the eldest brother that is entered and there is evidence of possession by him and his heirs, as well as of payment of rent, the inference is that the right in the holding is a joint right and not the individual right of the person who took the lease. (*Harper, S.M. and Shirreff, J.M.*) JANG BAHADUR *v.* KAULI. **1941 A.W.R. (Rev.) 928 = 1941 O.A. (Supp.) 802 = 1941 R.D. 817.**

———*Khudkast—Member of coparcenary not having special rights in—Power to gift.*

A member of the coparcenary body, who had no special right of severalty in his khudkasht, has no right to make gifts of land which belongs to the whole coparcenary body and the donee cannot acquire any rights. (*Shirreff, J.M.*) JHANDU SINGH *v.* BABU RAM. **1941 A.W.R. (Rev.) 548 (1) = 1941 O.A. (Supp.) 479 (1) = 1941 R.D. 592 (1).**

———*Khudkasht — Permanent lease of, by Hindu widow—Reversioner, if bound.*

Hindu Law applies to tenancies in the Central Provinces up to a point. A permanent lease is a transfer which a widow could not make without necessity. But in the case of khudkasht land, the permanency of tenure is derived not from the lease but from the tenancy law and the lessee's tenure is governed by conditions under the C. P. Tenancy Act. Such a lease becomes binding on the reversioner. (*Bose, J.*) GHASIRAM MEILAP *v.* GIRDHARI. **195 I.C. 603 = 14 R.N. 61 = 1941 N.L.J. 435 = A.I.R. 1941 Nag. 306.**

———*Khudkasht—Presumption of tenancy from cultivation.*

The ordinary presumption which arises when a man cultivates the khudkasht land of the proprietor on batai or on payment of rent, is that he is a tenant. The onus is on those who rely on an 'agreement of partnership' to prove it. (*Binney, F.C.*) RAMU GANPAT *v.* NAZARSINGH. **1941 N.L.J. 567.**

———Lease—Assignment of part by lessee—Liability of assignee for whole rent. *See* 1940 Dig., Col. 761. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **192 I.C. 17 = 13 R.P. 362 = 7 B.R. 283.**

———*Lease—Construction—Lease for building—Provision that lessee to be paid market value of building before*

surrender of possession—Market value—Ascertainment—Deduction for depreciation—If to be allowed—Mesne profits—Right of lessor.

Where a lease of a plot of land provides that the lessee "shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment," in assessing the amount payable to the lessee at the time of resumption by the lessor, due allowance should be made for depreciation. The circumstance that the lessor would take some time to construct the building and would, during that period, be deprived of the present user and the income derived therefrom, is no valid reason for refusing to make a deduction for depreciation. The market value is only the constructional value of the building and its special letting value cannot be taken into consideration in fixing the value to be paid to the lessee on eviction, in the absence of a contract to the contrary. Where the lessor terminates the lease and tenders a ridiculously low amount as the value of the building, *e.g.*, where he tenders an amount of Rs. 3,000, and the market value is ultimately found to be Rs. 18,000, the lessee's possession after such tender cannot be held to be the possession of a trespasser or wrongful possession, so as to entitle the lessor to claim mesne profits from the date of such tender. (*Leach, C.J. and Horwill, J.*) ETHIRAJULU NAIDU *v.* RANGANATHAM CHETTY.

54 L.W 508 = 1941 M.W.N. 938 = (1941) 2 M.L.J. 711.

———*Lease—Construction—Lease for construction of house with tiled or thatched roof—Rent payable on monthly basis—Lessee free to give up house and remove materials thereof whenever he chose—Nature of tenancy.*

When a tenancy is terminable at the will of the tenant it must be held to be terminable at the will of the landlord also. A lease was granted for the construction of a house with merely tiled or thatched roof; the rent fixed was payable monthly and though a sum of Rs. 3 was stated to be the yearly rent, it was made clear that if a particular year consisted of 13 months, there were to be 13 payments of 4 annas each; the sale was permitted only on payment of one fourth of the consideration money; and it was expressly stated that the lessee was free to give up the house and remove the materials thereof whenever he chose.

Held, that the tenancy created under the lease must be held to be either a tenancy-at-will or a tenancy from month to month and that being so the kabuliyat though unregistered was admissible in evidence. (*Harries, C. J. and Fazl Ali, J.*) RAM LAL SAHU *v.* BIBI ZOHRA.

20 Pat. 115 = 22 Pat.L.T. 721 = 195 I.C. 583 = 7 B.R. 946 = 14 R.P. 136 = A.I.R. 1941 Pat. 228.

———Lease—Construction—Lessee undertaking to deliver possession on termination of tenancy and to remove structures erected by him—Termination of tenancy—Lessee vacating without recovering structures—If retains interest in land or structures afterwards. *See* T. P. ACT, S. 108.

43 Bom.L.R. 576.

———*Lease—Construction—Lessee undertaking to pay "Municipal taxes....and riot taxes and all other existing and future rates, taxes or dues of whatever kind or nature, etc."—Interpretation of—Liability to pay property tax imposed later on.*

A clause in a lease of immovable property executed in January, 1938, provided "that the lessees shall pay the following Municipal taxes, *viz.*, general tax, halalkhore tax and licence-fees, the water tax.....and riot tax and all other existing and future rates, taxes or dues of whatever kind or nature for the time being payable either by the landlord or tenant in respect of the demised premises or any part thereof, and the lessees shall pay to the lessors the amount of such taxes or dues when demanded." On 30—3—1939, the Bombay Urban Immovable Property Tax came into operation and the question arose whether the tax under that Act fell within this clause in the lease.

Held, (1) that on the true construction of the clause the liability of the lessees was not confined to municipal taxes only, *viz.*, taxes the benefit of which was retained by the Municipality; (2) that the word "dues" had a wider import than the word "rates" or "taxes"; (3) that the Urban Immovable Property Tax was both a tax and a due in respect of the demised premises; and (4) that the lessees were therefore bound to pay that tax. (*Blackwell, J.*) MANCHERJI PALLONJI *v.* DINBAI NUSSERWANJI.

195 I.C. 517 = 11 R.B 43 = 43 Bom.L.R. 543 = A.I.R. 1941 Bom. 260.

———*Lease—Construction—Reclamation lease.*

Where the lands leased are jungle lands and the kabuliyat provides for progressive rents for successive years and mentions a maximum which can never be increased, the lease is a reclamation lease. A stipulation in the kabuliyat that the lessee will forfeit his rights if the reclamation is not made within a particular period is not essential. (*Mukherjea, J.*) SRIKANTA MRIDHA *v.* PRAFULLA CHANDRA GHOSH.

74 C.L.J. 139.

———*Merger—Landlord acquiring occupancy rights—Punjab Tenancy Act, S. 53.*

Per *Din Mohammad, J.*—In the Punjab the general rule of common law prevails that the lesser estate is drowned in the greater. Consequently in the case of a landlord acquiring occupancy rights, whether under S. 53 of the Punjab Tenancy Act or otherwise, it is not open to the landlord to keep the occupancy rights alive. (*Tek Chand, Din Mohammad and Beckett, JJ.*) THAKUR MADHO SINGH *v.* JAMES R.R. SKINNER.

43 P.L.R. 581 = A.I.R. 1941 Lah. 433 (F.B.).

———Mining lease—Nature of—If a sale of land or minerals. *See* 1940 Dig., Col 767. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON.

192 I.C. 17 = 13 R.P. 362 = 7 B.R. 283.

———*Notice to quit—Validity—District Board letting out lands made over to them by Government in their capacity as landlords—Notice given by them on behalf of Government—If valid—Bengal Local Self Government Act, S. 74.*

Where a District Board in their own capacity as landlords let out the lands made over to them by Government under S. 74 of the Bengal Local Self Government Act, they must *qua* landlords serve notice to quit on the tenant to determine the tenancy. A notice given by them on behalf of the Government directing the tenant to deliver possession of the land to them as agents of the Government is not valid. (*Mukherjea, J.*) DISTRICT BOARD OF TIPPERAH *v.* SARAFAT ALI.

195 I.C. 594 = 14 R.C. 117 = 73 C.L.J. 281 = A.I.R. 1941 Cal. 408.

———*Patni kabuliyat—Interest on arrears of rent—Rate of—Stipulation to pay "according to law"—Meaning—Bengal Tenancy Act, S. 67.*

A stipulation in a patni kabuliyat that the patnidar should pay interest on the arrears of rent "according to law" means according to the law in force at the time when the default is made. As there is no provision in the Patni Regulation about the rate of interest payable by patnidars for arrears of rent, the rate of interest as laid down in S. 67 of the Bengal Tenancy Act must be taken as the rate of interest which was contemplated by the parties. In other words, the rate of interest as laid down in the Bengal Tenancy Act for the time being in

force must be taken as a part of the contract. (*Nasim Ali and Pal, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* BIJOY CHAND MAHATAB.

I.L.R. (1941) 2 Cal. 335=45 C.W.N. 787.

———*Permanent tenancy--Adverse possession—Acquisition by—Essentials—Mere assertion by tenant without overt act or change of possession—Sufficiency.*

A tenant making an assertion of a right to permanent tenancy cannot acquire such right by adverse possession when the tenant does no overt act to indicate that it was not a mere assertion of title, and when there has been no change or transfer of possession or occupation from him to any third party in the exercise of such assertion of title. (*Nagesvara Iyer and Venkataranga Iyengar, JJ.*) THIRUPATHI BHATRACHAR *v.* VENKATARAYAPPA. **19 Mys.L.J. 86=46 Mys. H.C.R. 79.**

———*Permanent tenancy—Cessation—Tenant subsequently executing rent deeds inconsistent with such tenancy.*

Even if a tenancy was a permanent one at its inception, it ceases to have a permanent character if the tenant or his predecessor-in-title subsequently executes in favour of the landlord or his predecessor-in-title rent deeds for specified periods of time and admits his liability to ejectment and enhancement of rent. (*Abdul Rashid, J.*) SURAJ BHAN *v.* ABDUL KHALIQ.

195 I.C. 291=14 R.L. 57=43 P.L R. 75= A.I.R. 1941 Lah. 195.

———*Permanent tenancy—Inference— Mortgage by tenant reciting that rent is fixed permanently—Landlord not evicting heirs of tenant—Effect of.*

The fact that the tenant has executed mortgages of his tenancy interest reciting that the rent was fixed permanently does not lead to the inference that the tenancy is a permanent tenancy, in the absence of evidence to show that the landlord has recognised the mortgage or the title of the mortgagee. The fact that the landlord has not taken steps to evict the heirs of the tenant does not support the inference of permanency. Nor is the recital in the mortgage that the rent is fixed permanently admissible in evidence against the landlord; even if it be admissible, it is not of any weight against the landlord. (*Shearer, J.*) CHAGGANLAL MARWARI *v.* INDRA KEOT. **194 I.C. 459=13 R.P. 723= 7 B.R. 775=A.I.R. 1941 Pat. 495.**

———*Permanent tenancy—Inference — Origin of tenancy known—Terms put in writing at inception of tenancy—Effect of.*

Where the tenancy is of a known origin and the terms on which the original tenant was inducted on the land were admittedly put in writing at the inception of the tenancy, the tenancy cannot be said to be permanent tenancy. (*Harries, C. J. and Fazl Ali, J.*) RAM LAL SAHU *v.* BIBI ZOHRA. **20 Pat. 115=195 I.C. 583= 7 B.R. 946=14 R.P. 136=22 Pat.L T. 721= A.I.R. 1941 Pat. 228.**

———*Permanent tenancy—Inference— Settlement of small plot of land for building—House built by tenant —Rent low and not enhanced—Inference of permanent tenancy—If justified.*

From the circumstance that the land settled with the tenant is a small parcel intended to be used as a building plot, and that the tenant has constructed a house on it, it cannot be inferred that the tenancy was intended to be permanent, when the house is not of any great value. Nor can an inference of permanent tenancy be drawn from the mere fact that the rent fixed is low and has not been enhanced. (*Shearer, J.*) CHAGGANLAL MARWARI *v.* INDRA KEOT. **194 I.C. 459=13 R.P. 723=7 B.R. 775=A.I.R. 1941 Pat. 495.**

———*Permanent tenancy—Lease for construction of tiled or thatched house—Lessee erecting pucca house without interference by lessor—Landlord if estopped from denying permanent lease.*

Where a lease is granted for the construction of a house with merely a tiled or thatched roof and not a pucca roof, the mere fact that the lessee has constructed a pucca structure without the interference by the lessor will not estop the lessor from contending that the lease is not a permanent lease. (*Harries, C. J. and Fazl Ali, J.*) RAM LAL SAHU *v.* BIBI ZOHRA. **20 Pat 115= 195 I.C. 583=7 B.R. 946=14 R.P. 136= 22 Pat L.T 721=A.I.R. 1941 Pat. 228.**

———Permanent tenancy—Presumption—Tenancy for agricultural purposes. *See* 1940 Dig., Col. 762 SHANKARRAO DAGADUJIRAO *v.* SAMBHU.

I.L.R. (1941) Bom. 107=73 C.L.J. 612= I.L.R (1940) Kar. (P.C.) 380= 43 Bom.L.R. 1=(1941) 1 M.L.J. 427 (P.C.).

———*Permanent tenancy—Proof—Inference from circumstances—Circumstances justifying.*

The origin of a tenancy, which was created before the T. P. Act, was unknown. There was no pucca building upon the land of the tenancy. The rent was not uniform but it was not charged at least for the last 52 years although during that period the price of land had jumped up. There were many transfers of the tenancy—private as well as Court sales—on the footing that it was transferable, and the transferees were recognised by the landlords as tenants. There was at least one instance of succession in the history of the tenancy. Some of the co-sharer landlords admitted the permanent character of the tenancy.

Held, that the above facts and circumstances justified the inference that the tenancy in its inception was permanent. (*Nasim Ali and Pal, JJ.*) JOGENDRA KRISHNA *v.* SUBASHINI **I.L.R. (1941) 2 Cal. 44= 74 C.L.J. 145=45 C.W.N 590= A.I.R. 1941 Cal. 541.**

———*'Possession', 'occupation'—Difference.*

There is a substantial difference between the word 'possession' and the word 'occupation' while the possession of a tenant may be that of a co tenant, it does not follow that the occupation of one can be equivalent to the occupation of another. Even if it were, however, the presumption ends as soon as the occupation of one becomes adverse to that of the other. (*Harper, S.M. and Shirreff, J.M.*) RAQUMA *v.* GHIRRAI.

1941 O.A. (Supp.) 456=1941 R.D. 548= 1941 A.W.R. (Rev.) 497.

——— *Relationship—Assignee of rents of holding—If becomes landlord in relation to tenant.*

An assignee of the rents of a holding does not by the assignment become the landlord in relation to the tenant of the holding. (*Rowland, J.*) RAMSEWAK KURMI *v.* THAKURJI MAHARAJ. **196 I.C. 552=8 B.R. 34= 14 R.P. 206.**

———*Relationship—Construction of documents—Use of term "Bhag-settlement".*

The grant for the settlement of four arahs of land was made in these terms "Bhag-settlement for three years, 6 maunds of paddy per arah be given".

Held, that the use of the word "Bhag-settlement" was not inconsistent with a tenancy, and the only reasonable interpretation of the document was that the persons settled were tenants holding at a produce rent. (*Henderson, J.*) SUDHINDRA CHANDRA SINGHA *v.* JADAV MARAK. **A.I.R. 1941 Cal. 717.**

———*Relationship—Partition of joint holding—Land allotted to one co-sharer found in possession of another—*

LANDLORD AND TENANT.

Former recorded as owner and latter as tenant—Relation of landlord and tenant—If exists between parties.

When a partition of a joint holding takes place and land allotted to one shareholder is found to be in possession of another, the ordinary practice adopted is for the person entitled under the partition proceeding to be recorded as owner, the other members of the proprietary body remaining in possession being recorded as tenants-at-will with or without some note in the rent column explaining that the recorded tenants pay no rent either because they claim to be proprietors in possession or for some other similar reason. In such circumstances the recorded proprietor has a right under S. 122 of the Land Revenue Act to apply to the Revenue Officer who carried out the partition to eject the co-sharers in possession and to place him in possession. After the lapse of three years this remedy is no longer open to the recorded owner though he may still have a remedy under the ordinary law to bring a suit for possession of the land. The relationship of landlord and tenant does not exist between the parties. (*Alan Mitchell, F.C.*) RASIL SINGH *v.* DHANI RAM.
20 Lah.L.T. 31.

———*Relationship—Proof.*

During the subsistence of tenancy the tenant *A* brought *B* on the land as sub-tenant. After the expiry of lease of *A*, *B* continued possessing the property exclusively. *A* sold her interest to *C*. *B* never paid rent to *C* nor was recognized as tenant by *C*.

Held, that as soon as the interest of *A* came to an end the interest of *B* as sub-tenant did not survive and *B* could not subsequently rank as tenant of *C*. Hence *C* could not sue *B* in ejectment as tenant after service of a notice to quit. (*Mukherjea, J.*) BIRAJA SUNDARI *v.* MAHAMAYA SEN.
A.I.R. 1941 Cal. 399.

———*Relationship—Recognition as tenant—Person paying rent described in rent receipt as* marfatdar *or* sorborahakar *or* gujratdar.

The fact that the landlord described in the rent receipts, the transferee of the tenancy from whom he received rent as *marfatdar* or *sorborahakar* or *gujratdar* and not as tenant, does not necessarily show that the landlord did not recognise the transferee as tenant. (*Nasim Ali and Pal, JJ.*) JOGENDRA KRISHNA *v.* SUBSAHINI.
I.L.R. (1941) 2 Cal. 44=74 C.L.J. 145=45 C.W.N. 590=A.I.R. 1941 Cal. 541.

———Rent—Abatement—Landlord preventing tenant from enjoying demised land—Right to rent. *See* 1940 Dig., Col. 763. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON.
192 I.C. 17=13 R.P. 362=7 B.R. 283.

———Rent—Abatement—Suit for rent—Claim to abatement on ground that land is covered with sand—Power of Court to grant. *See* BIHAR TENANCY ACT (AS AMENDED BY ACT VIII OF 1937).
22 Pat.L.T. 789.

———Rent—Enhancement—Excess area found on re-measurement—Settlement of increased rent—Previous measurement not proved to be inaccurate—Deduction from total area—If may be allowed—Rule of practice. *See* B. T. ACT, S. 52.
45 C.W.N. 575.

———Rent—Liability for—Dispossession of tenant by title paramount. *See* 1940 Dig., Col. 763. PARKASH KUAR *v.* GIAND CHAND.
191 I.C. 555=13 R.L. 318.

———Rent or money suit—Suit for money due in respect of patni. *See* 1940 Dig., Col. 763. SAILENDRA NATH GHOSH *v.* TRUSTEES TO THE ESTATE OF LATE BABU MATI LAL.
191 I.C. 161.

LANDLORD AND TENANT.

———*Rent—Remission—Intention of executive authority—Suit to eject heir of statutory tenant—Withdrawal—Status of tenant—New contract of tenancy, if constituted.*

The intention of the executive authority as regards remissions is that if a new tenant wished to take land he should do it on the clear understanding that the unremitted rent was the legal rent payable. If he did not wish to take the land on these terms there was no call on him to do and accordingly he should not receive remissions. Where an ejectment suit against the heir of a statutory tenant is withdrawn and defendant is allowed to remain in possession and become automatically on the expiry of three years, a statutory tenant, though technically this is described as an admission to the tenancy, it does not constitute a new tenancy as contemplated by the executive authority. (*Harper, S.M.*) SALIG RAM *v.* SONPAL.
1941 O.A. (Supp.) 618=1941 A.W.R. (Rev.) 678=1941 R.D. 667.

———*Rent—Suit alleging settlement of land on terms for payment of rent at rates prevailing in locality—Allegation of non-payment of rent—Prayer for settlement of rate of rent and for arrears—Maintainability of suit—If one for settlement of fair rent.*

The plaintiff, a landlord, brought a suit alleging that the land in suit was settled over thirty years ago with the defendants on the undertaking that the defendants would pay rent at the rates prevailing in the district from time to time. No rent had been paid and the plaintiff therefore prayed the Court to settle the rate of rent and for a decree for arrears of rent on such basis. The defendants' plea that the land was rent free was negatived. The defendant also pleaded that the suit as framed was not maintainable, as it was a suit to settle a fair and equitable rent for a holding.

Held, that the suit was really one for arrears of rent and an inquiry had to be held to ascertain what that rent was; and that being the real nature of the suit, it was maintainable in that form. (*Harries, C.J. and Fazl Ali, J.*) CHINTI KAHARIN *v.* KRIPA SHANKAR WARRAH.
7 B.R. 750=13 R.P. 698=194 I.C. 300=1941 P.W.N. 513=A.I.R. 1941 Pat. 488

———*Rent—Suit for—Plea of payment into Court under injunction—No proof—Effect—Payment to decree holder instead of into Court as directed by injunction—Effect.*

Where in a suit for rent the defendant pleads payment into Court in obedience to an injunction from a Court but where there is no copy of the injunction on the record, it is unsafe to take for granted the fact of the issue of the injunction and hence the plea fails and rent should be decreed. Similarly where though an injunction not to pay the rent to the zamindar was issued and the tenant was directed to pay the amount into Court, he pays it to the decree-holder in the suit in which the injunction was issued there is no payment as directed by the injunction and hence the payment, if any, cannot be pleaded in defence to a suit for rent. (*Shirreff, J.M. and Sathe, A.M.*) MANAK CHAND *v.* TOTA RAM.
1941 O.A. (Supp.) 814=1941 A.W.R. (Rev.) 970=1941 R.D. 950.

———*Rent—Suspension of—Conditions for application of doctrine—Landlord realising rent of part from sub-tenant in possession under mistake — If entitles tenant to suspension of rent of sub-tenure.*

Mere dispossession of the tenant from part of the demised premises is not sufficient to justify a total suspension of rent; in order to apply the doctrine of suspension it must be proved that the landlord deliberately and intentionally evicted the tenant from a part of the demised premises. In a suit for rent of a sub-tenure the

defendant pleaded that he had been dispossessed by the plaintiff from a portion of the tenure. It was found that the plaintiff had realised rent for the period in suit in respect of a plot from the tenant in possession who was settled by the defendant. It was, however, found that the plaintiff had realised the rent inadvertently under a mistake and that he did not intend to dispossess the defendant from any part of the sub-tenure.

Held, that it must be held that the purpose of the plaintiff in realising rent from the tenant in possession was not to evict the defendants and his action therefore did not entitle the defendant to a suspension of the rent of the sub-tenure. (*Agarwala, J.*) BASANTI LAL MARWARI *v.* JAMUNA PRASAD SINGH.

193 I.C. 250=7 B.R. 518=22 Pat.L.T. 310=13 R.P. 558=A.I.R. 1941 Pat. 417.

———*Rent—Suspension—Considerations for Court.*

It is not in every case of a lump rental and dispossession from a part, the tenant is at liberty to hold the other lands appertaining to the tenancy rent-free for all time to come. The Court should consider whether the landlord's failure to put the tenant in possession of the entire demised area was due to some mistake as to the extent of the boundaries or some other *bona fide* act. It has further to consider whether the tenancy is indivisible in the sense that the plots are such that dispossession from one plot necessarily interferes with the enjoyment of the rest. (*Mukherjea, J.*) SOURENDRA MOHAN *v.* KANAI LAL ROY. **195 I.C. 701=14 R.C. 127=73 C.L.J. 194=45 C.W.N. 396=A.I.R. 1941 Cal. 384.**

———Sir—*Mortgages of* sir *plots—Surrender of ex proprietary rights—Redemption of first mortgage by second mortgagee—First mortgagee, if should surrender cultivatory possession of mortgagor's former* sir *plots—T. P. Act, S.* 60.

Where a first mortgage of certain *sir* plots is redeemed by a second mortgagee of the same, under S. 60, T. P. Act, the first mortgagee is under an obligation to return to the second mortgagee all the proprietary rights which he obtained from his mortgagor on the strength of his mortgage. But if the *sir* rights of the mortgagor were extinguished on the surrender of his ex-proprietary rights, the first mortgagee is not liable to surrender cultivatory possession over the mortgagor's former *sir* plots to the second mortgagee. (*Sathe, A.M.*) HARDAM SINGH *v.* GANGA RAM.

1941 R.D. 816=1941 O.A. (Supp.) 742=1941 A.W.R. (Rev.) 837.

———Sir—*Originally joint—Dealt as severalty—Revival of joint* sir—*Propriety.*

Where the *sir* plots have been held and dealt with as severalty by the co-sharers as if held in proprietary possession, it would be neither practicable nor reasonable to revive joint *sir* rights. (*Shirreff, J.M.*) BHAGWAN SINGH *v.* PARBATI.

1941 O.A. (Supp.) 715 (1)=1941 A.W.R. (Rev.) 804 (1)=1941 R.D. 745 (1).

———*Status of tenant—Permanent lease in contravention of S.* 107 *of T. P. Act.*

Where a person is let into possession as a tenant and the permanent tenancy which he sets up fails as being in contravention of S. 107 of T. P. Act, his status originates as that of a yearly tenant. After the expiration of the first year of his tenancy, he is merely holding over with the landlord's consent until the landlord seeks to assess rent on the land and he denies his right to do so. A suit for his ejectment filed within 12 years from the date of the denial is, therefore, within time. (*Agarwala, J.*) NAIM SAHIB *v.* TATA IRON AND STEEL CO., LTD. **191 I.C. 686=7 B.R. 276=13 R.P. 390=A.I.R. 1941 Pat. 244.**

———*Sub-tenancy—Burden of proof.*

In a suit for arrears of rent against a sub-tenant, the sub-tenancy is denied, the burden of proving the relationship of tenant and sub-tenant is on the plaintiff and when no evidence is produced in support of it, the suit would have to be dismissed. (*Shirreff, J.M. and Sathe, A.M.*) PEAREY LAL *v.* RAM SAROOP.

1941 A.W.R. (Rev.) 1092 (1)=1941 O.A. (Supp.) 859=1941 R.D. 897.

———*Sub-tenancy—Sub-lease of part of demised premises—Sub-tenant, if liable to head lessor for rent.*

Where a tenant sub-leases only a part of the demised premises, the sub-tenant is not liable to the head lessor for the rent, for there is no privity of estate. It is only an assignee of the full term who is liable to the head lessor. (*Davies.*) AMBA LAL *v.* JETHMAL.

1941 A.M.L.J. 5.

———*Suit between—Question of title—If can be gone into.*

It is true that in certain cases between landlords and tenants the question of title need not be gone into. These are conceivably cases in which the defendant does not appropriate title in himself. But in a suit in which the defendant not only denies title of the plaintiff but sets it up in himself and puts it as the sole plea for defeating the plaintiff's case, the suit cannot be decided without going into the question of title. (*Masud Hasan, J.*) ABDUL GHANI *v.* FAQIRA. **43 P.L.R. J. & K. 233.**

———*Surrender in favour of prospective heirs by tenants—Rights if pass.*

There is no provision of law whereby a tenant may surrender his holding in favour of his prospective heirs. The latter do not acquire any rights by such a transaction. They cannot sue for rent. (*Shirreff, J.M. and Sathe, A.M.*) GAINDA LAL *v.* MAVASI.

1941 O.A. (Supp.) 823=1941 A.W.R. (Rev.) 979=1941 R.D. 932.

———*Tenancy — Extinguishment — Abandonment—Basis—Implied surrender—Effect.*

Under the ordinary law of landlord and tenant a tenancy is extinguished when there is abandonment by the tenant followed by possession by the landlord. Anything amounting to abandonment which shows that the landlord has assented to it will amount to surrender by operation of law. This is founded on an implied agreement between the landlord and tenant to take and give a surrender of the holding, the agreement being implied from the actings of the parties. Abandonment is in effect an implied surrender under these conditions. An abandonment would ordinarily extinguish the tenancy. (*Stone, C.J. and Bose, J.*) MURLIDHAR *v.* HAZARILAL.

1941 N.L.J. 612.

———*Tenancy right—Right based on adverse possession.*

A right based on 12 years adverse possession is not a tenancy right as Art. 144, Limitation Act, does not apply to the Tenancy Act. (*Shirreff, J.M.*) MAHARAJI *v.* JAGATPAL SINGH. **1941 A.W.R. (Rev.) 754 (1)=1941 O.A. (Supp.) 675 (1)=1941 R.D. 739 (2).**

———Termination of tenancy—Tenancy at will and tenancy for fixed term. *See* 1940 Dig., Col. 765. BANWARI LAL *v.* MT. HUSSAINI. **191 I.C. 289=13 R.L. 284.**

———*Thekadari and cultivatory lease—Distinction—Effect of the presence of conditions as to heritability, transferability and non-liability to ejectment.*

The main criterion for distinguishing between a thekadari lease and a cultivatory lease is the fact whether the lessee is given the right of collecting rents from

sitting tenants or whether he was given vacant land which he could either cultivate himself or sub-let to others. Where the terms of a lease showed that the land must have been vacant and that it was let for cultivatory purposes and the area concerned was also not too big to make such assumption impossible, it was *held* that it was a cultivatory lease and that the existence of conditions in the lease as to heritability, transferability and non-liability to ejectment did not necessarily convert it into a thekadari lease, for such rights could be combined with cultivatory leases also. (*Harper, S.M. and Sathe, J.M.*) BHOLA NATH *v.* GHURHU PASI. **1940 A.W.R. (B R.) 283 (2)= 1941 R.D. 18=1941 A.L.J. (Supp.) 1= 1941 O.A. (Supp.) 114.**

———*Transferee of partial interest in the term—Liability to discharge burdens of the lessee.*

If a lessee retains part of his original interest in the term, the mortgagee of the leasehold cannot be liable to the lessor for the whole of the rent and covenants ; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. Privity of estate cannot result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest, which is not the whole interest in the term. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. (*Sir George Rankin.*) JAGADAMBA LOAN CO., LTD. *v.* SHIBA PRASAD SINGH. **20 Pat. 521= 45 C.W.N. 644=193 I.C. 890=1941 P.W.N. 367= 7 B R. 715=1941 O.L.R. 413=54 L.W. 3= 1941 M.W.N. 651=I.L.R. (1941) Kar. (P.C.) 66= 43 P.L.R. 512=13 R.P.C. 185=73 C.L.J. 563= 22 Pat L.T. 689=43 Bom.L.R. 789= 1941 O.A. 385=1941 A.W.R. (Rev.) 332= A.I.R. 1941 P.C. 36=(1941) 2 M.L.J. 53 (P.C.).**

———*Unrecorded tenant—If bound by ejectment proceedings against recorded tenant.*

An unrecorded tenant is bound by ejectment proceedings taken by the Zamindar against the recorded tenants. (*Sathe, J.M.*) UMED *v.* PARAGA. **1941 O.W.N. 700=1941 R.D. 385= 1941 A.W.R. (Rev.) 469 (2)= 1941 O.A. (Supp.) 428.**

———Zaripeshgi—Uusufructuary mortgage— Distinction between. *See* 1940 Dig., Col. 768. RAMMAN LAL *v.* RAGHUNATH SHANKAR. **I.L.R. (1941) All. 17= 194 I.C. 347=13 R.A. 495=1941 A.L.J. 55= 1941 O.W.N. 388=1941 RD 180= 1941 A.L W. 277=A.I.R. 1941 All. 58.**

LAND TENURE—Creation of derivative tenures—Nature of relationship—Effect of inferior tenure ceasing to exist. *See* 1940 Dig., Col. 765. PROFULLA NATH TAGORE *v.* SANTOSH KUMAR DAS. **I.L.R. (1941) 1 Cal. 1=1941 P.W.N. 278= I.L.R. (1940) Kar. (P.C.) 394=45 C.W.N. 309.**

———*Inam village—Urlam case—Application of.*

The decision of the Privy Council in the *Viranvayal case* (64 M.L.J. 715) cannot be regarded as having actually decided that the decision in the *Urlam case* is applicable to inam villages. (*Pandrang Row and Abdur Rahman, JJ.*) DISTRICT BOARD OF WEST TANJORE *v.* SECRETARY OF STATE. **1941 M.W.N. 278=53 L.W. 306= A.I.R. 1941 Mad. 629=(1941) 1 M.L.J. 378.**

———*Muafi tenure—Nature of.*

Muafi or rent fee tenure may be analogous to that of tenancy but it is governed by different provision of law, and a muafi tenure is not one of the classes of tenancy referred to in the Oudh Rent Act. (*Bennett, J.*) AZIZ

AHMAD KHAN *v.* INAYAT KHAN. **1941 O.A. 805= 196 I.C. 673=1941 O.L.R. 738= 1941 O.W.N. 1101=1941 A.W.R. (Rev.) 879= 1941 R D. 851.**

———*Mukarrari tenure—Saleability in execution of decree for rent.*

A landlord has the right to sell a mukarrari tenure for arrears of rent even if such a right is not expressly given. (*Dhavle and Meredith, JJ.*) BHAN KUMAR CHAND *v.* LACHMIKANTA RAI. **A.I.R. 1941 Pat. 566.**

———*Patni—River beds included in patni tenure becoming culturable land—Government resuming aforesaid land and assessing it to revenue—Zamindars accepting settlement of land—Rights and liabilities of patnidar.*

Where the relationship of landlord and tenant exists between the parties their mutual rights and liabilities must depend on the original contract made by their respective predecessors-in-interest irrespective of any subsequent resettlement by Government. Where the beds of the rivers included in the original patni lease become culturable land which is resumed by the Government and of which the zamindar takes settlement from the Government, the rents settled in respect of that land in the resumption proceedings cannot add to the liabilities of the patnidars who are entitled to hold in accordance with the original patni lease, while the representatives of the original zamindars continue to own the lands and consequently the patnidars are entitled to a declaration that the rents assessed should be treated as *samil jamas* with tenure rent as long as the representatives of the original lessors retained the superior interest. Where the zamindar refuses to take settlement of the land and the patnidar pays the rents assessed in the resumption proceedings direct to the Government, the patnidar is entitled to claim abatement to the extent to which it can be shown that he is paying twice over for the same land. But in the absence of any evidence as to the terms of the grant, or that the rate of rent was in any way affected by the consideration that there might be reformation in the beds of existing rivers it cannot be said that the patnidars are paying rent twice over for any part of the land held by them. (*Bartley and Roxburgh, JJ.*) SUKHODA PRASAD *v.* GAGANENDRA NATH. **A.I.R. 1941 Cal. 242.**

———Permanent settlement — Hudabandi papers—Value of. *See* 1940 Dig., Col. 1018. RAJNANDINI DEBI *v.* MANMATHA PAL. **A.I.R. 1941 Cal. 223.**

———Pradhani—Custom—Village first cultivated later than 1788. *See* 1940 Dig., Col. 765. JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **67 I.A. 290= 73 C.L.J. 261 (P.C.).**

———Saunjhi tenure—Jullander city — Revival of saunjhidar. *See* 1940 Dig., Col. 766. SHEO RAM *v.* RAM CHAND. **192 I.C. 429=13 R.L. 378.**

———*Talukdari wanta in Gujarat — Nature and incidents—If freehold or leasehold—History of the tenure.*

A talukdari wanta in Gujarat is neither an alienated nor an unalienated village. It is a peculiar estate which continues to be the property of its holder under the British rule as it was in pre-British dynasties from ancient times. It was subjected to legislation from time to time under S. 27 of the Bombay Regulation I of 1823 ; the holder of a wanta was recognised as having a legal right to the lands, and possession for thirty years was regarded as proof of a sufficient right of property in the lands comprised in the wanta. The British Government recognised the wanta tenure as well as the right of the holder to the lands included in it; from the history of

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the tenure, it is clear that a talukdar is neither an inamdar nor an occupant of his lands. His wanta is a freehold and not a leasehold; what was formerly paid as tribute and peishkush, is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British Rule and has not since been taken away by any legal process. (*Wadia and Divatia, JJ.*) NARHARSINGJI ISHWARSINGJI *v.* SECRETARY OF STATE. **I.L.R. (1941) Bom. 226= 195 I.C. 640=4 R.B. 49=43 Bom.L.R. 167= A.I.R. 1941 Bom. 161.**

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See (i) LANDLORD AND TENANT.
(ii) LAND TENURES.
(iii) T. P. ACT, SS. 105-117.

———*Perpetual lease by widow—Fraudulent transaction—If void under S.* 23, *Contract Act—If can confer at least ordinary tenancy rights.*

Where a perpetual lease by a widow is in favour of her near illegitimate relations who are not cultivators and the rent is inadequate and the only object is to confer on her illegitimate relations wrongful gain in perpetuity and to deprive the reversioners of most of the usufruct of the property for all time to come, such a transaction is clearly fraudulent and therefore void under S. 23, Contract Act. Such a perpetual lease which is fictitious and fraudulent cannot confer even ordinary tenancy rights on the lessees, for there is no intention at all of creating a genuine tenancy. (*Harper, S.M. and Shirreff, J.M.*) BHIRON NATH PANDE *v.* KAWAL PATTI KUAR.
1941 O.A. (Supp.) 759=1941 A.W.R. (Rev.) 858.

———*Perpetual lease by widow—Reversioner's suit to challenge—Starting point of limitation.*

Where the reversioners challenge a perpetual lease by a widow, the period of limitation for such a suit would begin to run, not from the date of the lease but from the date of the death of the widow. (*Harper, S.M. and Shirreff, J.M.*) BHIRON NATH PANDE *v.* KAWAL PATTI KUAR. **1941 O.A. (Supp.) 759= 1941 A.W.R. (Rev.) 858.**

LEGAL PRACTITIONER—*Attorney—Change in constitution of firm of attorneys—Client not asking for change of attorney—Partners on record—If discharged.*

It may very well be that on a change in the constitution of a firm of attorneys a client is entitled to ask as of right for a change of attorney. But if the client does not ask for a change of attorney it is absurd to hold that the partners remaining on the record are discharged merely because another partner has died or retired or a new partner has joined the firm after the warrant has been filed. (*Panckridge, J.*) F. L. HARCOURT *v.* CLARKE, RAWLINS, KER & CO.
I.L.R (1941) 2 Cal. 205= A.I.R. 1941 Cal. 662.

———*Attorney--Lien — Warrant given to firm of attorneys—Dissolution of firm—Effect of—Right to charge on fund in Court.*

Where a warrant of attorney is given by a party to a suit to a firm of attorneys, the dissolution of the firm no doubt amounts to a discharge of the attorneys by themselves. But the members of the firm do not lose their lien over a fund in Court recovered by their exertions before dissolution. They have a right to have their costs taxed up to the date of dissolution and secured upon the fund in Court. Where, however, the attorneys discharge themselves in circumstances which amount to misconduct, the position may be different. (*Panckridge, J.*) TAPENDRA CHANDRA GOOPTU *v.* JOGENDRA CHANDRA GOOPTU. **I.L.R. (1941) 2 Cal. 289.**

LEGAL PRACTITIONERS' ACT (1879), S. 13.

———*Cost—Taxation—Attorney's costs—Review of taxation—Increase of charges over those charged in bill of costs—Permissibility.*

No increase of charges can be allowed on a review of taxation over those charged in the bill of costs. (*Beaumont, C.J. and Wadia, J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD. **43 Bom.L.R. 655.**

———Cost—Taxation—Solicitor employed by client on salary—Right to costs as between party and party—Costs—If limited to meet out of pocket expenses—Indemnity—Burden of proof. *See* 1940 Dig., Col. 417. MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* ANANDRAO. **I.L.R. (1940) Bom. 803= 192 I.C. 120=13 R.B. 232.**

———*Costs—Taxation—Suit against firm dismissed with costs—Dissolution of firm pending suit—Change of attorney after dissolution.*

In a suit filed against a firm, one of the partners *X*, gave a warrant of attorney to *M* to act on behalf of the firm. While the suit was pending the firm was dissolved, and after its dissolution *M* entered into a partnership with another attorney. *X* then gave a fresh warrant of attorney to *M* and his partner describing himself as proprietor of the firm. The suit was dismissed with costs. The bill of costs was tendered for taxation by the attorneys. The Registrar on appeal from an order of the Taxing Officer, *held*, that an allocatur could not issue, allowing costs to all the partners of the firm who to use his words, "have not been covered by the existing warrant".

Held, that *X* in giving the fresh warrant could and did only act on behalf of the old and dissolved firm and that the Registrar erred in refusing to issue the allocatur. (*Panckridge, J.*) F.L. HARCOURT *v.* CLARKE, RAWLINS, KER & CO. **I.L.R. (1941) 2 Cal. 193= A.I.R. 1941 Cal. 679.**

———Relation with client—Transaction of mortgage between solicitor and client—How Court would view. *See* 1940 Dig., Col. 770. NISAR AHMAD KHAN *v.* MOHAN MANUCHA. **67 I.A. 431= I.L.R. (1940) Kar. (P.C.) 419=191 I.C. 94= 13 R.P.C. 117=1941 O.W.N. 513=73 C.L.J. 121= 43 Bom.L.R. 465=1941 A.L.J. 316= 1941 M.W.N. 1=7 B.R. 218 (P.C.).**

LEGAL PRACTITIONERS' ACT (XVIII OF 1879), S. 13—*Misconduct—Filing false fees certificate—Propriety—Liability to disciplinary action.*

It is a very serious matter for a pleader or an advocate to file a false fees certificate with regard to fees which he has not received and the Court will take strong disciplinary action in any such case coming to its notice. (*Leach, C.J., Gentle and Somayya, JJ.*) SUNDARESA AIYAR, *In re.* **54 L.W. 481= 1941 M.W.N. 936=A.I.R. 1941 Mad. 905= (1941) 2 M.L.J. 663 (S.B.).**

———**S. 13 (f)**—Misconduct—Conviction for criminal breach of trust—Punishment. *See* 1940 Dig., Col. 771. T., A LOWER GRADE PLEADER, *In the matter of.* **191 I.C. 122=42 Cr.L.J. 110.**

———**S. 13**—Misconduct—Failure to maintain accounts—Liability to be dealt with under S. 13 (*f*). *See* 1940 Dig., Col. 771. RAMANUJA AYYANGAR, *In the matter of* (FIRST GRADE PLEADER, VELLORE). **I.L.R. (1941) Mad. 286=13 R.M. 639= 42 Cr.L.J. 346=192 I.C. 604=1940 M.W.N. 1267= 1941 O.W.N. 53=1941 A.W.R. (Supp.) 6= 1941 O.A. (Supp.) 63=1941 A.L.W. 58= A.I.R. 1941 Mad. 63=(1940) 2 M.L.J. 1031 (F.B.).**

———**S. 13**—*Misconduct—Gross negligence—Identifying person brought to him by judgment-debtor without*

LEGAL PRACTITIONERS' ACT (1879), S. 18.

further inquiry and without taking thumb impression —Disciplinary action.

In an execution case a satisfaction petition was filed purporting to be by the decree-holder. On the petition was a signature alleged to be that of the decree-holder's son, acknowledging satisfaction and also an endorsement of identification of the decree holder by a mukhtar. The petition of satisfaction was found to be a forgery and the judgment-debtor held guilty. The judgment debtor, a sadhu, had been known to the mukhtar for 15 years. The latter came to him and showed him a man who he said was the decree-holder and asked the mukhtar to identify him as such. He was shown the petition of satisfaction which had already been completed and the mukhtar identified the person shown to him as the decree-holder. It was said that the decree-holder was illiterate and could not sign and therefore another person who purported to be his son had signed. The mukhtar did not take the precaution of taking the thumb-impression of the person who was said to be the decree-holder on the judgment-debtor's assurance that he would take his thumb-impression.

Held, that the frank admission by the mukhtar that while identifying he made no further investigation and acted merely upon the assurance of the judgment-debtor must be considered as a point in his favour and though the cases of mukhtars' identifying improperly must be regarded severely and though, in the circumstances, the mukhtar was grossly careless and negligent, the Court could take a more lenient view, because of the mukhtar's past record as a most respectable member of the profession for 23 years and because there was no suggestion that the mukhtar acted as he did for gain or in order to benefit the judgment-debtor in the case, by taking serious notice of the mukhtar's conduct without imposing any punishment by way of suspension. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) *In re* RAMSWARUP LAL.

193 I.C. 861 = 13 R P. 648 = 42 Cr.L.J. 473 = 7 B.R. 631 = 1941 P.W.N. 417 = 22 Pat.L.T. 679 = A.I.R. 1941 Pat. 179 (S.B.).

——**S. 18**—*Practitioner convicted of embezzling—Proper punishment.*

A practitioner who is capable of embezzling money belonging to his client is proved to have such a defect of character, that it is not in the interest either of the profession or of the litigant public with whom he is brought into contact in the course of his profession, that he should continue to occupy the position of privilege which a member of the legal profession enjoys. It is the duty of the Court to protect not only members of the profession, but also those who are brought into contact with the legal practitioners. A man with such a defect of character should have no place in the legal profession and, therefore, the only proper action in proceedings under the Legal Practitioners Act against a man convicted of embezzling is to remove him from the rolls altogether. (*Young, C.J., Dalip Singh and Ram Lall, JJ.*) B, A PLEADER, SIMLA, *In the matter of.*

196 I.C. 730 = A.I.R. 1941 Lah. 384 (F B.)

——**S. 36**—*Order under —Interference by High Court—Government of India Act, S. 224 (2).*

An order under S. 36 does amount to a judgment as contemplated by S. 224 (2), Government of India Act, and is not open to revision under S. 115, C. P. Code, any more than under the Cr. P. Code. S. 224 (2), Government of India Act, 1935, bars the interference by the High Court on the administrative side and hence the High Court has no power to question a decision under S. 36. (*Young, C.J. and Sale, J.*) MULA SINGH *v.* EMPEROR. **I.L.R (1941) Lah. 133 = 192 I.C. 363 =**

LETTERS PATENT (Bombay), Cl. 10.

42 Cr.L.J. 289 = 4 F.L.J. (H.C.) 52 = 13 R.L. 393 = A.I.R. 1941 Lah. 1.

LETTERS PATENT—Leave to appeal under—Principles regulating the grant of. *See* 1940 Dig., Col. 772. KALYAN DAS *v.* BRIJ KISHORE. **193 I.C. 495 = 13 R.A. 412 = A.I.R. 1941 All. 9.**

——**Cl. 31**—Final judgment, decree or order—Order summarily rejecting application for reference under S. 66 (3) Income-tax Act—Leave to appeal to Privy Council —If can be granted. *See* INCOME TAX ACT, S. 66 (3). **22 Pat.L.T. 341 = 1941 I.T R. 244.**

——**(Allahabad), Cl. 30** —*Final order—Meaning of—Refusal of temporary injunction—Appealability.*

The words 'final order' in Cl. 30 of the Letters Patent are used in the contradistinction to the words 'interlocutory order'. The test to decide whether an order is final is to see whether the rights of the parties have been finally and once for all decided by it. If the effect of the order is not to adjudicate finally the rights of the parties the order cannot be characterised as final. In one sense every order passed by a Court is final so far as that Court is concerned, but the finality of the order contemplated by Cl. 30 is in relation to the rights of the partie. and not with reference to the Court passing the decrees In other words if the effect of the order is to bar a party from seeking redress with respect to the alleged infringement of his rights by a proceeding according to law, the order is final, otherwise it is not. Temporary injunctions are granted to a party or refused in the exercise of powers vested in it by O. 39, C. P. Code and such orders can never bar a party from having resort to procedure prescribed by law for the redress of the infringement of an alleged right. Hence an order refusing a request for the issue of a certain temporary injunction cannot be considered to be a 'final order' as contemplated by Cl. 30, Letters Patent and is not appealable. (*Iqbal Ahmad, C.J. and Collister, J.*) MANMOHAN DAS *v.* U. P. GOVERNMENT. **1941 A.L.J. 508 = 1941 O.A. (Supp.) 688 = 1941 A.W R. (H.C.) 258 = 1941 R.D. 769 = 1941 A.L.W. 837 = A.I.R. 1941 All. 367.**

——**(Bombay), Cl. 10**—*Powers of High Court—Attorney—Moral delinquency in private character—Contempt of Court in private capacity—Scandalous allegations against Judge in notice under S. 80, C. P. Code —Liability to suspension.*

It must not be supposed that a Court of justice has not the power to remove an Attorney if he is unfit to be entrusted with a professional status and character. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll. Contempt of Court when committed by an Attorney in a private capacity can be of such a nature as to show professional unfitness. There can be no grosser contempt on the part of an Attorney than to allege that a Judge has acted with prejudice, bias and malice in the course of his judicial duties, that he decided a case not according to his own convictions but to please somebody else and that he abused his powers as a Judge and acted dishonestly and in bad faith. The fact that such allegations are contained in a notice sent by the Attorney under S. 80, C. P. Code, to a Judge in respect of certain remarks made by the Judge in a judgment in a case in which the Attorney was a witness is no ground for holding that no offence is committed. No one by merely filing or threatening to file a suit and calling his communication a notice under S. 80, C. P. Code, can insult and vilify a Judge in that manner. The fact that the scandalous allegations are contained in a notice under S. 80 C. P. Code, cannot therefore prevent them from being contempt of Court, and the

LETTERS PATENT (Bombay), Cl. 10.

Attorney who makes such allegations renders himself liable to be dealt with under the disciplinary powers of the High Court under Cl. 10 of the Letters Patent (Bombay). (*Broomfield and Wassoodew, JJ.*) TULSIDAS AMANMAL KARANI, *In re.* **195 I.C 359 = 14 R. B. 39 = 42 Cr.L.J. 723 = 43 Bom.L.R 250 = A.I.R. 1941 Bom. 228.**

——(**Bombay**), **Cl. 10**—*Reasonable cause—Power to take disciplinary action—Grounds—Misconduct—What amounts to—Moral turpitude—If essential ingredient—Bar Councils Act, S.* 10.

Cl. 10 of the Letters Patent which empowers the High Court to remove or suspend from practice advocates, vakils, or attorneys on 'reasonable cause," gives a wide discretion to the Court in regard to the exercise of this disciplinary authority. "Reasonable cause" in the clause means the same as professional or other misconduct under S. 10 of the Bar Councils Act. "Misconduct" is a sufficiently wide expression, it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court or any of the Courts subordinate thereto may be considered to be misconduct calling for disciplinary action. What the Court has to consider is the conduct of the Advocate or Attorney as it affects his position as an Advocate or Attorney and his relations to the Court. (*Broomfield and Wassoodew, JJ.*) TULSIDAS AMANMAL KARANI, *In re.* **195 I.C. 359 = 14 R.B. 39 = 42 Cr.L.J 723 = 43 Bom L R 250 = A.I.R 1941 Bom. 228.**

——(**Bombay**), **Cl. 12**—*Cause of action—Bill of exchange drawn in Bombay on person resident outside and accepted by drawee—Dishonour—Suit in Bombay High Court—Jurisdiction of High Court.*

Any step which a plaintiff has to prove in order to establish his title to sue on a negotiable instrument is a material fact, and if any such event has taken place within the jurisdiction of the High Court, with leave granted under Cl. 12 of the Letters Patent, the High Court has jurisdiction to try the suit. The 1st defendant drew in Bombay five bills of exchange on the 2nd defendant who was residing at Calicut in the Madras Province in favour of the plaintiffs. These were endorsed over by the plaintiffs to a Bank in Calicut for collection, and when presented to the 2nd defendant were accepted by him. But on the due date he dishonoured them by non-payment. The plaintiffs having filed a suit in the Bombay High Court after obtaining leave under Cl. 12 of the Letters Patent, the 2nd defendant pleaded that the High Court of Bombay had no jurisdiction because he had accepted the bills at Calicut and no part of the cause of action arose in Bombay as against him. The 1st defendant did not appear at all.

Held, that the fact that the bills were drawn on defendant No. 2 was a material fact to be proved by the plaintiffs, to establish their claim, and that fact took place in Bombay, the Bombay High Court had jurisdiction to try the suit with leave under Cl. 12 of the Letters Patent. (*Kania, J.*) CANARA INDUSTRIAL AND BANKING SYNDICATE CO., LTD. *v.* NARAYAN VENKATESH. **43 Bom.L.R. 916.**

——(**Bombay**), **Cl. 17**—*Jurisdiction—Minor coparcener of Hindu joint family residing beyond limits of ordinary original jurisdiction -Appointment of guardian of property—Power of High Court—Application by manager for sanction of sale of property as being for benefit of minor—Procedure to be followed by Court.*

LETTERS PATENT (Calcutta), Cl. 15.

The High Court has power and can make an order appointing a guardian in respect of undivided coparcenary property of a minor Hindu coparcener, in respect of a minor situate within the limits of the ordinary original jurisdiction of the High Court, that is, the town and island of Bombay. This jurisdiction extends to minors wherever in the Presidency they may be found, provided they are subjects of the British Crown. The jurisdiction of the High Court to sanction a contract for the benefit of a minor extends to a minor Hindu coparcener resident within the Bombay Presidency, who is a British subject. Where the manager of a joint Hindu family comes to Court and asks it to sanction a sale of joint family property including the interests of the minor coparcener, as being for the benefit of the minor, the Court ought not to make an order *ex parte*. The minor concerned should be made a respondent to the application, and he should be represented by a guardian *ad litem*, who should normally be an officer of the Court, and he should satisfy himself as to the interest of the minor, by requiring further evidence as to the alleged necessity for the sale or as to the price being a good one, and as to how the proceeds of the sale are to be dealt with. If he requires funds to enable him to look into the matter properly, the party seeking the order must provide such funds. (*Beaumont, C.J., Kania and Somjee, JJ.*) RATANJI RAMAJI, *In re.* **43 Bom L.R. 926 = A.I.R. 1941 Bom. 397 (S.B.).**

——(**Calcutta**), **Cl. 12**—Application to revoke leave—Plea of jurisdiction involving difficult questions—If can be dealt with. *See* 1940 Dig., Col. 773. ABDUL SHAKOOR *v.* ALI MAHOMED EBRAHIM SHAKOOR. **195 I.C. 257 = 14 R.C. 63 = A.I.R. 1941 Cal. 236.**

——(**Calcutta**), **Cl. 12**—*"Business"—If includes carriage by railway—Suit against Secretary of State.*

Railway carriage business is a business within the meaning of Cl. 12 of the Letters Patent. As Government carry on the business of railway carriage under the name of the Eastern Bengal Railway amongst other places, at the head office in Calcutta a suit can be brought in Calcutta against the Secretary of State in respect of a claim against the railway. (*Lort Williams, J.*) GOLAB RAI PALIRAM *v.* SECRETARY OF STATE. **I.L.R. (1941) 2 Cal. 160.**

——(**Calcutta**), **Cl. 12**—*Suit for money lent in Calcutta to non-resident foreigner—Jurisdiction of Calcutta High Court—Contract Act, S.* 49.

A resident of Calcutta lent money to a non-resident foreigner The money was lent in Calcutta by means of cheques drawn on lender's account with Imperial Bank of India. The lender brought a suit in Calcutta High Court for recovery of amount lent. The High Court issued writ to the defendant who entered appearance without any protest and submitted to the jurisdiction of the High Court.

Held, (1) that by implication the place of payment was Calcutta; (2) that S. 49, Contract Act, had no application and the Common law rule that it was the debtor's duty to seek out his creditor applied; (3) that the Calcutta High Court (Original Side) had jurisdiction to entertain the suit. (*Lort William, Ag.C.J.*) DIBYASWARI DEBI *v.* NARAYAN DIN KUMARI. **A.I.R. 1941 Cal. 291.**

——(**Calcutta**), **Cl. 15**—*'Judgment'—Appeal under Tea Control Act—Order of Judge refusing to strike out Tea Licensing Committee as respondents—Appeal.*

Per *Derbyshire, C.J.*—An order of a Judge of the High Court in an appeal filed under the Tea Control Act refusing to strike out the Tea Licensing Committee as respondents, is not a "judgment" within the meaning of Cl. 15 of the Letters Patent. No appeal, therefore,

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lies from his order to a Division Bench of the High Court. (*Derbyshire, C.J. and Nasim Ali, J.*) SUPROKASH *v.* INDIAN TEA LICENSING COMMITTEE.
45 C.W.N 454.

——(Calcutta), Cl. 15—'Judgment' — Decision of Judge on election petition. *See* CALCUTTA MUNICIPAL ACT, SS. 46 AND 47. 45 C.W.N. 181.

——(Madras), Cl. 12—"Carrying on business"—Insurance Company with head office in Calcutta and branch at Madras—Madras branch not authorised to enter into contracts of insurance or make payments in respect of policies—Company if carries on business in Madras. *See* 1940 Dig., Col. 774. PACHAIAMMAL *v.* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LTD. I.L.R. (1941) Mad 109 = 195 I.C. 201 = 14 R.M. 148 = A.I.R. 1941 Mad. 270 = (1940) 2 M.L.J. 688.

——(Madras), Cl. 15—*Leave to appeal—Grant of—Jurisdiction of Judge to limit points fit for appeal.*

In granting a certificate for leave to appeal under Cl. 15 of the Letters Patent it is not open to the Judge granting leave to limit the points fit for appeal; it is for the Court hearing the Letters Patent appeal to say what questions it will allow to be raised. (*Leach, C.J., Mockett and Krishnaswami Ayyangar, JJ.*) MIR GHULAM HUSSAIN *v.* AYESHA BIBI.
I L.R. (1941) Mad. 775 = 196 I.C. 87 = 14 R.M. 248 = 1941 M.W.N. 456 = 53 L.W. 650 = A.I.R. 1941 Mad. 481 = (1941) 1 M.L.J. 800 (F B.).

——(Nagpur) and Limitation Act, S. 4—*Letters Patent appeal—Time for filing—Long vacation—Exclusion.*

Where according to the rules of the Court provision is made for filing of Letters Patent appeals alone during the long vacation, it cannot be said that the Court is closed so far as that business is concerned. So limitation for such an appeal is not affected by S. 4, Limitation Act. (*Stone, C.J. and Clarke, J.*) KISANLAL *v.* TANSUKHRAI. I.L R (1941) Nag. 563 = 1941 N.L.J. 284 = A.I.R. 1941 Nag. 216.

——(Nagpur), Cl. 10 and Civil Procedure Code, O 47, R 4 (1)—*Rejection of review application—If a judgment—Appeal, if lies.*

An order rejecting an application to review is not a judgment within the meaning of the Letters Patent and a Letters Patent appeal does not lie against the order rejecting under O. 47, R 4 (1), C. P. Code, an application to review. (*Stone, C.J. and Bose, J.*) KANHAIYA KASHIRAM *v.* HIRAJI MOHANSINGH.
1941 N L.J. 617.

——(Rangoon), Cl. 13—Appeal under—Powers of appellate Court—If confined to point mentioned in certificate granting leave *See* C. P. CODE, O. 41, R. 33 AND LETTERS PATENT (RANGOON), CL. 13.
1940 Rang. L.R. 693.

——(Rangoon), Cl. 13—*Judgment—Decision on—Application for writ of* certiorari.

A decision of a single Judge of the High Court or of any Division Court making absolute or discharging a rule *nisi* on a petition for the issue of a prerogative writ of *certiorari* is a judgment within the meaning of Cl. 13 of the Letters Patent of the Rangoon High Court. (*Roberts, C. J. and Dunkley, J.*) U BA SAN *v.* U YA.
195 I.C. 551 = 14 R.R. 45 = A.I.R 1941 Rang. 199.

——(Rangoon) Cl 13—'Judgment'—Meaning. *See* RANGOON INSOLVENCY ACT, SS. 8 (2) (*b*), 36 AND LETTERS PATENT (RANGOON), CL. 13.
1940 Rang L.R. 702.

——(Rangoon), Cl. 13—'*Judgment*'—*Order making absolute a rule* nisi *for* certiorari *granted by a Judge.*

LIMITATION ACT (1908), S. 4.

An order making absolute a rule *nisi* for *certiorari* granted by a Judge on the Original Side of the High Court is not a judgment and hence is not appealable. (*Roberts, C.J., Mya Bu, Mosely, Ba U and Dunkley, JJ.*) M. NAGOOR GANI *v.* A. K. A. C. T. A. L. C. CHETTIAR. 1941 Rang L.R. 694 = 196 I.C. 470 = 14 R.R. 86 = A.I.R. 1941 Rang. 227 (F.B.).

LICENCE. *See* EASEMENTS ACT, S. 60.

LIFE ASSURANCE COMPANIES ACT (VI OF 1911), S. 34—Construction—Persons liable under—Same person liable holding different capacities. *See* 1940 Dig., Col. 776. K.C. PANDALAI, *In re.*
42 Cr.L J. 39.

LIMITATION—Burden of proof. *See* BURDEN OF PROOF—LIMITATION. 1941 R.D. 672.

——Hindu law—Pre-partition debts—Acknowledgment by father—Keeps alive debt against sons. *See* HINDU LAW—DEBTS. (1941) 2 M.L.J. 311 (F.B.)

LIMITATION ACT (IX OF 1908)—Applicability—Property made wakf. *See* 1940 Dig., Col 777. SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. I.L.R. (1940) Kar. (P.C.) 251 = 22 Pat.L.T. 140 = 73 C.L.J. 199 = (1940) 2 M.L.J 903 (P.C.).

——Relief from operation of—Power of Court to afford. *See* 1940 Dig, Col. 777. ENG GIM MOH *v.* CHINESE MERITED BANKING CO., LTD.
1941 Rang.L.R. 1 = 192 I C. 625 = 13 R.R. 186.

——Ss. 3 and 4—*Applicability and scope—Plaintiff uniting several causes of action under O. 2, R. 3, C. P. Code—Limitation—If to be applied to suit as a whole or to the different causes of action.*

If a plaintiff, availing himself of the option given to him under O. 2, R. 3, C. P. Code, has united several causes of action against the same defendant before a Court competent to try not necessarily those causes of action separately but the suit as a whole when those causes of action are combined, the question of limitation under Ss. 3 and 4 of the Limitation Act has to be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of the other Courts which have been able to try those suits when split up had they been brought before them. No restriction can be implied on the facilities given by O. 2, R. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on. The law of limitation should not be unduly strained to bar a suit any more than it should be strained to allow it to be tried. (*Mockett, J.*) MAHA LATCHAYYA *v.* SESHAYYA. 1941 M.W.N. 807 = A.I.R. 1941 Mad. 786 = (1941) 2 M.L.J. 244.

——Ss. 3 and 14—Date of institution of suit—Plaint presented in Court of Munsif grossly under-valued—Return for presentation to proper Court—Re-presentation to same Court after striking off certain items of property so as to make suit within jurisdiction—Date of suit—Date of re-presentation or original presentation—Exclusion of period—Limitation Act, S. 14. *See* 1940 Dig., Col. 778. CHANDRAYYA *v.* SEETHANNA.
194 I C. 646 = 14 R.M. 28 = (1940) 1 M.L.J. 590

——S 3—Effect of. *See* COMPANY—WINDING UP—SET OFF. 1941 O.W N 548.

—— S. 3 and Civil Procedure Code O. 8, R. 2—Question of limitation not raised—Duty of Court. *See* 1940 Dig., Cl. 777. OFFICIAL TRUSTEE *v.* RAEBURN
193 I.C. 61 = 13 R.R. 199

——S. 4—Applicability—Suit cognisable by Village Court—Limitation expiring on day when latter Court open but during vacation of Munsif's Court—Presenta-

LIMITATION ACT (1908), S. 4.

tion in Munsif's Court on reopening day—If in time—C. P. Code, S. 15. *See* 1940 Dig., Col. 778. SUBBA RAO *v.* NARASIAH. **194 I.C. 434=13 R.M 773=(1940) 1 M.L.J. 220.**

——**S. 4**—Applicability—Suit on promissory note—Court being closed for summer recess—Assignment of note on reopening date—Suit filed on same day—Maintainability. *See* 1940 Dig., Col. 779. THIMMANNA BHAT *v* ADYANTHAYA. **194 I C. 401=13 R.M. 770=(1940) 2 M L.J 251.**

——**Ss. 4 and 19**—*S.* 4, *if affects computation of period according to S.* 19.

S. 4 has nothing to do with computing the period prescribed under S. 19. Consequently, an acknowledgment signed after the expiration of the period prescribed by S. 19 cannot be brought within time by the application of S. 4. (*Stone, C.J. and Clarke, J.*) SHIVJIRAM DHANNALAL *v.* GULABCHAND KALOORAM **I.L.R. (1941) Nag. 144=194 I.C. 806=14 R.N. 14=A.I.R. 1941 Nag. 100.**

——**S. 4, Expl.**—"*Instituted*"—*Suit filed in Court having jurisdiction—Subsequent return for presentation to proper Court as a result of finding as to value of subject-matter- Re-presentation to proper Court—Date of institution of suit.*

The presentation of a plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. But when a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order, it must be held that the suit has been instituted. Merely because at some later stage, as the result of a finding on the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation to that Court, it does not mean that the suit has not been instituted. And when a plaint has been so returned and re-presented to the Court having jurisdiction, the date of institution of the suit is the date on which the plaint was originally presented and not the date on which it was re-presented. (*Leach, C J. and Krishnaswami Ayyangar, J.*) RAMASWAMI AIYAR *v.* VEERARAYAN RAJU. **196 I.C. 521=14 R.M. 303=53 L W. 611=1941 M.W.N. 579=A.I.R. 1941 Mad. 711=(1941) 1 M.L.J. 629**

——**S. 5**—*Scope*—"*Sufficient cause*"—*Existence of circumstances mentioned in Ss.* 4 *and* 14—*If can be considered.*

In considering the question of "sufficient cause" under S. 5 of the Limitation Act, the equities on which Ss.4 and 14 of the Limitation Act are based may be taken into account. The existence of circumstances mentioned in Ss. 4 and 14 of the Limitation Act may, therefore, be regarded as a sufficient ground for excusing the delay caused by the Courts being closed or by wrong proceedings. (*Abdul Rahman, J.*) KAVAMBU PILLAI *v.* THE COURT OF WARDS. **1941 M.W.N. 989=(1941) 2 M.L.J. 873**

——**S. 5**—Applicability—Appeal under Cantonments (House Accommodation Act). *See* CANTONMENTS (HOUSE ACCOMMODATION) ACT, S. 29 (2) AND LIMITATION ACT, S. 5. **1941 A.W.R (H.C.) 122.**

——**S. 5**—*Explanation of delay—Duty of appellant.*

In order to have the benefit of S. 5 of the Limitation Act, it is the duty of the appellant to explain the delay for every day that elapses beyond the period allowed by the Limitation Act for filing an appeal. (*Mitchell, F. C.*) TAJ MAHOMED *v.* MUKH RAM. **20 Lah.L.T. 115**

LIMITATION ACT (1908), S. 5.

——**S. 5**—*Extension of time—Conflict of views on certain point—Delay caused by adopting one view.*

Where there are conflicting views on a certain point and the delay caused in filing the appeal is caused by adopting one of the views, even though the Court takes the contrary view, it can extend the time under S. 5. (*Almond, J.C. and Soofi, J.*) SHIVAN DITTA *v.* RADHAKISHAN KAPUR. **196 I.C. 654=A.I R. 1941 Pesh. 74.**

——**S. 5**—Extension of time—Ground for—Appeal filed with deficit Court-fee—Order of Court not communicated to pleader. *See* 1940 Dig., Col. 780. HARI PADA *v.* SHAILABALA DEVI. **191 I.C. 701=13 R.C. 276.**

——**S. 5**—*Laches—Non-inclusion of all respondents, resulting in total abatement—Excusing delay in preferring appeal against them—Permissibility.*

Where all the necessary parties are not added as respondents as a consequence of which the appeal would abate *in toto*, and an attempt is made to add them after limitation, the delay cannot be excused, when it is due to the laches of the appellant, that all the respondents were not added. The valuable right of exoneration from the appeal cannot be taken away unless there are cogent reasons for doing so. (*Davies*) ABDUL REHMAN *v.* BANWARI LAL. **1941 A M.L.J. 57.**

——**S. 5**—*Review pending—Sufficient cause.*

The time spent by a party in prosecuting a review application may be deducted from the period of limitation for filing an appeal. Under S. 5, Limitation Act, if the Court is satisfied that the review application was being prosecuted properly and in a *bona fide* manner. It is wrong to think that the period is one which had to be compulsorily deducted. (*Sathe, A.M.*) GUDAR SINGH *v.* CHHAJJU. **1941 O A. (Supp.) 893=1941 A.W R. (Rev.) 1100.**

——**Ss. 5 and 14**—*Sufficient cause.*

Where throughout the proceedings, the motives of a party had been above board and he had not flagged in the prosecution of his case at any stage, it was held that even if he was not entitled to the benefits of S. 14 of the Limitation Act, it was a fit case where the benefits of S. 5 should be given. (*Harper, S.M. and Sathe, J. M.*) GOBARDHAN SINGH *v* SPECIAL MANAGER, COURT OF WARDS, MAHEWA ESTATES. **1941 O.W N. 713=1941 O.A. (Supp.) 365 (2)=1941 A.W.R. (Rev.) 435=1941 R. D. 412=1941 A.L.J. (Supp.) 92.**

——**S. 5**—Sufficient cause—Delay due to office furnishing wrong copy. *See* 1940 Dig., Col. 780. SURAJ PRASAD *v.* RAM NARAIN SAHU. **1941 A.W.R. (Rev) 87=1941 O.A. (Supp) 75.**

——**S. 5**—"*Sufficient cause*"—*Discretion of Court—Exercise of—Consideration — Respondent acquiring valuable rights—Relevancy.*

The words "sufficient cause" in S. 5 of the Limitation Act have to be liberally construed. The test is whether negligence, inaction or want of *bona fides* can be imputed to the applicant The exercise by the Court of its discretion to excuse the delay would to a certain extent be detrimental to the respondent who has in the meanwhile acquired valuable rights, but the question has to be approached from the point of view of the applicant's conduct rather than of the advantage gained by the respondent. (*Abdul Rahman, J.*) KAVAMBU PILLAI *v.* THE COURT OF WARDS. **1941 M.W.N. 989=(1941) 2 M L J 873.**

——**S. 5 and C. P. Code (1908), O. 41, R. 30**—*Sufficient cause—Infringement of rules and orders by Court—If can affect period of limitation—Diligence of*

LIMITATION ACT (1908), S. 5.

appellant, when relevant—Absence of notice for delivery of judgment—Time for appeal.

A litigant is entitled to expect that the infringement of the rules and orders of the Court by the Judge should not hamper him in his appeal; and if he is allowed a reasonable time within which to bring that appeal the best way of finding out what time is reasonable is to consult the relevant Article and to assume that the period prescribed will be a reasonable period. No doubt, if after the expiration of that period, he seeks for a further period he must then show that he has acted with due diligence. Where a Judge in appeal pronounced judgment in contravention of O. 41, R. 30 and the parties came to know of the delivery of judgment only a couple of months later, it was *held*, that the aggrieved party was entitled to the full period allowed by law commencing from the date of the knowledge of the delivery of judgment. (*Roberts, C.J. and Dunkley, J.*) MA HMWE *v.* DAW WIN THA. **1941 Rang.L.R. 213 = 195 I.C. 296 = 14 R.R. 36 = A.I.R. 1941 Rang. 194.**

——**S. 5**—*'Sufficient cause'—Mistaken advice given by pleader.*

The filing of an appeal in a wrong Court in good faith acting upon mistaken advice given by his pleader amounts to sufficient cause within the meaning of S. 5 of the Limitation Act. (*Tek Chand, J.*) KISHAN CHAND *v.* MOHAMMAD HUSSAIN. **43 P.L.R. 502.**

——**S. 5**—*Sufficient cause—Mistake as to forum of appeal—Connected suits with a common judgment having different forums of appeal—Absence of negligence.*

Where connected suits with different valuations is disposed of by a common judgment and owing to a mistake in thinking that the appeals therefrom should be filed in the same Court (*i. e.*) the Chief Court, the appeal which ought to be filed in the District Court is not filed in time but is filed after the mistake was discovered after the expiry of limitation there is no gross negligence on the part of the counsel and the mistake is not an unnatural one, and the facts constitute sufficient cause within the meaning of S. 5, Limitation Act, for extending the period of limitation. (*Bennett and Madeley, JJ.*) U. P. GOVERNMENT IN THE NAZUL DEPARTMENT *v.* CHURCH MISSIONARY TRUST ASSOCIATION, LTD. **1941 O.W.N. 1282 = 1941 A.W.R. (C.C.) 379 = 1941 O.A. 969.**

——**S. 5**—Sufficient cause—Second memorandum of appeal filed because of erroneous rejection of first. *See* 1940 Dig., Col 781. GAJADHAR BHAGAT *v.* MOTI CHAND. **22 Pat.L.T. 549 = A.I.R. 1941 Pat. 108.**

——**S. 5**—*Sufficient cause—Uncertainty in the law as to proper remedy.*

Where an application originally filed as an appeal, was as such, within time, but on its being decided by a Judge that it ought to be dealt with as a revision, it is found to be beyond time as revision, the reason for the delay being the conflict of decisions as to proper remedy, it is sufficient cause for the delay being excused. (*Bose, J.*) ANANDRAO BALIRAM *v.* PARWATIBAI. **197 I.C. 221 = 1941 N.L.J. 519 = A.I.R. 1941 Nag. 308.**

——**S. 6 and Arts. 134 B and 144**—*Applicability—Alienation by manager of math—Suit by succeeding manager to set aside—Limitation—Interval of time between death of one and appointment of other—Effect—Minority of successor—If extends limitation.*

Held, by the Full Bench (*Abdur Rahman and Krishnaswami Ayyangar*, J., diss.), (1) where a manager of a Hindu Religious institution makes an alienation of the property of the institution for valuable consideration, and the succeeding manager seeks to impeach the alienation by suit, Art. 134-B of the Limitation Act and not Art. 144 will apply even when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager; (2) that even assuming that Art. 144 of the Limitation Act is applicable to such a case, adverse possession commences from the date of the death, resignation or removal of the previous manager who effected the alienation and not from the date of the election or appointment of the succeeding manager; and (3) that if the succeeding manager happens to be a minor at the date of the election or appointment, he will be entitled to the benefit of S. 6 of the Limitation Act, but where his appointment is made after the period of limitation has started to run, S. 6 will not help him. (*Leach, C.J., Venkataramana Rao, Abdur Rahman, Krishnaswami Ayyangar and Horwill, JJ.*) VENKATESWARA SARMA *v.* VENKATESA IYER. **I.L.R. (1941) Mad. 599 = 1941 M.W.N. 408 = 53 L.W. 569 = A.I.R. 1941 Mad. 449 = (1941) 1 M.L.J. 644 (F.B.).**

LIMITATION ACT (1908), S. 7.

——**S. 6**—*Applicability—Mortgage suit—Application for final decree.*

S. 6 of the Limitation Act only applies to a person entitled to institute a suit or make an application for the execution of a decree; an application for a final decree in a mortgage suit is not an application for the execution of a decree, and to such an application, S. 6 does not apply. (*Beaumont, C.J. and Sen, J.*) GOVINDNAIK GURUNATHNAIK *v.* BASAWANNEWA PARUTAPPA. **I.L.R. (1941) Bom. 435 = 197 I.C. 30 = 43 Bom.L.R. 329 = A.I.R. 1941 Bom. 203.**

——**Ss. 6, 7, 8 and 9**—*Scope and effect—Hindu widow—Alienation of husband's estate—Adoption of son—Death of adopted son unmarried after right to sue became time-barred—Second adoption—Suit by second adoptee—Maintainability—Fresh cause of action—If accrues.*

T, a Hindu, died in 1900 leaving his widow, *D*. She made two alienations of certain lands of her husband's estate in 1901 and 1904. She then made an adoption to her deceased husband, but the adopted son died unmarried in 1918 in his twenties. In 1934, she adopted the plaintiff who brought a suit to recover possession of the lands alienated on the ground that the alienations by the widow, his adoptive mother, were not for legal necessity. The defendants raised the plea of limitation

Held, that the effect of Ss. 6, 7, 8 and 9 of the Limitation Act was to bar the plaintiff's right to sue, whether or not the previously adopted son died a major or a minor. Since the right of the former adopted son was barred by limitation, time having already run against him, no further right to sue in respect of the alienations could accrue to the plaintiff. (*Beaumont, C. J.*) ANNU BAJARA *v.* DADU TUKARAM. **195 I.C. 732 = 14 R.B. 73 = 43 Bom.L.R. 222 = A.I.R. 1941 Bom. 197**

——**Ss. 6 and 7**—*Scope—If subject to S. 48, C. P. Code.*

S. 6 as well as S. 7 of the Limitation Act must be read subject to S. 48, C. P. Code. (*Dhavle and Meredith, JJ.*) ZALIKHAN *v.* RAM PRASAD. **20 Pat. 1 = 190 I.C. 369 = 13 R.P. 196 = 7 B.R. 15 = 22 Pat.L.T. 721 = A.I.R. 1941 Pat. 45.**

——**S. 7**—*Applicability—Hindu father also manager of joint family—Competency to give valid discharge for himself and minor son—Suit to recover debt due to family—Father joining also minor son as co-plaintiff—Limitation—If extended.*

LIMITATION ACT (1908), S. 7.

S. 7 does not apply to a case where a suit is brought by a Hindu father as the manager of a joint family to recover a debt due to the joint family and in which the father and manager unnecessarily joins his minor son as co-planitiff, appointing himself as next friend of the minor son. The section is intended to apply to a case where each of the several persons is jointly entitled to file a suit. The father as manager is alone entitled to institute a suit. The minor has no right to interfere in the management of the joint family affairs including the institution of a suit. If it is clear that the suit is one brought by the father as manager of the joint family for a debt due to the joint family, the fact that he quite unnecessarily chooses to join his minor son as a co-plaintiff and to appoint himself as next friend, cannot make any difference to the law of limitation and time would not be extended by S 7 of the Limitation Act. It cannot be said that the father is not in a position to give a valid discharge for himself and for the minor whom he represents so as to entitle the minor son to the extended period of limitation. (*Davis, C.J. and Lobo, J.*) TOPANMAL RAJOMAL *v.* GORDHANDAS.

I.L.R. (1941) Kar. 72 = 196 I.C. 572 = A.I.R. 1941 Sind 166.

——**S. 7**—*Applicability—Malabar tarwad — Gift deed by karnavan and senior anandiravan—Karnavan executing also as guardian of minor member—Suit by minor after majority to set aside deed—Limitation—Starting point.*

On 14—1—1913, *K*, the karnavan of a Malabar tarwad executed a deed of gift of certain properties belonging to the tarwad in favour of his own children. He signed it as karnavan and as guardian of the plaintiff (1st respondent) who was then a minor The 2nd respondent who was the only other member of the tarwad and an adult, also signed the deed. The gift was found to be a fraud on the tarwad and it was found that the 2nd respondent was the victim of a fraud practised by the karnavan *K*. *K* died in 1919, and since then the 2nd respondent was the karnavan of the tarwad, but the latter did not file any suit to set aside the gift deed. The 1st respondent plaintiff became a major on 28—10—1927 and on 14—10—1930, brought a suit to set aside the deed of gift and for possession of the properties from the alienees under the deed of gift.

Held, that the 2nd respondent, when the latter became karnavan, was in a position to give a discharge on behalf of the tarwad and therefore time ran against the 1st respondent also. The suit having been brought more than 12 years after the date of the gift was therefore barred and not saved by S. 7 of the Limitation Act. (*Leach, C.J. and Happell, J.*) DEVAKI *v.* KANNAN.

53 L.W. 724 = 1941 M.W.N 632 = A.I.R. 1941 Mad. 678.

——**S. 7**—Hindu joint family—Eldest brother or member—Competency to give valid discharge—Presumption—Plea of incapacity to give discharge—Burden of proof. *See* 1940 Dig., Col 782. VARADA BHAKTAVATSALUDU *v.* VENKATANARASIMHA RAO.

191 I C. 369 = 13 R M. 486 = (1940) 1 M.L.J. 195.

——**S. 7**—*Scope of—Brothers forming joint Hindu family- Suit challenging alienation by mother—Limitation.*

In all cases to which S. 7 of the Limitation Act strictly applies, the section bars a suit by a younger minor member of a joint Hindu family in a case where an elder brother having become a major and having therefore also become a manager of the joint family, has failed to institute a suit within the period of limitation applicable to him. Where a Hindu mother alienated certain family property during the minority of her two sons, it was *held*, that the right of the two sons forming a joint Hindu family to question the alienation was a right jointly enjoyed by them and they were jointly entitled to institute a suit for that purpose and that as there was no justification for holding that the manager of the family was not capable of giving a discharge or release of the right to institute such a suit, on the failure of the elder brother manager to institute a suit within the period of limitation prescribed for a suit by him, the right of suit for the recovery of the property became barred not only against the elder brother but also against the other member and that it could not be said that the younger brother had a separate individual right to institute such a suit. (*Yorke and Ghulam Hasan, JJ.*) JAGDISH NARAIN *v.* BISHUN DATT

191 I.C. 825 = 13 R.O. 291 = 1941 O.L.R 38 = 1941 A.W.R. (C.C.) 12 = 1940 O.W.N. 1237 = 1940 O.A. 1197 = A.I.R. 1941 Oudh 165.

LIMITATION ACT (1908), S. 10.

——**S. 10**—*Applicability—Express trust—Deed of wakf—Trustees to pay income to settlor for life and afterwards to beneficiaries named in deed—Trustees administering and paying income to beneficiaries after death of settlor—Suit by heir to declare deed void and for possession of property—Limitation.*

In order to invoke the application of S. 10 of the Limitation Act, the property must be vested in a trustee or trustees for a specific purpose. A person claiming adversely to the trust and on the footing that the trust deed itself was bad cannot contend that the property was held by the trustees for any purpose. Where a person claiming to be an heir of the settlor and to be entitled to the property on the ground that the trust deed was void and that as an heir of the settlor he is entitled along with the other heirs to recover the property from the trustees, S. 10 of the Limitation Act does not apply. *A*, a Mahomedan, executed on 29—10—1895 a deed of wakf or trust under which the trustees were to pay the income of the property to the settlor during his lifetime and after his death to the beneficiaries mentioned in the deed. *A* died on 7—6—1897. Ever since then the trustees administered the property as trustees under the deed of trust and held the property for the beneficiaries paying the income to the beneficiaries. On 28—3—1938, the plaintiff claiming to be an heir's heir of the settlor brought a suit for a declaration that the deed of trust was void and inoperative, that the trustees should be ordered to deliver up the property to him and the other heirs, and the trust deed for cancellation and for an account of their management of the property.

Held, that S. 10, Limitation Act, did not apply to the suit as the plaintiff could not be said to be a person claiming against a trustee holding the property for an express trust, and the suit was time barred. (*Kania, J.*) FIDAHUSSEIN KADERBHAI *v.* TYABALLY EUSUFALLY.

196 I.C 821 = 43 Bom.L.R. 622 = A.I.R. 1941 Bom. 307.

——**S. 10**—*Applicability—High priest of temple—If trustee.*

As a general rule, the high priest of a temple and a person in like position, is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. The property is not conveyed to or vested in him nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration. But a high priest appointed under a decree of Court under S. 539 of the old C. P. Code, 1882, as a "trustee

LIMITATION ACT (1908), S. 10.

for all the properties movable and immovable devoted to the service" of the temple God, is an exception to the general rule. A suit against his widow for the recovery of the amount due on certain war bonds vested in him in trust would fall within S. 10 of the Limitation Act and will not be barred by any length of time. (*Lord Russell of Killowen*) BAIDYANATHJI *v.* URMILA DEVI. **22 Pat.L.T. 981=1941 O.L.R. 807=1941 O.A. 1024=196 I.C. 696=A.I.R. 1941 P.C. 130 (P.C.).**

——**S. 10**—*Applicability — "Specific purpose"—Meaning of—Nattukottai Chetties — Money deposited with person at time of marriage of daughter—If express trust created in favour of children of marriage.*

The phrase "trust for a specific purpose" in S. 10 of the Limitation Act is only a more expanded mode of constituting express trust in English law. The plaintiff and the defendant were members of the Nattukottai Chetty community. The 1st plaintiff married the sister of the defendant. At the time of the marriage, the father-in-law of the plaintiff, S. A. A. A. Chetty, provided a sum of money as his daughter's stridhanam, and out of the amount provided, a sum of Rs. 2045-2-0 was deposited in May, 1919, with the defendant in the name of the 1st plaintiff to the order of S.A.A. The defendant was aware of the nature of the money, its source, and the purpose for which it was being deposited, namely to earn interest and be augmented for the benefit of the children of the marriage, according to the custom of the community. An additional sum of Rs. 447, being the share of the 1st plaintiff's wife in her mother's property, was similarly deposited with the defendant in July, 1921. S.A A., the maraldar, died in 1926, and the 1st plaintiff's minor daughter, the 2nd plaintiff became entitled to the amount; the 1st plaintiff's wife died in 1939. Demands were made but were not complied with, and the plaintiffs sued the defendant for recovery of the amounts.

Held, that the defendant, in the circumstances, became and remained a trustee of the amounts deposited with him, for a specific purpose, namely, of interest being earned and the total fund being increased for the benefit of the children of the 1st plaintiff and his wife; that S. 10 of the Limitation Act applied to the case and enabled the 2nd plaintiff to recover the amounts without any bar of limitation. (*Gentle, J.*) PALANIAPPA CHETTIAR *v.* NACHIAPPA CHETTIAR.

A.I.R 1941 Mad. 841=(1941) 2 M.L.J. 558.

——**S. 10**—*Applicability—Suit for profits by administrators of trust property—Defendant entrusted by plaintiffs with property for safe custody and management.*

Where plaintiffs called administrators of certain trust property dedicated by will, entrusted the property to the defendants for safe custody and management and eventual return and later on sued the defendants for profits for a period of 11 years it was held that S. 10 of the Limitation Act did not apply to the case and that a mere custodian or manager of property handed over to him by the legal or *de facto* manager could not be reached by the section and that the suit would be governed by the ordinary rule of limitation. The entrustment of the property to the defendants would not make them "managers" within the meaning of S. 10, Limitation Act. (*Stone, C.J. and Bose, J.*) SHRI MAHADEOJI *v.* BALDEO PRASAD. **1941 N.L.J. 184=A.I.R. 1941 Nag. 181.**

——**S. 10**—Applicability—Trustee *de son tort*—Effect of the amendment of 1929. *See* 1940 Dig., Col.

LIMITATION ACT (1908), S. 12.

782. DHARAM NARAIN *v.* SURAJ NARAIN.
I.L.R. (1940) All. 815=193 I.C. 697=13 R.A. 435=A.I.R. 1941 All. 1.

——**S. 10 and Art. 120**—Scope of S. 10—When Art. 120 applies. *See* 1940 Dig., Col. 783. OFFICIAL TRUSTEE *v.* RAEBURN. **193 I.C. 61=13 R.R. 199.**

——**S. 12**—*Applicability—Letters Patent appeals.*

S. 12 of the Limitation Act governs appeals under the Letters Patent from an order passed by a Single Judge of the High Court in the exercise of its original jurisdiction, whether ordinary or extraordinary and from the judgments passed by the High Court in its appellate jurisdiction. Consequently, the appellant in such cases is entitled to exclude the "time requisite" for obtaining a copy of the order or judgment appealed against, though such copy is not required to be filed with the memorandum of appeal. 16 Lah. 448, Overr. (*Tek Chand, Dalip Singh, Bhide, Blacker and Sale, JJ.*) PUNJAB CO-OPERATIVE BANK, LTD., LAHORE *v.* OFFICIAL LIQUIDATORS, PUNJAB COTTON PRESS CO., LTD. **I.L.R. (1941) Lah. 191=195 I.C. 452=14 R.L. 70=1941 Comp. C. 254=43 P.L.R. 297=A.I.R. 1941 Lah. 257 (F.B.).**

——**S. 12**—*Period till signing of decree—Exclusion of.*

The period till the decree is actually prepared and signed should be excluded for purposes of limitation if the application for copy is made before the preparation of the decree. (*Bhide, J.*) JIWAN DAS *v.* RAKHMAT DIN. **195 I.C. 157=14 R.L. 37=43 P.L.R. 88=A.I.R. 1941 Lah. 212.**

——**S. 12**—*Time for obtaining copy of decree—Period between date of judgment and date of signing of decree—When can be excluded.*

In case an application for obtaining a copy of the decree has already been made, and a decree is signed later on, the period which thus elapses, would be deemed to be the time requisite for the obtaining of the copy, because the signing of the decree is a matter which is not within the control of the applicant. By the mere act of applying for the copy the applicant does whatever is within his power with due diligence and caution to obtain the benefit of S. 12. But if he does not put in the application for a copy till after the decree has been signed, he cannot be said to have exercised due diligence and caution, and in that case the period which elapses between the date of the judgment and the date of the signing of the decree cannot be considered to be the time requisite for obtaining the copies. (*Almond, J.C. and Soofi, J.*) SHIVAN DITTA *v.* RADHA KISHAN KAPUR. **196 I.C. 654=A.I.R. 1941 Pesh. 74.**

——**S. 12**—"Time requisite"—Period between date of judgment and date of signing of decree—If can be excluded. *See* 1940 Dig., Col. 783. BALAPPA TAMANNA *v.* DYAMAPPA BHUSAPPA. **192 I.C. 275=13 R.B. 245.**

——**S. 12**—*Time to be excluded—Computation of—Appeal without copy of order appealed against—Extra time allowed—Dismissal of appeal when justified.*

When the order appealed against is not filed along with the appeal memo. and the Court grants time for its being obtained and filed, an order of dismissal of the appeal would be justified only when it is found that the copy had not been applied for within time and had not been filed within the extended period of limitation. The time taken for the copy to be got ready by the office, would have to be excluded in the calculation of time for purposes of limitation (*Harper S M. and*

LIMITATION ACT (1908), S. 12.

Sathe, J. M.) RAM GOPAL *v.* EMPEROR.
1941 R.D. 244 = 1941 A.W.R (Rev.) 353 = 1941 O.A. (Supp.) 267.

——**S. 12 (2)**—*Applicability—Madras Village Courts Act, S. 73*—Ex parte *decree by Village Court—Application to District Munsif to set aside—Time taken for obtaining copy of decree of Village Court—Exclusion of.*

S. 12 (2) of the Limitation Act is applicable to an application under S. 73 of the Madras Village Courts Act preferred to the Court of a District Munsif against an *ex parte* decree of a Village Panchayat Court. For the purposes of S. 12 (2) the application to the District Munsif has to be treated as an appeal and the time requisite to apply for and obtain a copy of the decree of the Panchayat Court can be excluded in computing the period of limitation for filing the application to the District Munsif under S. 73 of the Village Courts Act. Though S. 73 does not require an applicant to produce along with his petition a certified copy of the decree to which he takes exception, S. 12 (2) of the Limitation Act still applies, because S. 12 (2) is applicable even to a case where the appeal or application need not be accompained by a copy of the decree objected to (*Krishnaswami Aiyangar, J.*) STANDARD TYPE FOUNDRY *v.* VENKATARAMANIAH
1941 M W N. 349 = 53 L.W. 487 = A.I R. 1941 Mad. 589 = (1941) 1 M.L.J. 540.

——**S. 12 (2)**—*Time requisite for obtaining copy—Vacation—Exclusion.*

Where judgment was delivered in a case on the last working day before the closing of Court for vacation and an application for copies of judgment and decree was made on the reopening day, it was held that the period of vacation should be excluded in computing time for appeal, as time requisite for obtaining the copies. (*Ghulam Hasan, J.*) UMA SHANKAR SINGH *v.* DUL KARIM KHAN. **196 I.C. 689 = 1941 A.W.R. (Rev.) 944 = 1941 O.L.R. 732 = 1941 O.A. 851 = 1941 O.W.N. 1223.**

——**S. 12 (2)**—*'Time requisite'—Requisite stamps and folios as notified filed, and date given for delivery of copy—Second requisition for extra stamps made before that date—Time intervening between second requisition and compliance therewith—If can be excluded.*

Application was made for copies of the judgment and decree on March 18th and plaintiff was notified about the requisite number of folios and stamps on the same date. Stamps and folios as required were supplied on March 19th and March 25th was the date fixed for delivery of the copies. On March 20th, the copying department notified that further folios and stamps would be required. This fact was not notified directly to the plaintiff or his lawyer but it was notified in the manner provided by Rule 626 and Rule 636 of the High Court Rules and Circular Orders. The plaintiff came to know of this on the date fixed for the delivery of the copies (*i.e.*) March 25th. The 26th March to the 29th March were holidays. On the 30th March the plaintiff supplied the additional stamps and folios and on the 31st March the copies were delivered.

Held, that the whole period from March 18th to March 31st were "requisite for obtaining copies" within the meaning of S. 12 (2) of the Limitation Act and should be excluded in computing the period of limitation for an appeal. (*Sen, J.*) JAMADAR SINGH *v.* NAIYAB ALI. **I.L.R. (1941) 1 Cal. 536 = 196 I.C. 193 = 14 R.C. 190 = 74 C.L.J 121 = 45 C.W.N. 498 = A.I.R. 1941 Cal. 378.**

——**S. 12 (3)**—*Deduction of time for copy—If allowable in cases of leave to appeal to Privy Council.*

LIMITATION ACT (1908), S. 14.

A party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment. (*Yorke and Ghulam Hasan, JJ.*) H. HUNTER *v.* EHSAN HUSAIN.
16 Luck. 638 = 193 I.C 295 = 13 R O 444 = 1941 O.L.R. 267 = 1941 O.W N. 352 = 1941 O.A. 263 = 1941 A.W.R. (C C.) 106 = A.I.R. 1941 Oudh 247.

——**S. 13**—*Extension of time—Condition—Residence in British India during pendency of debt—Necessity.*

So long as the defendant is resident outside British India, the period of limitation is prolonged. It is not a necessary concomitant of S. 13, Limitation Act, that he should have been at some time during the pendency of the debt resident in British India. (*Davies.*) BAL KISHAN *v.* JOHRI LAL. **1941 A.M.L J. 41.**

——**S. 14**—*Applicability—Failure to give proper notice to Official Receiver in earlier proceedings—Plaintiff guilty of negligence.*

An objector, whose objections to the execution sale had been dismissed, brought a regular suit claiming property that was being sold. In the meantime the judgment debtor became insolvent. The objector though knowing this did not implead the Official Receiver as a party and when compelled to do so he failed to give the receiver proper notice. His suit was dismissed and he then brought a declaratory suit under O. 21, R. 63.

Held, that the plaintiff had been guilty of gross negligence and hence he was not entitled under S. 14 to deduct time spent in earlier proceedings. (*Beckett, J.*) AMAR NATH *v.* BASANT RAM. **A.I.R. 1941 Lah. 256.**

——**S. 14**—*Benefit under—Good faith, condition precedent.*

The establishment of good faith is a pre-requisite condition before the benefit of S. 14 can be allowed. Where the good faith of the party prosecuting his remedy in a different proceeding was open to grave doubt and where the parties to the different proceedings were not identical it was held that benefit of S.14, Limitation Act could not be claimed. (*Shirreff, J.M. and Sathe, A.M.*) SAHIB BUX SINGH *v.* DEOKALI BARAI.
1941 A.W.R. (Rev.) 1041 = 1941 O.A. (Supp) 850.

——**S. 14**—*Burden of proof—Good faith—Onus—Evidence Act, S. 103.*

A person claiming the benefit of S. 14 of the Limitation Act must show that he comes within it and the burden is on the plaintiff to prove that he acted in good faith in instituting the earlier proceedings. S. 103 expressly states that the burden of proof of any particular fact lies on the person who affirms it unless it is provided by law that the proof is elsewhere. (*Leach, C. J., Gentle and Krishnaswami Aiyangar, JJ.*) KASI-KANANDA GNANACHARYA SWAMIGAL *v.* SARAVANA PERUMAL PILLAI. **I.L R. (1941) Mad. 347 = 194 I.C. 328 = 13 R.M. 753 = 53 L.W. 164 = 1941 M.W.N. 125 = A.I.R. 1941 Mad. 319 = (1941) 1 M.L J. 257 (F B.).**

——**S. 14**—Prosecution of suit in wrong Court—Plaintiff not having reason to think that defendant's residence was in another place—Benefit of S. 14, if available. *See* 1940 Dig., Col. 785. ABDULLA KHAN *v.* TIRBUAN DUTT SINGH. **16 Luck. 402 = 13 R.O. 265 = 191 I C. 708 = 1941 A.W.R. (C.C.) 3 = 1941 O L.R. 9 = A I.R. 1941 Oudh 161.**

LIMITATION ACT (1908), S. 14.

——**S. 14**—*Relief under*—Bona fides, *if an entitling circumstance.*

It is not diligence but *bona fides* which should be considered when judging the mistake in selecting the forum. (*Harper, S.M. and Sathe, J.M.*) GOBARDHAN SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, MAHEWA ESTATES. **1941 O W.N. 713 = 1941 O.A. (Supp.) 365 (2) = 1941 A.W.R. (Rev.) 435 = 1941 R.D. 412 = 1941 A.L J. (Supp.) 92.**

——**S. 14**—*Right of benefit of—Award between Bank and private individual—Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court—Subsequent ruling declaring that such awards were cognizable by District Judge.*

In an arbitration between the Bank, a limited liability company, and a private individual an award was passed in favour of the Bank, which diligently and in good faith prosecuted proceedings for the execution of the award in the Sub-Judge's Court believing that Court to have jurisdiction. Subsequently it was ruled that awards such as the one in question were cognizable by District Judge:

Held, that the Bank was entitled to the benefit of S. 14. (*Mir Ahmad and Soofi, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LEKHU RAM. **192 I.C. 758 = 13 R. Pesh. 44 = A.I.R. 1941 Pesh. 3.**

——**S. 14**—Scope—If subject to or controlled by Art. 182 (5). *See* 1940 Dig., Col. 785. BISHUNDEO NARAIN MISSIR *v.* RAGHUNATH PRASAD. **191 I.C. 695 = 13 R.P. 339 = 7 B R. 245.**

——**S. 14 (1)**—*Due diligence—Counsel failing to cite important authority—Party, if to suffer.*

It would be a most vicious principle to decide that for the failure of counsel to cite an important authority, the party should be held to have not prosecuted the proceeding with due diligence. It would be most unfair to saddle a client with the consequences of such an omission on the part of his counsel. (*Davies.*) ACHAL DAS *v.* SUNDA RAM. **1940 A.M.L.J. 120.**

——**S. 14 (2)**—Applicability to execution applications. *See* 1940 Dig., Col. 785. BISHUNDEO NARAIN MISSIR *v.* RAGHUNATH PRASAD. **191 I.C. 695 = 13 R.P. 339 = 7 B.R. 245.**

——**S. 15**—Applicability—Letter of Chief Court directing stay of execution in the case of agriculturists—If can extend period of limitation. *See* 1940 Dig., Col. 786. GURDIN BHANT *v* CHHEDI BHANT. **16 Luck. 495 = 191 I.C. 757 = 13 R O. 284 = 1941 O.L R. 25 = A.I.R. 1941 Oudh 93.**

——**S. 15**—*Applicability—Suit stayed under O. 32, R. 10, C. P. Code, by reason of death of next friend of minor plaintiff—Right to apply for final decree in such suit—If suspended during period of stay—Exclusion of time for application for final decree.*

Where the next friend of a sole plaintiff or sole surviving plaintiff dies and the suit stands stayed or in abeyance under O. 32, R. 10, C. P. Code, the right to apply for a final decree in such a suit is suspended, and the period during which the suit stands stayed ought to be excluded in computing the period of limitation to apply for a final decree. S. 15 of the Limitation Act in terms does not apply, but the principle of the section ought to be applied. Plaintiffs 1 and 2, the latter a minor, filed a suit on a mortgage, plaintiff No. 1, acting as next friend of his minor brother, second plaintiff. On 20th February, 1925, a preliminary decree was passed. In January, 1927, the first plaintiff died, and no next friend was appointed for the second plaintiff. All further proceedings in the suit were therefore stayed for the time being. The second plaintiff attained majority on 12th April, 1933, and he died on 13th September, 1933. The first plaintiff's widow made an adoption in June, 1933, and in July, 1934, the adopted son, as the legal representative and heir of the plaintiffs applied for a final decree. It was pleaded that the application was barred under Art. 181 of the Limitation Act.

LIMITATION ACT (1908), S. 19.

Held, that it was unjust that time to make an application in a suit should continue to run during a period when the suit has been stayed by statute and no application is possible; that since the suit was in abeyance by virtue of O. 32, R. 10, C. P. Code, on the death of the first plaintiff, the right to apply for a final decree was suspended during the period in which the suit was stayed and, deducting that period, the application was in time (*Beaumont, C. J. and Sen, J.*) GOVINDNAIK GURUNATHNAIK *v.* BASAWANNEWA PARUTAPPA **I.L.R (1941) Bom. 435 = 197 I.C. 30 = 43 Bom.L.R. 329 = A.I.R. 1941 Bom. 203.**

——**S. 15**—*Applicability to local law—Bihar Tenancy Act, Sch. III, Art. 6—Period under—If extended by S. 15—Compromise decree—Stipulation that decree should not be executed until the happening of contingency—Effect of.*

S. 15 of the Limitation Act operates on the periods of limitation prescribed by the Bihar Tenancy Act, by reason of the combined operation of subSs. (1) and (2) of S. 185 of the Bihar Tenancy Act. Art. 6 of Sch. III of the Bihar Tenancy Act which prescribes a period of three years from the date of the decree has to be read with S. 15 of the Limitation Act. The decree in a rent suit was passed on a compromise and the compromise provided that the decree should not be executed until the decision in a title suit, then pending was given. The application for execution was filed within three years of the decision in the title suit but more than three years after the rent decree.

Held, that the petition of compromise containing the stipulation that the rent decree should not be executed until the decision in the title suit was a part of the decree in the rent suit, and must be regarded as an order staying the execution of the decree till the date of the decision of the title suit, and the application was therefore in time. (*Agarwala, J.*) JAGDEO SINGH *v.* BABU LAL SAH. **196 I.C. 609 = 14 R.P. 217 = 8 B R. 59 = 1941 P.W.N. 183 = A.I.R. 1941 Pat 499.**

——**S. 18**—*Applicability—Application under Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act—Application of S. 18—If excluded by S. 11 of the Bihar Act.*

There is nothing in S. 11 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act which excludes S. 18 of the Limitation Act, and S. 18 of the Limitation Act will therefore apply to an application for restoration of a holding under Bihar Act IX of 1938. (*Swanzy, A. M.*) NARSINGH PRASAD *v.* SILA NATH JHA. **7 B.R. 1003.**

——**S. 19**—*Acknowledgment—Effect of—Fresh cause of action.*

As between solvent persons an acknowledgment express or even implied by *A* that he owes money to *B* is about as good evidence as could be had that *A* owes *B* that money, even if it does not give *B* a fresh cause of action. (*Blagden, J.*) BHAWANI SANKAR JAISI *v.* GANGA PRASAD. **A.I.R. 1941 Rang 244.**

——**S. 19**—*Acknowledgment—Endorsement by debtor—Construction.*

An endorsement at the back of the bond thumb-marked by debtor which ran "To-day....Rs. 360-10-0 ....were paid towards this bond" amounted to a clear acknowledgment within the meaning of S. 19.

LIMITATION ACT (1908), S. 19.

(*Tek Chand and Abdul Rashid, JJ.*) SIRAJ DIN *v.* UMAR DIN. **192 I.C. 118 = 13 R.L. 361 = A.I.R. 1941 Lah 23.**

——**S. 19**—*Acknowledgment—Letter at the request of the debtor, written by a* mukhtar—*Sufficiency.*

Where one of the *mukhtars* appointed along with others under a *mukhtarnama* writes a letter to a creditor at the request of the debtor acknowledging the liability and pleading present inability to pay, it is a valid acknowledgment of the debt, the *mukhtar* acting independently of the *mukhtarnama* and under special authority. (*Yorke and Agarwal, JJ.*) DEPUTY COMMISSIONER, KHERI *v.* RAM KUMAR SAXENA.

16 Luck. 701 = 192 I.C. 885 = 13 R.O. 421 = 1941 A.W.R. (C.C.) 70 = 1941 O.L.R. 245 = 1941 O.W.N. 108 = 1941 O.A. 142 = A.I.R. 1941 Oudh 254.

——**S. 19**—Acknowledgment—List of reliance—If amounts to. *See* 1939 Dig., Col. 747. TAPIBAI *v.* SHANKARLAL. **I.L.R. (1941) Nag. 222**

——**S. 19**—Acknowledgment of liability—Intention of parties—Oral evidence—Admissibility—Surrounding circumstances—If can be looked into. *See* EVIDENCE ACT, S. 92. **45 C.W.N. 208.**

——**S. 19**—*Acknowledgment—Partnership—Firm's name given, but not signed—Sufficiency.*

As it is customary in business circles in India to give the name of the firm only in statements of accounts made up, it has been held to amount to signature for purposes of S. 19, Limitation Act. Hence where a partner makes an acknowledgment in the name of the firm but does not sign it, it is a valid acknowledgment on behalf of the firm. (*Bennet and Ghulam Hasan, JJ.*) HET RAM *v.* SUBHAG CHAND. **194 I.C. 168 = 13 R.O. 554 = 1941 A.W.R. (Rev.) 300 = 1941 R.D. 279 = 1941 A.L.W. 380 = 1941 O.L.R. 419 = 1941 O.W.N. 527 = 1941 O.A. 331 = A.I.R. 1941 Oudh 376.**

——**S. 19**—*Acknowledgment—Post card not necessarily referring to suit debt on face of it—Oral evidence to prove reference to suit debt—Admissibility.*

Where a plaintiff relies on post cards as containing acknowledgments to save limitation for a suit on a promissory note, but there is nothing on the face of the post cards to say that they necessarily referred to the suit debt, the plaintiff may be allowed to prove by evidence that the post cards relate to the suit debt. There is nothing in S. 19 of the Limitation Act or in the Evidence Act which precludes the letting in of oral evidence to explain what debts the post cards necessarily refer to. (*Horwill, J.*) ATHMARAMAYYA *v.* SESHAPPA AIYAR. **53 L.W. 102 = 1941 M.W.N. 175 = A.I.R. 1941 Mad. 409 = (1941) 1 M.L.J. 173**

——**S. 19**—'Agent duly authorised'—Judge signing deposition of witness—If an agent of the witness. *See* 1940 Dig., Col. 787. GAJADHAR PRASAD *v.* UDAI CHAND. **193 I.C. 401 = 13 R.N. 324.**

——**Ss. 19 and 20**—*Applicability—Promi sory note—Payment and endorsement as being towards note—Payment not appropriated—Sufficiency to save limitation as acknowledgment.*

When there is a bond or note under which a considerable sum is due and the debtor makes towards that bond a payment which is clearly less than the balance due, accompanying the payment with an endorsement to the effect that it is towards the debt in the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the indorsement is made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed, although such a payment being an open payment or unappropriated payment cannot avail the creditor under S. 20 of the Limitation Act as a payment towards interest as such or towards principal saving limitation (*Wadsworth and Patanjali Sastri, JJ.*) RAMAYYA *v.* ANJAYYA. **54 L.W. 624 = (1941) 2 M.L.J. 848.**

——**S. 19**—*Applicability—Rent decree for less than Rs. 500 against three persons falling under Sch. 3 of Bihar Tenancy Act—Application by one for payment—If saves limitation for execution.*

S. 19 of the Limitation Act applies and gives a fresh start of limitation in cases in which limitation is provided by Sch. 3 of the Bihar Tenancy Act. An application for payment by one of several judgment-debtors against whom a joint decree for rent for an amount less than Rs. 500 has been passed would save limitation for execution of the decree as the application for payment amounts to an acknowledgment. (*Rowland and Chatterji, JJ.*) LACHMI NARAIN *v.* BRAHMDEO NARAIN. **22 Pat.L.T. 416.**

——**S. 19**—*Applicability—Acknowledgment of liability—What constitutes—Acknowledgment of liability of particular debt—Necessity for.*

Before S. 19 of the Limitation Act can apply, there must be words which clearly indicate an acknowledgment of liability of the particular debt. It is not for the Court to overstrain the meaning of the words used; there is no warrant for holding that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment. *S* mortgaged his property to *M* on 9—8—1921 for Rs. 5,000. On 6—1—1923, he executed a second mortgage in favour of *M* for Rs. 1,000. On 4—7—1924 *S* executed a usufructuary mortgage of the property in favour of *R* for Rs. 1,000 which contained the following passage: "If we commit default in respect of any condition, you shall bring the said property to a public or private sale. Take the principal and interest and also auction expenses as per account pay *M*, if any debts incurred for the benefit of our family has to be paid to him in respect of the said property, and pay the balance, if any, to us."

Held, that the passage could not be read as an acknowledgment within the meaning of S 19 Limitation Act of the mortgage deeds in favour of *M*. (*Leach, C.J. and Horwill, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* NATESA ACHARI. **1941 M.W.N. 827 = 54 L.W. 718 = A.I.R. 1941 Mad. 892 = (1941) 2 M.L.J. 460.**

——**Ss. 19 and 20**—Joint-debtors—Payment towards debt by one debtor after the death of the other within limitation—If saves limitation against the heirs of the deceased debtor. *See* 1940 Dig., Col. 788. KUNJANDI *v.* CHINNAVAVA ROWTHEN. **195 I.C. 235 = 14 R.M. 164 = A.I.R. 1941 Mad. 110 = (1940) 2 M.L.J. 326**

——**Ss. 19 and 21**—*Scope—Mortgage by Mahomedan—Death of mortgagor—Acknowledgment by some co-heirs—Effect of—Claim barred as against some heirs—If barred as a whole.*

Where after the death of a mortgagor, who was a Mahomedan, some of the heirs owning 14 as. share of the property mortgaged executed sale deeds of the equity of redemption in the property in respect of their shares therein, thereby acknowledging the mortgage debt, but the remaining heir, owning the remaining 2 as. share did not make any acknowledgment, it cannot be held that the acknowledgment by some heirs does not avail to save limitation and therefore the whole suit is barred by limitation. As a general rule a mortgage contract is indivisible, but in a case where the parties are Maho-

medans, the share of each of the heirs of the original mortgagor is defined by law (*i.e.*, the Mahomedan law), and therefore although the suit is barred with regard to the 2 as. share of the heir who has not acknowledged, it cannot be held to be barred as to the remaining 14 as. share in respect of which there have been acknowledgments within the period of limitation. (*Varma and Manohar Lall, JJ.*) HAKIM SAYID FIDA ALI *v.* BHUNESHWARI KUAR. **20 Pat 770.**

——S. 19—*Separate remedies in respect of same transaction—Acknowledgment in respect of one—If saves limitation as regards the other—Promissory note for unpaid purchase-money—Acknowledgment — If saves limitation for suit to enforce vendor's lien for unpaid purchase money.*

In a case where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction, and the remedies are distinct and separate in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. Where a vendee of immovable property executes a promissory note to the vendor for the balance of the sale price due to the vendor, acknowledgments of liability evidenced by endorsements made on the promissory note cannot be treated as acknowledgments of liability in respect of the vendor's lien for the portion of the purchase-money which is due, so as to save limitation to file a suit to enforce claim on the lien as against the immovable properties. (*Chandrasekhara Ayyar, J.*) SAYED ABDUL HUQ SAHIB *v.* USMAN KHAN SAHIB.

54 L.W 591=(1941) 2 M.L.J. 939.

——S. 19 (2)—Co-mortgagor—Acknowledgment by —If saves limitation for suit by other mortgagor against redeeming co-mortgagor for redemption. *See* 1940 Dig., Col. 789. MUKH NARAIN SINGH *v.* RAMLOCHAN TIWARI. **A.I.R. 1941 Pat. 147.**

—— S. 20—*Acknowledgment of payment—Signature of debtor—If necessary.*

The actual signature of the debtor is not necessary provided that the acknowledgment required by S. 20 of the Limitation Act is in the handwriting of the person making the payment. But the acknowledgment must appear on its face to be on account of the debt. (*Rowland, J.*) GOBIND RAM *v.* CHUNI RAM JAMUNA DAS. **196 I.C. 392=14 R P 190=8 B R. 21.**

——S. 20—*Agency—If may be implied—Payment by Hindu minor on behalf of his father*

For the purpose of S. 20, the agent need not be authorised in writing and the agency may be implied. Where a payment is made by a Hindu minor son on behalf of his father, it must be taken that he was impliedly acting as his father's agent. (*Davies.*) RAM PARSHAD *v.* MOOL CHAND. **1941 A M.L.J. 63**

——S. 20—*Agent duly authorised—Mortgage by debtor—Mortgagee directed to discharge debt due by debtor—Part payment by mortgagee—If payment by agent duly authorised—If saves limitation.*

Leach. C.J. and King, J. (*Patanjali Sastri, diss.*)—Where a mortgagee undertakes as a part of the consideration for the mortgage to discharge a debt due by the mortgagor, he cannot be deemed to have authority to make a payment of interest or a part payment of principal, for purposes of S. 20 of the Limitation Act. Whether there is authority to make a part payment is a question of fact. Of course, if the person who is to make the payment is left a discretion in the matter, his principal will have to suffer the consequences of a payment to account, if the conditions of S. 20 for the saving of limitation are also complied with. Where the mortgagee is directed to pay

in full the debt due by the mortgagor, it cannot be said that there is any discretion left to the mortgagee in the matter. His duty is to discharge the debt in full and he has no authority to do anything else. If he makes only a part-payment that will not bind the mortgagor and cannot save limitation for a suit against the mortgagor. (*Leach, C. J., King and Patanjali Sastri, JJ.*) RAMACHANDRA *v.* SHANTARAMA

I.L.R. (1941) Mad. 191=195 I.C. 733=14 R.M. 221=52 L W. 935=1941 M.W.N. 9=A.I.R. 1941 Mad. 67 (2)=(1941) 1 M.L.J. 77(F B.).

——S. 20—*Appropriation — Creditor's rights—Limits of.*

A creditor has the right to appropriate a payment made by the debtor without instructions towards the principal, if he so likes, but if the creditor wants to save limitation the appropriation must have been made within the period of limitation and the fact that the appropriation has so been made within the period of limitation can appear from the account books of the creditor. (*Bajpai and Dar, JJ.*) SITARAM BABU RAM *v.* SITARAM LALMAN. **I.L.R. (1941) All. 291=193 I.C. 854=13 R.A. 458=1941 O.W.N. 293=1941 O.A. (Supp.) 290=1941 A.L.W. 195=1941 A.W.R. (H.C.) 42=1941 A.L.J. 50=A.I.R. 1941 All. 132.**

——S. 20—*Authority of agent—It may be implied—Common manager appointed under S. 95 of B. T. Act incurring debt—Agreement between him and proprietors that he should pay off debt out of assets—Payment of interest by him—If effective against proprietors.*

Per *Pal, J.*—Under S. 20 of the Limitation Act, the authority of the agent may even be implied from the facts and circumstances of the loan. The section does not require any formal authorisation. Where a common manager appointed under S. 95 of the B. T. Act incurs a debt and it is agreed between him and the proprietors that he should pay off the debt out of the assets of the estate under his management, an authority is implied from the proprietors to the common manager to pay the interest on their behalf as it becomes due, and this is sufficient to make the payments of interest by him effective under S. 20 of the Limitation Act so as to save limitation against the proprietors. The fact that the payments are debited in the common manager's books to the accounts of some of the proprietors only and are stated there as on the requisition of these proprietors, will not affect the position in the absence of any evidence that while making these payments to the creditor the common manager did so with any such reservation. (*Nasim Ali and Pal, JJ.*) SUKUMARI GUPTA *v.* DHIRENDRA NATH ROY. **73 C.L J. 356=A.I.R. 1941 Cal. 643.**

—— S. 20—*Construction—Payment and indorsement by mortgagor after parting with property—It saves limitation against purchaser of equity of redemption.*

S. 20 of the Limitation Act does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by the person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. The right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period A payment and endorsement by a mortgagor who has parted with the mortgaged property but is personally liable to pay on his covenant would therefore save limitation against the prior purchaser of the equity of redemption. (*Wadsworth and Patanjali Sastri, JJ.*) THAYYANAYAKI

LIMITATION ACT (1908), S. 20.

AMMAL *v.* SUNDARAPPA. **54 L.W. 579= 1941 M.W.N. 1000 = (1941) 2 M.L.J. 913.**

——**S.** 20—Construction—"Person liable to pay the debt" — "Agent duly authorised" — Meaning of—Mortgage—Purchaser from mortgagor of property not comprised in mortgage with direction to discharge mortgage debt—Part-payment by—If saves limitation—Ratification by mortgagor—Effect of. *See* 1940 Dig, Col. 789. THINNAPPA CHETTIAR *v.* KRISHNA RAO. **195 I.C. 329 = 14 R.M. 173 = A.I.R. 1941 Mad. 6 = (1940) 2 M L J. 726.**

——**S.** 20—Creditor appropriating 'open' payment—Availability of S 20—Facts to be proved. *See* 1940 Dig., Col. 790. RAMA SHAH *v* LAL CHAND **7 Cut.L.T. 1 = 22 Pat.L.T. 425 = (1940) 1 M L J 895 (P.C.).**

——**S.** 20—Loan bearing no interest—Part payment by debtor—Effect of. *See* 1940 Dig., Col. 790. KESAR SINGH *v.* WAZIR SINGH. **191 I.C. 817 = 13 R.L. 338.**

——**S.** 20—Part-payments by debtor—When saves limitation. *See* 1940 Dig., Col. 791. KESAR CHAND *v.* BULAQI RAM. **191 I.C. 802 = 13 R.L. 334.**

——**S.** 20—*Payment by cheque—When amounts to acknowledgment.*

A cheque proved to be signed by a debtor and given by him in payment, which has been accepted by the creditor and duly honoured by the bank drawn on, would amount to an acknowledgment of payment within the meaning of the proviso to S. 20, Limitation Act. It is only if the primary evidence of the cheque itself is not obtainable, for reasons to be made out, that secondary evidence would be permissible to be given of it and what that contained. (*Ba U and Shaw, JJ.*) FATIMA BEE BEE *v.* OFFICIAL TRUSTEE. **A.I.R. 1941 Rang. 344.**

——**S.** 20—"Person duly authorised"—Promissory note by member of joint family—Payment and endorsement by undivided father—If saves limitation. *See* 1940 Dig., Col. 791. KANNAYYA NAIDU *v* APPALA NAIDU. **191 I.C. 853 = 13 R.M. 517 = (1940) 2 M.L.J. 369.**

——**Ss.** 20 and 21—*Pronote by undivided father and son—Payment by father alone—If saves limitation against son.*

In the case of a pronote executed by a Hindu undivided father and son, a payment by the father alone cannot save limitation against the son in the absence of proof that the loan was contracted for the benefit of the entire family. Mere proof that the father was the manager of the family cannot save limitation. 25 Mad. 220 (F.B.), Rel. on. (*Fazl Ali, J.*) JURO RANTO *v.* ADIKANTA PRADHANO. **195 I.C. 52 = 14 R.P. 73 = 7 B R. 861 = A.I.R. 1941 Pat. 208.**

——**Ss** 20 and 21—*Scope—Hindu joint family—Promissory note by manager—Subsequent partition—Payment and indorsement by one member after partition—If saves limitation against other separated members of the family.*

A payment made after partition by a member of a Hindu family of interest due on a promissory note executed by the managing member when the family was joint will not start a fresh period of limitation against the other members of the family, the payment having been duly acknowledged by the person who made it. While the family remains joint only the manager or his duly authorised agent can extend the period of limitation against family. After partition there is no manager, and therefore no one can extend the period of limitation in respect of a family debt so as to affect the erstwhile members. (*Leach, C.J., Gentle and Somayya, JJ.*) RANGASWAMI AIYANGAR *v.* SIVAPRAKASAM PILLAI. **1941 M.W.N. 1012 = 54 L W. 596 = A.I.R. 1941 Mad. 925 = (1941) 2 M.L.J. 883 (F.B.)**

LIMITATION ACT (1908), S. 20.

——**S.** 20—Unspecified payments—Appropriation towards interest—Creditor's right—Saving of limitation—Conditions. *See* 1940 Dig., Col. 792. KHAT KHATA NAND *v.* SURAJ PAL SINGH. **16 Luck. 113 = A.I.R. 1941 Oudh 56.**

——**S.** 20 (1)—Principal and surety—Payments by principal—Effect of, against surety—Implied authority of principal to make payments. *See* 1940 Dig., Col. 792. RANJIT KUMAR ROY *v.* KABIRAJ KISHORI MOHAN GOPI. **191 I C. 608 = 13 R C. 258.**

——**S.** 20 (2)—*Applicability—Mortgagee in possession after preliminary decree under invalid contract of sale—Receipt of rents and profits—If saves limitation for application for final decree.*

On 8th April, 1926, the appellant obtained a preliminary decree in a suit on his mortgage against one *M* and his sons. A period of six months was allowed for redemption by the decree. The respondent had obtained a money decree against the mortgagors and had also attached the equity of redemption in the mortgaged properties and he was as such made a party to the mortgage suit. The attachment was continuing at the time of the preliminary decree. In July, 1926, the mortgagors conveyed the mortgaged properties to the appellant in satisfaction of the mortgage debt and the appellant went into possession. The respondent in the meanwhile brought the properties to sale in execution of the decree, purchased them himself subject to the appellant's mortgage, and dispossessed the appellant in 1932. On 27th October, 1933, the appellant filed an application for a final decree for sale; the respondent pleaded limitation.

Held, that the fact that the sale in favour of the appellant proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received while in possession under the contract sale must, in the circumstances, be deemed to have been received by him as mortgagee. The appellant must therefore be deemed to have been in possession as mortgagee and therefore S. 20 (2) of the Limitation Act applied with the result that his application for final decree made on 27th October, 1937, was in time.

Held, further, that S. 20 operates to extend the time for the filing of an application for a final decree. (*Leach, C.J and Happell, J.*) DORAISAMI NAICKEN *v.* PERIA KARUPPAN CHETTIAR. **I.L.R. (1941) Mad. 739 = 1941 M.W.N. 289 = 53 L.W. 348 = A.I.R. 1941 Mad. 475 = (1941) 1 M.L J. 388.**

——**S.** 20 (2)—Applicability—Possession under void mortgage—Receipt of rents and profits—If saves limitation for suit. *See* 1940 Dig., Col. 793. MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS. **1940 P W.N. 986.**

——**S.** 20 (2)—Applicability—Preliminary decree in mortgage suit—Subsequent attachment of mortgaged property in execution of money decree of another creditor—Private sale by mortgagor to mortgagee—Receipt of rents and profits by mortgagee—If 'payment' and if saves limitation for final decree—Preliminary decree—If satisfied by receipt of rents and profits—C. P. Code, O. 34, R. 5. *See* 1940 Dig, Col. 794. PERIA KARUPPAN CHETTIAR *v* DORAISWAMI NAICKEN. **192 I C. 81 = 13 R.N. 527 = (1940) 1 M.L J. 134.**

——**S.** 20 (2)—*Applicability—Usufructuary mortgage—Final decree in suit on—Appropriation of income by mortgagee in possession—If saves limitation for execution of decree on mortgage.*

LIMITATION ACT (1908), S. 20.

The receipt of rent by a mortgagee in possession is not payment by the mortgagor in the ordinary sense of the word. S. 20 of the Limitation Act, however, says that it shall be deemed to be payment, because the mortgagor has himself consented to it in his contract with the mortgagee. It is thus an acknowledgment, continuously repeated so long as the contract is in force, by the mortgagor of the mortgagee's claim under the mortgage. But the final decree in a suit on such mortgage puts an end to the contract, and in regard to payment substitutes new terms to regulate the rights of the parties. It is no longer open to the mortgagee, who has become the decree-holder to appropriate the income of the mortgaged property towards his interest. That interest is limited to 6 per cent. and he must recover it by sale of the mortgaged property. If he remains in possession and appropriates to himself the income of the mortgaged properties, that is no longer an action to which the mortgagor, who is now the judgment-debtor, has consented, —and is therefore in no sense any acknowledgment by him. S. 20 of the Limitation Act cannot successfully be called in aid to save the bar of limitation, for purposes of execution of the decree. (*King, J.*) KESAVAN CHETTIAR *v.* RAMASWAMI CHETTIAR.

1941 M.W.N. 44 = 53 L.W. 93 = A.I.R. 1941 Mad. 406 = (1941) 1 M.L.J. 116.

——**S. 20 (2)**—*Applicability—Usufructuary mortgagee in possession after final decree—Receipt of profits—If saves limitation.*

Where a usufructuary mortgagee remains in possession after a final decree on the mortgage has been passed, receipts by him of the profits must be treated as receipts by way of interest and each receipt starts a fresh period of limitation for an application for execution of the decree. S. 20 (2) of the Limitation Act would clearly apply even when a decree has been passed in favour of the mortgagee. (1941) 1 M.L.J. 116, reversed. (*Leach, C.J. and Venkataramana Rao, J.*) RAMASWAMI CHETTIAR *v.* KESAVAN CHETTIAR.

54 L.W. 124 = 1941 M.W.N. 749 = A.I.R. 1941 Mad. 737 = (1941) 2 M.L.J. 248.

——**S. 21**—*Payment by co-contractor—If saves limitation against others.*

A payment by one co-contractor will not save limitation against the others under S. 21 of the Limitation Act. (*Mukherjea and Roxburgh, JJ.*) JNAN CHANDRA MUKHERJI *v.* MONORANJAN MITRA.

74 C.L.J. 327.

——**S. 21 (2)**—Co-mortgagors—Mahomedan brother and sister—Payment by brother—If on behalf of his sister. *See* 1940 Dig., Col. 794. EUSOOF KARWA *v.* MRS. NIEMEYER. **194 I.C. 177 = 13 R.R. 275 = A.I.R. 1941 Rang. 37.**

——**S. 22**—Applicability—Party impleaded on his application. *See* 1940 Dig., Col. 794. SITA RAM *v.* MUNSHI RAM. **192 I.C. 105 = 13 R.L. 358.**

——**S. 22**—*Applicability—Suit against estate of deceased with wrong legal representative as defendant—Subsequent addition of right legal representatives after period of limitation—Effect—Claim—If barred.*

Where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit has been represented throughout, and there is no change of party in the real sense of the word, so as to invoke the operation of S. 22 of the Limitation Act. Petitioner filed a suit on the last day of limitation to recover a sum of money due to him from the estate of *R*, deceased, making the widow of *R* defendant to the suit and claiming a decree against the assets of *R* in the hands of the defendant widow while the suit was pending, the petitioner learnt that *R* had left a will under which two persons were appointed executors of his estate and he therefore applied to have those two persons also impleaded as defendants to the suit.

LIMITATION ACT (1908), S. 28.

Held, that there was no addition of new defendants and S. 22 of the Limitation Act did not therefore apply. (*King, J.*) SUBBIAH AMBALAM SAKVAI *v.* UNNAMALAI ACHI. **1941 M.W.N. 383 = 53 L.W. 501 = A.I.R. 1941 Mad 609 = (1941) 1 M.L.J. 580.**

——**S. 22**—*Applicability—Suit in time—Joinder of persons subsequently—Cause of action against such persons accruing during pendency of suit—Effect of.*

Limitation bars a suit where the right to sue had already accrued before the suit. But where a suit has already been brought in time and the right to sue some other persons accrues during the pendency of the suit, the question is of impleading parties who are affected by the doctrine of *lis pendens*. (*Chatterji, J.*) KUNJA BEHARI MISRA *v.* BENUDHAR PANDA.

7 Cut.L.T. 49.

——**S. 22**—Mortgage suit—Plaintiff impleading legal representatives after limitation—Suit, if barred—Suit decreed against all defendants—Dismissal of suit on appeal by such legal representatives—If involves dismissal as against non-appealing defendants also. *See* 1940 Dig., Col. 795. SITA RAM *v.* MUNSHI RAM.

192 I.C. 105 = 13 R.L. 358.

——**S. 22**—*Suit against railway—Plaint describing Government as Secretary of State for India—Amendment after limitation altering description to Governor-General in Council—Effect of—C. P. Code, S. 79.*

Where in a suit instituted within time against the Government as responsible for the administration of the railways, the plaint described the Government as the Secretary of State for India, and the plaint was subsequently amended after the period of limitation had elapsed altering the description to the Governor-General in Council as required by S. 79, C. P. Code, as amended.

Held, that as the claim had always been against the same Government it could not be anything more than a matter of misdescription and that the suit was, therefore, not barred by limitation. (*Henderson, J.*) KANAILAL KRIPASANKAR DIKSHIT *v.* THE GOVERNOR-GENERAL IN COUNCIL. **46 C.W.N. 18.**

——**S. 23**—Applicability and scope—Obstruction to right of way—Public right and private way—Distinction—Perpetual right of suit—If exists—Trespass—When continuing wrong—Test. *See* 1940 Dig., Col. 796. BIBHUTI NARAYAN SINGH *v.* GURU MAHADEV ASRAM PRASAD SAHI. **22 Pat.L.T. 46.**

——**S. 23**—Applicability—Continuing wrong—Chabutra erected on public ahar—Suit after expiry of 12 years for removal—Maintainability—Erection—If continuing wrong. *See* 1940 Dig., Col. 796. AKHAURI HALIWANT SAHAY *v.* DEO NARAIN MALI

194 I.C. 243 = 13 R.P. 689 = 1940 P.W.N. 967 = 7 B.R. 739 = 22 Pat.L.T. 986 = A.I.R. 1941 Pat. 181.

——**S. 23**—Applicability—Right to perform festival in temple—Dispute between two sects—Order under S. 144, Cr.P. Code, at the instance of one sect restraining the other—Effect of—Recurring infringement—Suit for declaration of illegality of order and of right to conduct festival—Limitation. *See* LIMITATION ACT, ART. 120.

(1941) 1 M.L.J. 322.

——**S. 23**—*Applicability—Suit by Union Board for possession of land as part of public road.*

S. 23 of the Limitation Act is not applicable to a suit by a Union Board for possession of land claiming it as part of a public road vested in it. (*Mukherjea and*

LIMITATION ACT (1908), S. 23.

Biswas, JJ.) DHAJADHARI GHOSH *v.* UNION BOARD OE KENDRAGORIA. **45 C.W.N. 802=73 C.L.J. 608.**

——**S. 23 and Art. 120**—"Continuing wrong"—Test—Encroachment by joint owner by building Chabutra on common land—Suit for injunction—Limitation. *See* 1940 Dig., Col. 797. KHAIR MAHOMED KHAN *v.* MT. JANNET. **I.L.R. (1941) Lah. 22=43 P.L.R. 400 (F.B.).**

——**S. 25**—*Applicability—Promissory note bearing both English date and Malayalam date—Inconsistency between the two—Computation of time for limitation—Evidence as to date of note—Admissibility—Evidence Act, S. 96.*

A promissory note bore both the English date 16th November, 1934 and the Malayalam date Thulam 30, 1110, corresponding to 15th November, 1934. In a suit on the promissory note filed on 16th November, 1937,

Held, that S. 25 of the Limitation Act creates no presumption as to the date of a document but merely provides that periods of limitation shall be worked out according to the Gregorian Calendar. The question as to the date of the promissory note is one of fact to be decided by evidence and probabilities according to S. 96 of the Evidence Act. (*Wadsworth, J.*) ACHUTHAN NAYAR *v.* ACHUTHAN NAYAR. **53 L.W. 449 (1)=1941 M.W.N. 335 (1)=A.I.R. 1941 Mad. 587=(1941) 1 M.L.J. 502.**

——**S. 26**—*Easement of prescription—Enjoyment of right within two years of suit—When and when not necessary.*

It is only when a person claims an easement under the provisions of S. 26 of the Limitation Act that he must show that the period of 20 years' enjoyment of the right extended up to a time within two years of the suit. An easement by prescription or long user can, however, be acquired otherwise than by the aid of that section, for instance, a person can show that he has enjoyed a right of easement from time immemorial in such a way as to lead to the presumption of a grant of such right. In such a case, it would not be necessary for him to show that he enjoyed the right till within two years of the suit (*Sen, J.*) ABDUL HAMID *v.* AHMED ALI. **45 C.W.N. 486.**

——**S. 28**—*Scope and effect of—Adverse possession—Nature of rights acquired by.*

Twelve years' adverse possession of land by a wrongdoer not only bars the remedy of the real owner and extinguishes his title, but confers a title on the person in possession. That goes to the length that the title of the real owner who had been dispossessed cannot even revive if, at a later date, he re-acquires possession. S. 28, Limitation Act, not only deprives the real owner of his right in the property but transfers it to the person who has successfully set up his adverse possession under the statute. Where a person remains in uninterrupted and unexplained possession and there is no indication of the capacity in which he was in possession then *prima facie* his possession must be presumed to be possession with an intention to claim the full rights of a proprietor. (*Braund, J.*) MAHOMED YUSUF *v.* SARJU SINGH. **1941 A.W.R. (Rev.) 1072=1941 A.L.W. 1028=1941 O.A. (Supp.) 870=1941 A.L.J. 676.**

——**S. 29**—*Scope and effect of amendment of* 1922—*Meaning of expression 'the remaining provisions of this Act shall not apply.'*

The amendment to S. 29 of the Limitation Act in 1922 has extended and not restricted the scope of the section. Under the new S. 29 some of the provisions of the Limitation Act are made applicable without being expressly included unless they are expressly excluded by the special or local law. The rest of the provisions remain as before applicable only when they are expressly included. The expression 'the remaining provisions of the Act shall not apply' in the amended S. 29 simply means that they are not to apply *pro prio vigore* that is merely by virtue of the Limitation Act itself and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. (*Bajpai and Dar, JJ.*) CHHEDA LAL *v.* OFFICER COMMANDING. **I.L.R. (1941) All. 356=194 I.C. 404=13 R.A. 500=1941 O.W.N. 453=1941 O.A. (Supp.) 195=1941 A.W.R. (H.C.) 122=1941 A.L.J. 267=1941 A.L.W. 322=A.I.R. 1941 All. 207.**

LIMITATION ACT (1908), Art. 12.

——**S. 29**—*"Special law"—Rules framed under Letters Patent.*

The statutory rules framed by the High Court under Cl 27 of the Letters Patent under the authority delegated to it by His Majesty who, in turn, was acting under the powers conferred on him by Act of Parliament are a "special law" within the meaning of S. 29 of the Limitation Act. (*Tek Chand, Dalip Singh, Bhide, Blacker and Sale, JJ.*) PUNJAB CO-OPERATIVE BANK, LTD., LAHORE *v.* OFFICIAL LIQUIDATORS, PUNJAB COTTON PRESS CO., LTD **I.L.R. (1941) Lah. 191=195 I.C. 452=14 R.L. 70=1941 Comp. C. 254=43 P.L.R. 297=A.I.R. 1941 Lah. 257 (F.B.)**

——**Art. 7**—*Applicability—Village barber.*

Art. 7 of the Limitation Act is confined to suits for wages of household servant, artisan or labourer. A village barber is not a household servant nor is he a labourer nor an artisan and hence a suit by him for wages is not governed by Art. 7 of Limitation Act. (*Bose, J.*) TULSI RAM *v.* PAIKAN. **194 I.C. 580=14 R.N. 3=1941 N.L.J. 102=A.I.R. 1941 Nag. 132.**

——**Art. 11**—Applicability—Attachment of properties in execution—Claim petition by mortgagee praying for an order for sale subject to his mortgage—Order directing notification of mortgage and of decree holder's allegation as to collusive nature—If against claimant—Suit within one year—Necessity. *See* 1940 Dig., Col. 797. CO OPERATIVE CREDIT SOCIETY, KAIKARAN *v.* NARASIMHA RAO. **A.I.R. 1941 Mad. 77=(1940) 2 M.L.J. 402.**

——**Art. 11**—Applicability—Person not party to order. *See* 1940 Dig., Col. 798. SARDAR BEGAM *v.* HARSUKH RAI. **192 I.C. 663=13 R.L. 397.**

——**Art. 11-A**—Applicability. *See* 1940 Dig., Col. 798. MAHOMED JAMIL KHAN *v.* KEWAL RAM. **191 I.C. 160=13 R.L. 264.**

——**Art. 12**—*Applicability—Declaratory suit.*

Art. 12 of the Limitation Act has no application to a suit for a declaration that the plaintiff's interest in a holding has not been affected by a certificate sale. It would apply if the suit is brought by a certificate debtor to set aside the sale. (*Sen, J.*) FAZALAR RAHIM *v.* KHORSED ALAM. **I.L.R. (1941) 1 Cal. 339=45 C.W.N. 277=A.I.R. 1941 Cal. 333**

——**Art. 12**—*Applicability—Void sale—Suit to declare not binding on plaintiff's interests.*

Art. 12 of the Limitation Act applies only if the sale is valid; but if the sale is void or a nullity, a suit for a declaration that the plaintiff's interest is not affected by it is not governed by Art. 12. (*Agarwala, J.*) NEHAL KHAN *v.* FELU DOME. **194 I.C. 435=13 R.P. 721=7 B.R. 770=A.I.R. 1941 Pat 490.**

——**Art. 12 (a)**—*Applicability—Sale on basis of mortgage decree.*

The language of Art. 12 (*a*) of the Limitation Act is wide and there is no reason to restrict the application of the expression "in execution of a decree" to cases of

LIMITATION ACT (1908), Art. 14.

simple money decrees. The article applies to the case of sales on the basis of mortgage decrees also. (*Bennett and Madeley, JJ.*) MOHAMMAD BAKHSH *v.* ALLAH DIN. **196 I.C. 457 = 14 R.O. 172 = 1941 A.W.R. (C.C.) 291 = 1941 A.L.W. 898 = 1941 O.L.R. 689 = 1941 O A. 766 = 1941 O W.N 1077.**

——**Art. 14**—Applicability — Order by Customs Officer imposing penalty under S. 167 (17), Sea Customs Act—Suit to set aside and to recover back penalty paid under protest—Limitation. *See* 1940 Dig., Col. 798. BRUUSGAARD KIOSTERUDS DAMPSKIBS AKTIESELSKAB *v.* SECRETARY OF STATE **191 I.C. 867 = 13 R B. 211 = 4 F.L.J. (H.C) 60.**

—— **Art. 14**—Applicability—Test. *See* 1940 Dig., Col. 798. KUNJBEHARI RAI *v.* BUNI SINHA. **A.I.R. 1941 Pat 50.**

——**Art 29 and S. 23**—Applicability of Art. 29—Wrongful attachment in execution of stranger's property—Suit for damages—Seizure, if a continuing wrong. *See* 1940 Dig., Col. 799. ENG GIM MOH *v.* CHINESE MERITED BANKING CO., LTD. **1941 Rang L R. 1 = 192 I.C 625 = 13 R.R. 186.**

——**Arts. 30 and 115**—*Applicability—Carriage by railway—Suit against Government—Carriers Act, S. 2.*

The law relating to common carriers in India is contained in the Carriers Act and the definition of "common carrier" in S. 2 of that Act excludes the Government from that category. Art. 30 of the Limitation Act which applies to "carriers" does not, therefore, apply to a suit against the Government relating to carriage by railway. Art. 115 is the appropriate article. (*Lort Williams, J.*) GOLAB RAI PALIRAM *v.* SECRETARY OF STATE. **I L.R. (1941) 2 Cal. 160.**

——**Art. 30**—*Starting point—Onus.*

In a suit against carrier for compensation for injuring goods, time does not run from the date of the plaintiff's knowledge. Time begins to run from the date when the injury was actually caused and the burden of proving when the injury was caused rests upon the carrier. (*Henderson, J.*) EAST INDIAN RY. *v.* GOPILAL SHARMA. **A.I R. 1941 Cal. 304.**

——**Arts. 36 and 39**—*Applicability—Suit for damages for removal of clay.*

Where the claim is for damages in respect of removal of clay, it is not a mere claim for compensation founded on trespass so as to attract Art. 39 of the Limitation Act but it is a claim in respect of a tortious act which comes within the scope of Art. 36 of the Act. (*Yorke and Ghulam Hasan, JJ.*) HIRDEY NARAIN *v.* BABU RAM. **191 I.C. 885 = 13 R.O. 316 = 1941 O.L.R. 69 = 1941 A.W.R. (C.C.) 22 = 1940 O.A. 1251 = 1940 O.W.N. 1318 = A.I.R 1941 Oudh 172.**

——**Art. 36**—Inapplicability—Suit by trustee against stranger to recover trust funds applied in breach of trust. *See* LIMITATION ACT, ARTS. 120 AND 36 **192 I.C. 1 = A.I.R. 1941 P.C. 1 (P.C.).**

——**Art. 39**—Applicability—Suit for damages for removal of clay. *See* LIMITATION ACT, ARTS. 36 AND 39—APPLICABILITY. **1940 O.A. 1251 = A I.R. 1941 Oudh 172.**

——**Art. 44**—Applicability—Manager described as *de facto* guardian. *See* 1940 Dig., Col. 799. LALIT KUMAR DAS *v.* NOGENDRA LAL DAS. **193 I C. 168 = 13 R.C. 375.**

——**Arts. 44 and 142**—*Applicability—Suit for possession of property transferred by pardanashin guardian.*

To a suit by a ward on attaining majority, for possession of property transferred by his guardian, a pardanashin lady, under a transfer void *ab initio*, Art. 44 of the Limitation Act has no application. To such a suit it is Art. 142 that applies. (*Yorke and Ghulam Hasan, JJ.*) HIRDEY NARAIN *v.* BABU RAM. **191 I C. 885 = 13 R O. 316 = 1941 O L.R 69 = 1941 A W.R. (C C.) 22 = 1940 O.A. 1251 = 1940 O.W.N. 1318 = A.I.R. 1941 Oudh 172.**

LIMITATION ACT (1908), Art. 47.

——**Art. 44 and S. 28**—Failure of ward to sue within time—If extinguishes his right to property. *See* 1940 Dig., Col. 799. LALIT KUMAR DAS *v.* NOGENDRA LAL DAS. **193 I C 168 = 13 R.C 375.**

—— **Art. 44**—Mahomedan minor — Alienation by Court guardian without leave of Court—Suit to set aside—Limitation—Void or voidable. *See* GUARDIAN AND WARDS ACT, S. 30. **53 L.W. 650 = (1941) 1 M.L J. 800 (F.B.).**

—— **Art. 44**—Scope of—Minor, as defendant, if can challenge a transfer. *See* 1940 Dig., Col. 799. JAGARNATH PRASAD *v.* CHUNILAL. **191 I.C. 647 = 13 R.A. 260.**

——**Art. 47**—*Applicability—Order under S. 145, Cr. P. Code, declaring defendant to be in possession—Suit by plaintiff for possession of his share of property.*

Where in the proceedings under S. 145, Cr. P. Code, between the plaintiff and the defendant, the Magistrate declares the defendant to be in possession of the property in dispute, a suit by the plaintiff for possession of his share of the property falls within the purview of Art. 47. (*Almond, J.C.*) MIAN SHARIF GUL *v.* SAID GUL. **196 I.C. 444 = 14 R Pesh 30 = 42 Cr L.J. 872 = A.I.R. 1941 Pesh. 65.**

——**Art. 47**—*Applicability—Order under S. 145, Cr. P. Code—Person not party to proceedings—If bound by order.*

A person who is not a party to the proceedings under S. 145, Cr. P. Code, is not bound by an order passed under that section and consequently Art. 47 cannot apply to him. (*Almond, J.C.*) MIAN SHARIF GUL *v.* SAID GUL. **196 I.C. 444 = 14 R. Pesh. 30 = 42 Cr.L.J. 872 = A.I.R. 1941 Pesh. 65.**

——**Art. 47**—*"Final order"—Proceedings under S. 145, Cr P. Code—Revision by High Court—Suit to contest—Limitation—Starting point—Date of order by Magistrate or date of order in revision.*

There is no reason why an order passed by the High Court in the exercise of its power of revision under S. 439, Cr. P. Code, should not be regarded as a final order within the meaning Art. 47 of the Limitation Act whether the High Court ultimately interferes in revision or not, its order is none the less a final order. Where in proceedings under S. 145, Cr. P. Code, a Magistrate passes an order against which an application in revision is filed under S. 435, Cr. P. Code, before the Sessions Judge, who makes a reference to the High Court under S. 438, Cr. P. Code, with a recommendation that the magistrate's order should be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order passed by the High Court under S. 439, Cr. P. Code, is the final order in the case for purposes of Art. 47, Limitation Act, and limitation for a suit in the Civil Court runs from that date and not from the date of the order of the Magistrate although the High Court discharges the reference. The final order in Col. 3 of Art. 47, Limitation Act, must be understood to refer to the order contemplated by Col. 1 of the same article.

Obiter.—An order of the High Court dismissing an appeal for want of jurisdiction cannot be a final order.

Quaere.—Whether, when the High Court summarily dismisses an application for revision, the order is a final order for purposes of Art. 47 of the Limitation Act. (*Chatterji and Meredith, JJ.*) RAMPAL SINGH *v.*

LIMITATION ACT (1908), Art. 52.

MANSUKH RAI KHEMKA. 20 Pat. 735= 193 I C. 501=13 R.P. 593=7 B R. 609= 22 Pat.L.T. 202=1941 P W.N. 174= A.I.R. 1941 Pat. 372

——Art. 52—*Inapplicability—Suit based on contract of commission agency.*

Firm *A* agreed to act as commission agent for the firm *B*. There was a single contract, namely, a contract of agency. Firm *A* submitted its accounts annually, and the amount due at the end of each year was added to the account for the following year. Firm *A* sued to recover certain sum found due on adjustment of accounts, or alternatively for an account and decree for the amount found due.

Held, that this was not a contract for goods sold and delivered. Hence Art. 52 did not apply. (*McNair, J.*) MAMRAJ MANIRAM *v.* MUHAMMAD HASHIM.

194 I C. 727=14 R.C. 10=A.I.R. 1941 Cal. 245.

——Arts. 57 and 96—*Applicability—Banker and customer—Customer drawing cheques on bank without funds to his credit—Banking honouring same through carelessness of clerk or officer—No evidence of misapprehension of their being any security—Limitation for suit.*

Where a customer of a bank draws cheques on it knowing that the funds to his credit are not sufficient to them but expecting the bank nevertheless to honour them, he impliedly applies to the bank for an overdraft or a loan. A suit for recovery of the amounts due by the customer in such a case is governed by Art. 57 of the Limitation Act and must be instituted within three years from the date on which the earliest of the various sums paid to the customer or to his orders in respect of the cheques so drawn. The mere fact that some clerk or officer of the bank has been careless in honouring cheques drawn by the customer when presented for payment would not make the moneys paid under a mistake so as to mark Art. 96 of the Limitation Act applicable to the suit for recovery of such sums, when there is no evidence to show that the manager was or could have been under any misapprehension that the amounts were covered by security, especially when the customer had been a customer for a very considerable time and was a man in a large way of business. Art. 96 would only apply to a case where money is paid to another under the influence of a mistake, that is, upon a supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the prayer that the fact was untrue. But where the money was not in fact paid under any such mistake, Art. 96 cannot apply. (*Meredith and Shearer, JJ.*) UMA SHANKAR PRASAD *v.* BANK OF BEHAR, LTD. 1941 P.W.N. 638

——Art. 60—Bailment of money—If deposit or loan—Test. *See* 1940 Dig., Col. 800. SULEMAN HAJI AHMED UMER *v.* HAJI ABDULLA.

I.L.R. (1940) Kar. (P.C.) 277= 72 C.L.J. 435 (P.C.).

——Arts. 61 and 120—Applicability—Sale certificate—Stamps purchased and paid for by one of two joint purchasers—Suit for contribution—Limitation. *See* 1940 Dig., Col. 801. MEYAPPA CHETTIAR *v.* RAMASWAMI CHETTIAR. 193 I.C. 823=13 R.M 719= A.I.R. 1941 Mad. 96=(1940) 2 M.L.J. 494.

——Arts. 62 and 120—*Applicability—Claim against fraudulent transferee from* benamidar—*If falls under Art.* 62—*Trust—If exists between* benamidar *and real owner.*

On 9—1—1925, two brothers *A* and *B* sold certain immovable properties to *K* who in part discharge of the sale price executed a promissory note in favour of *C*, the wife of *A*. *C* subsequently quarrelled with *A* and left him, and on 5—11—1931, fraudulently endorsed the promissory note to *D* without consideration and with the object of defeating *A* and *B*. In 1932, *D*, who was an endorsee with full knowledge of all the facts brought a suit and got a decree on 19—7—1933. This decree was set aside on appeal, and the suit was remanded for evidence on 9—8—1934. On 26—11—1934 a fresh decree was passed in favour of *D*. On 26—11—1937, *A* and *B* filed a suit against *C* and *D*, to recover the amount of the decree which *D* had recovered from *K*.

Held, that the suit was not a suit for money had and received falling under Art. 62 of the Limitation Act, but that the real claim was against *D* in whose hands were the moneys paid in discharge of the promissory note in favour of *C* who was a *benamidar* for *A* and *B*. The relationship between a *benamidar* and the real owner was in the nature of a trust, and the suit was governed by Art. 120 and was in time as there was an equitable claim, and *A* and *B* were entitled to trace the proceeds of the sale in the hands of *D*, *C* being a trustee for *A* and *B*. (*Leach, C.J. and Somayya, J.*) DEVARAJULU NAIDU *v.* JAYALAKSHMI AMMAL

54 L.W. 115=1941 M W N. 727= A.I.R. 1941 Mad. 767 (2)=(1941) 2 M.L.J. 222.

——Arts. 62 and 96—*Applicability—Execution sale—Subsequent suit by defeated claimant under O.* 21, *R.* 63, *C. P. Code—Decree—Suit by purchaser for purchase money from decree-holder—Limitation—Starting point—Mistake.*

Certain properties were put up for sale in execution of a decree obtained by the appellant and purchased by the plaintiff's predecessor in-title and the purchase money was paid over to the decree-holder on 12-3—1925. Subsequently a mortgagee of the property whose claim had been rejected filed a suit to set aside the claim order making the purchaser a party to the suit and the suit was decreed on 4—12—1926, on the ground that the judgment-debtor had no interest on the property. On 12—6—1928 the plaintiff filed a suit to recover from the decree holder the money which he had paid for the property at the auction.

Held, (1) that the fundamental basis of the claim made by the plaintiff was the existence of a mistake as to the true state of affairs regarding the property and its title, and therefore the suit fell under Art 96 and not Art. 62 of the Limitation Act; (2) that time began to run only when the mistake became known to the plaintiff, *i.e.*, 4—12—1926, the date of the decree in the claim suit, and the suit being within three years of that date was in time. (*King, J.*) RUDRAYYA *v.* SUBBARAYAPPA. 1941 M.W.N. 484= A.I.R. 1941 Mad. 742.

——Arts. 62 and 116—*Applicability—Registered perpetual lease by one of the joint tenants—Covenant to refund nazarana in case of dispossession—Lessee knowing lessor's defect in title—Subsequent dispossession—Suit to recover nazarana paid—Limitation—Starting point.*

Where a registered perpetual lease by one of the joint tenants contains a covenant to refund the nazarana in case of dispossession and the lessee knowing of the defective title of the lessor does not take any action but obtains possession and is dispossessed after ten years and sues for the refund of the nazarana, it is Art. 116 and not Art. 62 of the Limitation Act that applies to the suit and the starting point is the date of dispossession. (*Bennett, J.*) AHSAN ALI KHAN *v.* SURAJ NARAIN. 196 I.C. 888=1941 O.L.R. 795=1941 O.A. 883= 1941 A.W.R. (Rev.) 1002=1941 O.W.N. 1182

LIMITATION ACT (1908), Art. 62.

——**Arts. 62, 89 and 120**—*Applicability—Suit for money collected by deceased* karpardar *or agent*—Karpardar *not liable to make over collections directly on receipt but permitted to keep amounts for litigation expenses of principal—Running account—Limitation applicable.*

Where in a suit for recovery of certain sums from the sons of a deceased *karpardar* or agent, it is found that the *karpardar* was under no liability to pay over the sums received by him to the principal directly on receipt, and that there was a running account, the arrangement being that he should keep in his hands sufficient funds out of the collections for costs of litigation on behalf of his principal, the proper article applicable to the suit is not Art. 62 of the Limitation Act, and limitation will not run from the date of each receipt by the deceased agent: Art. 89 or 120 will apply to the case. (*Agarwala and Meredith, JJ.*) SADHU CHARAN PARIJA *v* KRISHNAMANI DEI. **7 Cut L.T. 87.**

——**Art. 62**—*Applicability—Theft of money—Suit for recovery from thief—Limitation applicable.*

Where a person has lost money by theft he can sue the thief for the recovery of the money. quite apart from the crime, but if he does, the suit must be framed as one for money had and received, and the suit then falls under Art. 62 of the Limitation Act. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) GAFFAR KHAN *v.* SYED NOOR. **I.L.R. (1941) Mad 414=53 L.W. 54= 1941 M W.N. 24=A.I.R. 1941 Mad. 391= (1941) 1 M.L.J. 27.**

——**Arts. 62, 109 and 120**—*Relative applicability—Suit for profits against person entrusted with property for safe custody.*

Where a suit is for profits of property entrusted to the defendant by the plaintiffs for safe custody and management neither Art. 62 nor 109 apply to the case. It is Art. 120 that applies. Art. 62 cannot apply to a case in which profits and not money is sought to be recovered. It only applies when the defendant has received money as distinct from profits into his hands. Nor could Art. 109 apply because the receipt of profits was not wrongful. The defendant was in rightful possession and received the profits rightfully but it is his retention that was wrongful. (*Stone, C.J. and Bose, J.*) SHRI MAHADEOJI *v.* BALDEO PRASAD. **1941 N.L.J. 184= A.I.R. 1941 Nag. 181.**

——**Arts. 62 and 120**—*Relative applicability—Suit to enforce equitable claim to recover money realised contrary to agreement.*

Where before a decree for specific performance could be passed in respect of an agreement to assign a particular decree, the defendant withdraws the money deposited in respect of the said decree and the plaintiff files a suit to recover it, it is a suit to enforce an equitable claim to follow the money withdrawn by the defendant contrary to agreement and as such it does not fall under Art. 62 of the Limitation Act but comes under Art. 120 of the Act, the starting point being the date of the conveyance to him of the decree. (*Niyogi, J.*) FAKIR CHAND *v.* SHAMRAO. **1941 N.L.J. 665.**

——**Art. 64**—"*Account stated*"—*Meaning of.*

An account stated is an account which contains entries on both sides and in which the parties have agreed that the items on one side should be set against the items on the other side and the balance should be paid. The items on the smaller side are set off and deemed to be paid by the items of the larger side from which arises a promise for good consideration to pay the balance A stated account is a promise for good consideration to pay the balance even though some of the debts are barred by limitation. Where a hatchita is executed for the balance due after setting off the payments against the amounts borrowed from time to time as shown in the account books and the parties have agreed to this setting off, and have accepted the balance as correct, a suit for money due on the hatchita is a suit for money found to be due on accounts stated within the meaning of Art. 64. (*Nasim Ali and Pal, JJ.*) NABENDRANATH BASAK *v.* SHASABINDOO NATH BASAK. **A.I.R. 1941 Cal. 595.**

LIMITATION ACT (1908), Art. 68.

——**Art. 64**—Applicability—Suit on alleged settlement of account—Heading of account and entries in handwriting of defendant—Whether a statement of account "signed" by the defendant sufficient for purposes of Art. 64. *See* 1940 Dig., Col. 802. KANTHASAMI REDDIAR *v.* PETHUSAMI REDDIAR. **192 I.C. 350=13 R.M. 541=(1940) 2 M.L.J. 334.**

——**Arts. 66, 68, 75 and 80**—*Bond providing for repayment within a fixed time—Option to sue on failure to pay interest—Nature of bond—Starting point of limitation for suit on—Relative scope and applicability of Arts.* 68, 74 *and* 80.

Where an ordinary unregistered money bond provides for repayment of the principal with interest after a specified period and further provides that interest is payable annually and in default, the creditor was entitled to sue for the entire amount due without waiting for the expiry of the period specified in the bond, the bond is a single bond, notwithstanding the default clause. The period of limitation for instituting a suit on such a bond, runs from the date specified for payment as prescribed by Art. 66 of Limitation Act. Time does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80 of the Limitation Act. It is doubtful if Art. 68 would apply to such a case. Though the bond contains a condition, it is not one which relates to the whole sum due on the bond. Art. 68 applies rather to bonds of the nature of security bonds. The bond in question could not be called instalment bonds and it is only in the case of an instalment bond to which Art. 75 applies that time begins to run from the date when the default is made. (*Thomas, C.J, Yorke and Ghulam Hasan, JJ.*) RAGHUNANDAN TEWARI *v.* SHEORAJI. **16 Luck 464=193 I.C. 481=13 R.O. 456= 1941 O.L.R. 280=1941 O.W.N. 361= 1941 A.W.R. (C.C.) 108=1941 O A. 265= A.I.R 1941 Oudh 210 (F.B.).**

——**Art. 68**—Applicability. *See* LIMITATION ACT, ARTS. 66, 68 75 AND 80. **1941 O.W.N. 361 (F.B.).**

——**Art. 68 and Succession Act (1925), S. 292**—*Suit by assignee of administration bond under S.* 292 *of Succession Act—Starting point of limitation—S.* 292, *if confers a new cause of action on assignee.*

A suit by an assignee of an administration bond under the provisions of S. 292, Succession Act, for its enforcement, is a suit upon a bond subject to a condition to which Art. 68, Limitation Act, applies. Where the administrator dies, the condition must be deemed to have been broken at the latest on that date and limitation would begin to run from that date. S 292 of the Succession Act has not the effect of conferring a new cause of action on the assignee and hence cannot provide a fresh starting point for the purposes of limitation. (*Viscount Maugham*) GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD *v.* JANMAHOMED ABDUL RAHIM. **67 I.A. 416= I.L.R. (1941) Bom. 202=72 C.L.J. 497= 1941 O A. 303=43 P.L.R. 138= 53 L.W. 212=1941 A.W.R. (P.C.) 11= 43 Bom.L.R. 346=45 C.W.N. 429=**

LIMITATION ACT (1908), Art. 74.

1941 M.W.N. 321 = 1941 A.L.W. 37 = 193 I.C. 225 = 1941 P.W.N. 271 = 1941 O.L.R. 336 = 7 B.R. 660 = 13 R.P.C. 149 = I.L.R. (1941) Kar. (P.C.) 11 = 1941 O.W.N. 4 = A.I.R. 1941 P.C. 6 = (1941) 1 M.L.J. 88 (P.C.).

——**Arts. 74 and 75**—*Relative scope of—Tendency of Courts with reference to option of waiver—Subsequent defaults how affected.*

When a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default and the plaintiff can recover in respect of instalments falling due within three years before suit, *vide* Art. 74, Limitation Act. But if there is a default provision, Art 74 cannot be relied upon, and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time barred, that is he cannot recover even those instalments which fell due within three years of suit. But the chief Court of Oudh is in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier defaults The principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults. (*Yorke, J.*) GAYA PRASAD *v.* AHMAD HUSAIN. **194 I.C. 744 = 14 R.O. 34 = 1941 A.W.R. (C.C.) 256 = 1941 O.W.N. 861 = 1941 O.L.R. 523 = 1941 A.L.W. 761 = 1941 O.A. 589 = A.I.R. 1941 Oudh 485.**

——**Art. 75**—Applicability. *See* LIMITATION ACT, ARTS. 66, 68, 75, 80. **1941 O.W.N. 361 (F.B.).**

——**Art. 75**—Instalment bond—Waiver of option to recover whole amount in case of default—Tendency of Court. *See* 1940 Dig., Col. 803. SHEO NARAIN *v.* BAGESHUR. **16 Luck. 280 = 191 I.C. 220 = 13 R.O. 219 = A.I.R. 1941 Oudh 74**

——**Art. 75**—Scope of—Tendency of Courts with reference to option of waiver—Subsequent defaults how affected. *See* LIMITATION ACT, ARTS. 74 AND 75. **1941 O.A. 589.**

——**Arts. 75 and 116**—*Suit to enforce personal remedy—Mortgage deed providing for payment by instalments and a default clause—Starting point.*

Where a mortgage deed provides for payment by instalments with a default clause that on default in payment of an instalment the whole of the balance becomes payable, the mortgagee does not forfeit his right to recover the balance after the expiry of the term of the mortgage, though he might not have taken advantage of the default clause. A suit to enforce a personal remedy under such a bond is governed by Art. 75 read with Art. 116, Limitation Act and would be within time if filed within 6 years from the date fixed for the payment of the last instalment. (*Niyogi, J.*) AMRUT *v.* PAHAD SINGH. **1941 N.L.J. 649.**

——**Art. 80**—Applicability. *See* LIMITATION ACT, ARTS. 66, 68, 75 AND 80. **1941 O.W.N. 361 (F.B.).**

——**Arts. 83 and 116**—Sale consideration left with vendee for payment to vendor's creditors—Default by vendee—Suit by vendor for damages—Limitation—Starting point *See* 1940 Dig., Col 803. KARTAR SINGH *v.* SANT SINGH. **I.L.R. (1941) Lah. 353 = 192 I.C 841 = 13 R.L 418 = 43 P.L.R 548.**

——**Art. 85**—*Applicability—Mutual open and current account—Meaning of—Banker and customer—Customer drawing money on various occasions by cheques but making only two payments towards interest due on overdraft — Nature of account — Limitation for suit.*

A mutual, open and current account within the meaning of Art. 85 of the Limitation Act is a course of dealing where each party furnishes credit to the other on the reliance that on settlement the accounts will be allowed, so that one will reduce the balance due on the other. To be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations where a depositor borrows money from a bank by means of overdrafts and occasionally deposits money, which is applied to the overdrafts, the transaction is not a mutual account under Art. 85; where various sums were paid by the Bank to the depositor or customer or to persons who presented cheques drawn on the bank by the customer, and during the same period the customer makes to the bank only two payments which are credited towards reduction of the interest due on the overdraft, the account is nothing more than a loan transaction and it doos not fall under Art. 85 of the Limitation Act. (*Meredith and Shearer, JJ.*) UMA SHANKAR PRASAD *v.* BANK OF BEHAR, LTD. **1941 P.W.N. 638.**

LIMITATION ACT (1908), Art. 97.

——**Art. 85**—Mutual, open and current account—Cases relating thereto—If a safe guide. *See* 1939 Dig., Col. 765. TAPIBAI *v.* SHANKARLAL. **I.L.R. (1941) Nag. 222.**

——**Art. 85**—Mutual, open and current account—Meaning of—Absence of shifting balance, if affects the nature of the account. *See* 1940 Dig., Col. 765. TAPIBAI *v.* SHANKARLAL. **I.L.R. (1941) Nag. 222.**

——**Art. 85**—Mutual, open and current account—When ceases to be as such—Effect of acknowledgment. *See* 1940 Dig., Col. 765. TAPIBAI *v.* SHANKARLAL. **I.L.R. (1941) Nag. 222.**

——**Art. 85**—'Reciprocal demands'—Meaning of expression. *See* 1940 Dig., Col. 765. TAPIBAI *v.* SHANKARLAL. **I.L.R. (1941) Nag. 222.**

——**Art. 89**—Applicability—Agent or *karpardar*—Running account maintained in respect of collections—Arrangement to keep out of collections sufficient funds for meeting litigation expenses of principal—Suit against sons of *karpardar* after his death to recover sums collected by him—Limitation. *See* LIMITATION ACT, ARTS. 62, 89 AND 120. **7 Cut.L.T. 87.**

——**Art. 96**—Applicability—Conditions—Money paid by mistake—Nature of claim—Banker and customer—Cheques drawn on bank by customer without funds—Suit for money paid on such cheques—Limitation. *See* LIMITATION ACT, ARTS. 57 AND 96. **1941 P.W.N. 638.**

——**Art. 96**—Applicability—Execution sale—Subsequent decree in claim suit holding that judgment-debtor had no interest in property sold—Suit by purchaser for purchase money from decree-holder—Limitation. *See* LIMITATION ACT, ARTS. 62 AND 96. **1941 M.W.N. 484.**

——**Arts. 97 and 62**—*Applicability—Execution sale confirmed—Objections allowed and confirmed in revision—Suit by auction purchaser for recovery of purchase price—Cause of action—When arises.*

Where an execution sale is confirmed, and the objections to the sale are subsequently allowed and also confirmed in revision a suit by the auction purchaser for recovery of the purchase price on failure of consideration for sale falls under Art. 97 and not under Art. 62, and the cause of action arises either from the date of the order allowing the objections or from the date of the order in revision confirming the objections. (*Almond,*

LIMITATION ACT (1908), Art. 97.

J.C. and Mir Ahmad, J.) MIRZA JAN *v.* GHULAM RAZA. **194 I.C. 565=14 R. Pesh. 1=A.I.R. 1941 Pesh. 41.**

——**Arts. 97 and 62**—*Applicability—Mahomedan transferring land to wife in lieu of her dower debt—Deed not registered before his death—Subsequently mutation proceedings by widow rejected on objections by her step-sons—Suit by widow against step-sons for possession of land or for dower money—Cause of action—When accrues.*

By a document dated 16th June 1923, a Mahomedan transferred some land to his wife in lieu of amount of dower money due to her. He promised in the document to get a mutation attested in her favour. He however failed to get the document registered and to have a mutation duly attested and died in 1934. On 15th May, 1936, a mutation was entered to give effect to the document of 16th June, 1923. On 6th December, 1936, the document was shown to the Revenue Officer. But the step-sons of the widow objected to the attestation of the mutation which was therefore rejected. On 18th October, 1938, the widow brought a suit against her step-sons for possession of the land and asked in the alternative for recovery of Rs. 2,000, her dower money.

Held, that the transfer of the land to the woman was perfectly valid to begin with and hence Art. 97 applied to the suit inasmuch as the husband might have registered the document and got a mutation attested. The cause of action accrued to the plaintiff when the mutation was rejected and the suit was, therefore, within time. (*Mir Ahmad and Soofi, JJ.*) BEGAM JAN *v.* MALIK AMAN. **195 I.C. 844=14 R. Pesh. 20=A.I.R. 1941 Pesh. 57.**

——**Arts. 103 and 104**—*Suit for dower—Divorce by written deed—Limitation—Starting point.*

Under Mahomedan Law a divorce by means of a written deed is valid if communicated to the wife. Hence, time under Arts. 103 and 104, Limitation Act, for a suit for dower runs from the date of communication of divorce to the wife. The onus about the date of communication however in such a suit is on the plaintiff. (*Beckett, J.*) BURE KHAN *v.* MT. KHADIM BIBI. **A.I.R. 1941 Lah. 166.**

——**Art. 106**—*Inapplicability—Suit by legal representative of deceased partner for accounts of business continued after partner's death.*

Art. 106 of the Limitation Act does not apply to a suit by a legal representative of a deceased partner for accounts of the partnership business which was carried on by the surviving partners after the death of the partner. The right of the legal representative is not a right to a share of the profits of a dissolved partnership within the meaning of that article, but is a right accruing to him by the subsequent dealing with the assets belonging to the deceased partner. (*Nasim Ali and Pal, JJ.*) NILMADHAB NANDI *v.* NIRADA SUNDARI DASI. **45 C.W.N. 1065.**

——**Art. 106**—*Partnership for running chit fund—Suit for dissolution and accounts—Starting point—Partnership—When terminates.*

The business of a partnership formed for running a chit fund, with the partnership as the stake-holder, does not cease or terminate with the expiry of the chit period or earlier if the auction of chits every month comes to an end earlier for other reasons. Accordingly for a suit for dissolution and account of such a partnership time will not begin to run until all the assets of the partnership are realised and the liabilities paid, when alone the business can be said to come to an end. (*Somayya, J.*) SAMUEL NADAR *v.* THANGAVYA NADAR. **1941 M.W.N. 1045=54 L.W. 355=(1941) 2 M.L.J. 490.**

LIMITATION ACT (1908), Art. 111.

——**Art 109**—Applicability—Suit for profits against person entrusted with property for safe custody. *See* LIMITATION ACT, ARTS. 62, 109 AND 120. **1941 N.L.J. 184.**

——**Arts. 109 and 116**—Covenant in mortgage to deliver possession and to pay rent till then—Suit to enforce—Article applicable. *See* 1940 Dig., Col. 805. DAULAT RAM *v.* RAGHUBIR SAHI. **6 Luck. 203=A.I.R. 1941 Oudh 1.**

——**Arts. 110 and 115**—*Applicability—Suit for rent based on unregistered kabuliyat.*

A suit for arrears of rent based on an unregistered kabuliyat is governed by Art. 110 and not by Art. 115 of the Limitation Act. (*Nasim Ali and Pal, JJ.*) OFFICIAL TRUSTEES OF BENGAL *v.* BIJOY CHAND MAHATAB. **I.L.R. (1941) 2 Cal. 335=45 C.W.N. 787.**

——**Art. 110**—*Patni sold for arrears of rent—Sale subsequently set aside and possession restored to patnidar—Suit for such arrears — Limitation — Starting point.*

Where a patni was sold for arrears of rent but the sale is subsequently set aside and the patnidar is restored to possession, the patnidar takes back the patni subject to the obligation to pay the amount of rent which was in arrears. The amount of rent does not accrue until the sale of the patni is set aside and until that time the statute does not run. A suit for the recovery of the arrears of rent for which the patni was sold brought within three years from the date when the patni sale was set aside and the patnidar was restored to possession is, therefore, within time under Art. 110 of the Limitation Act. (*Nasim Ali and Pal, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* BIJOY CHAND MAHATAB. **I.L.R. (1941) 1 Cal. 335=45 C.W.N. 787.**

——**Arts. 111, 116 and 83**—*Registered sale-deed—Consideration left with vendee for payment to vendor's creditor for debt due under mortgage and hand-note—Vendee committing default—Hand note paid by vendor—Suit by vendor for unpaid consideration—Limitation.*

The plaintiff owed money to *P* on two mortgages and two hand-notes. He executed a sale-deed in favour of the defendant, the consideration for which was left with the latter for payment to *P*. Defendant failed to pay to *P* in spite of demand and the plaintiff himself paid off the hand-notes in March, 1929. Plaintiff instituted a suit in September, 1935, to recover the unpaid consideration money for the sale-deed.

Held, that the consideration for the sale-deed could not be split up into two parts, namely, the amount payable on the hand-notes and the amount payable on the mortgages of *P*, that as the mortgage debts had fallen due prior to the execution of the sale-deed there was a breach on the part of the defendant to pay the consideration money for the sale-deed when they declined to pay the debt on the hand-notes, that as there was an express agreement to pay the consideration money and as that agreement was contained in a registered document the period of limitation was that provided by Art. 111 read with Art. 116 of the Limitation Act, namely, six years, and that as time ran at the latest from March, 1929, the suit was barred.

Held, further, that even if the suit could be regarded as one on a contract of indemnity to which Art. 83 would apply, the suit was barred as the plaintiff was damnified in March, 1929, which was more than three years prior to the suit. (*Agarwala, J.*) BRAHAMDEO NARAIN RAI *v.* JAIKISHUN CHAUDHURY. **193 I.C. 172=13 R.P. 553=7 B.R. 587=A.I.R. 1941 Pat. 452.**

LIMITATION ACT (1908), Art. 115.

——**Arts. 115 and 120**—*Applicability—Suit by legal adviser for remuneration on basis of express agreement.*

A suit by a legal adviser for his remuneration for services rendered on the basis of an express agreement with the client is governed by Art. 115 and not by the residuary Art. 120 of the Limitation Act. (*Tek Chand and Din Mohammad, JJ.*) SHRI GOBIND LALJI *v.* MILAP CHAND. **43 P.L.R. 97.**

——**Art. 115**—*Suit on thavani account—Starting point—Partition among members of firm—Effect.*

A had thavani account with a joint family firm consisting of *B* and his sons. There was a partition after which *B* died. There was no evidence as to novation of the original contract. The sons refused to pay *A* whereupon he brought a suit for the amount due under the account.

Held, that limitation began to run from the date of refusal and not from the date of partition. (*Roberts, C.J. and Mosely, J.*) CHOCKALINGAM CHETTIAR *v.* KARUPPAN CHETTYAR. **195 I.C. 737 = 14 R.R. 57 = A.I.R. 1941 Rang. 129.**

——**Art. 116**—Applicability—Enforcement of personal covenant in registered mortgage. *See* 1940 Dig., Col. 807. NISAR AHMAD KHAN *v.* MOHAN MANUCHA. **67 I.A. 431 = I.L.R. (1940) Kar. (P.C.) 419 = 191 I.C. 94 = 13 R.P.C. 117 = 1941 O.W.N. 513 = 73 C.L.J. 121 = 43 Bom.L.R. 465 = 1941 A.L.J. 316 = 1941 M.W.N. 1 = 7 B.R. 218 (P.C.).**

——**Art. 116**—Applicability—Registered perpetual lease—Suit on covenant in—Starting point. *See* LIMITATION ACT, ARTS. 62 AND 116. **1941 O.W.N. 1182 = 1941 O.A. 883.**

——**Art. 116**—Principal and agent — Registered agreement by agent to repay amount found misappropriated within a month of its ascertainment—Suit by principal to recover misappropriated amounts—Limitation. *See* 1940 Dig., Col. 807. MOHINI MOHAN *v.* BIR BIKRAM KISHORE MANIKYA. **195 I.C. 151 = 14 R.C. 55 = 72 C.L.J. 480 = A.I.R. 1941 Cal. 257.**

——**Art. 116**—*Suit for breach of covenant of title and quiet enjoyment in sale deed—Date of cause of action.*

Where the purchaser pleads two causes of action (1) breach of covenant of title, (2) breach of an express covenant of quiet enjoyment, he is pleading quite clearly that his cause of action dates from the date of dispossession. (*Stone, C. J.*) BHAGIRATHI BAI *v.* SETH RAMBARAN. **1941 N.L.J. 84 = A.I.R. 1941 Nag. 169.**

——**Art. 116**—*Suit for rent—Registered patni lease—Limitation.*

A suit to recover rent due on a registered *patni* lease is governed by Art. 116 of the Limitation Act and the period of limitation is six years unless some special or local law has laid down a different period. (*Rowland, J.*) HUMAYUN REZA CHAUDHURY *v.* TARINI CHARAN TEWARI. **196 I.C. 466 = 14 R.P. 200 = 8 B.R. 24.**

——**Art. 120**—*Applicability — Co-owners — Sole possession and enjoyment by one—Suit by another for account — Limitation—Starting point—Demand and refusal—Necessity.*

A suit by one co-owner or tenant-in-common for an account against another is governed by Art. 120 of the Limitation Act, and the right to sue accrues only where there is a demand for accounts and a refusal to render them. Where there has been no demand for accounts or a refusal to render them, the plaintiff would be entitled to an account for the entire period of the defendant's management when he was in sole possession and in sole receipt of the rents and profits. (*Lobo, J.*) KHEMCHAND *v.* DAVARAM. **I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.**

LIMITATION ACT (1908), Art. 120.

——**Art. 120**—Applicability—Equitable claim—Suit against *benamidar* and transferee from latter—Limitation. *See* LIMITATION ACT, ARTS. 62 AND 120. **54 L.W. 115 = (1941) 2 M.L.J. 222.**

——**Art. 120**—Applicability—Interference with performance of duties of office-holder—Suit by holder for injunction to restrain interference—Limitation—Recurring cause of action. *See* 1940 Dig., Col. 808. ANNASWAMI AIYANGAR *v.* ADIVARAHACHARI. **I.L.R. (1941) Mad. 275 = 13 R.M. 602 = 192 I.C. 870 = A.I.R. 1941 Mad. 81 = (1940) 2 M.L.J. 990 (F.B.).**

——**Art. 120**—Applicability—*Karpardar* or agent for collection permitted to keep sufficient funds out of collections for litigation expenses of principal—Running account maintained—Suit by principal after *karpardar's* death for recovery of moneys collected from sons of *karpardar*—Limitation. *See* LIMITATION ACT, ARTS. 62, 89 AND 120. **7 Cut.L.T. 87.**

——**Art. 120**—*Applicability—Right to conduct festival in temple—Dispute between Vadagalais and Tengalais—Former getting order under S. 144, Cr. P. Code, against latter—Festival not performed from 1914 to 1927—Subsequent order under S. 144, Cr. P. Code, in 1930—Suit by Thengalais in 1930 to declare illegal—It barred.*

The Thengalais, of whom the appellant was one, possessed and exercised the right to conduct a certain festival in a temple up to 1909; the Vadagalais, to which sect the respondents belonged, exercised that right from 1910 to 1914. At the instance of the Vadagalais an order under S. 144, Cr. P. Code, was passed on 19—12—1914, restraining the Thengalais from interfering with the Vadagalais in the conduct of the festival. This order was in fact effective only for 19 days. The festival was not performed during the period from 1914 to 1927 and neither party was able to set up a claim against the other during this period. On 3—1—1930, the appellant filed a suit for a declaration that an order under S. 144, Cr. P. Code, which the respondents had obtained that day from a Magistrate was illegal and that the Vadagalais were not entitled to exercise any right in connect on with the temple to the exclusion of the Thengalais. The respondents—Vadagalais—who had conducted the festival in 1929-1930 pleaded limitation on the ground that the suit had not been instituted within 9 years of 19—12—1914 the date of the prior order under S. 144, Cr. P. Code, and this plea was upheld by the High Court in second appeal, holding that Art. 120 of the Limitation Act applied to the case.

Held, on Letters Patent appeal, that the Vadagalais had not obtained any prescriptive right to conduct the festival and their interference with the right of the Thengalais to hold the festival was not sufficiently long to give them any title; the infringement being a recurring one, the Thengalais did not lose their right merely because they did not file a suit in respect of the first infringement Being a recurring infringement the appellant could take action whenever he desired so long as the respondents had not acquired a right by adverse possession.

Held, further, that an order under S. 144, Cr.P.Code, could, at the most, be effective only for 2 months, and the order in this case, passed on 19—12—1914 was effective only for 19 days and did not interfere with the rights of the Thengalais for thirteen years from 1914 to

LIMITATION ACT (1908), Art. 120.

1927, and that the suit was hence not barred. Desirability of legislation as to whether disputes with regard to temple ritual could be left to the decision of the Madras Hindu Religious Endowments Board without recourse to the Courts, pointed out. (*Leach, C.J. and Happell, J.*) SRINIVASA AYYANGAR *v.* RAMANUJACHARIAR.
I.L.R. (1941) Mad. 544=53 L.W. 315=1941 M.W.N. 250=A.I.R. 1941 Mad. 498=(1941) 1 M.L.J 322.

——**Art. 120**—*Applicability—Suit by District Board to realise amount as tax on circumstances and property—Nature of.*

A suit by a District Board to realise a certain amount as tax on circumstances and property, is not really a suit for recovery of money but for the recovery of a liability under a particular suit. To such a suit the three years rule of limitation would not apply. It is governed by Art. 120 of the Limitation Act. (*Mulla, J.*) DISTRICT BOARD, DEHRA DUN *v.* BABU RAM.
I.L.R. (1941) All. 276=193 I.C. 870=13 R A. 459=1941 O.W.N. 282=1941 O.A (Supp.) 289=1941 A.L.W. 178=1941 A.L W. 1075=1941 A.W.R. (H.C.) 24=1941 A.L.J. 28=A.I.R. 1941 All. 152.

——**Arts. 120 and 131**—*Applicability — Suit by mutawalli against Secretary of State for declaration of right to receive* yeomiah *allowance as lawful holder of office—Limitation.*

A suit by the holder of the office of mutawalli or katheeb of a mosque against the Secretary of State for India for a declaration that he was entitled to the *yeomiah* allowance as the lawful holder of the office is a suit to establish a periodically recurring right attached to the office of mutawalli and is governed by Art. 131 of the Limitation Act. Art. 120 does not apply to such a suit. A suit brought within 12 years of the Secretary of State's refusal to recognise the validity of the plaintiff's claim would be in time. The fact that the allowance does not vary from year to year but is fixed would not make any difference as to the limitation applicable. (*Leach, C.J. and Happell, J.*) BATCHA SAHIB *v.* SECRETARY OF STATE.
I.L.R. (1941) Mad 587=1941 M.W.N. 232=53 L.W. 325=A.I.R. 1941 Mad. 428=(1941) 1 M.L.J. 374.

——**Arts. 120 and 36**—*Applicability—Suit by trustee against stranger to recover trust funds applied in breach of trust—Right to sue—When accrues.*

A suit by a trustee against a stranger to recover trust funds which have been applied in breach of trust falls under Art. 120 and not under Art. 36 of the Limitation Act. The right to sue accrues when the trustee becomes aware of the breach. (*Sir George Rankin.*) O. RM. O. M. SP. FIRM *v.* P. L. N. K. M. NAGAPPA CHETTIAR.
67 I.A. 448=I.L.R. (1941) Mad. 175=I.L.R. (1941) Kar. (P.C.) 1=13 R P.C. 139=45 C.W.N 385=7 B.R. 466=53 L.W. 522=73 C.L.J. 166=1941 A.L.W. 28=43 Bom.L.R. 440=1941 P.W.N. 299=1941 M.W.N. 571=1941 Comp.C. 231=192 I.C. 1=1941 O.L.R. 108=A.I.R. 1941 P.C. 1=(1941) 1 M.L.J. 393 (P.C.).

——**Art. 120**—Applicability—Suit to enforce equitable claim to recover money realised contrary to agreement. *See* LIMITATION ACT, ARTS. 62 AND 120.
1941 N.L.J. 665.

——**Art. 120**—Applicability—Suit for profits against person entrusted with property for safe custody. *See* LIMITATION ACT, ARTS. 62, 109 AND 120.
1941 N.L.J. 184.

LIMITATION ACT (1908), Art. 132.

——**Art. 120**—Applicability—Suit to establish right to inherit movable property. *See* 1940 Dig., Col. 809. SHARIFA BEGAM *v.* COURT OF WARDS.
191 I.C. 676=13 R.L. 343.

——**Arts. 120, 125 and S. 8**—Declaratory suit by remote reversioner as to invalidity of surrender by widow—Plaintiff not born on date of surrender—Right to sue—When accrues—Exemption for period of minority. *See* 1940 Dig., Col. 808. JANAKI NATH ROY *v.* JYOTISH CHANDRA ACHARYA.
I.L.R. (1941) 1 Cal 234=193 I.C. 419=13 R.C. 396=A.I.R. 1941 Cal. 41.

——**Art. 120**—Right to sue—Plaintiff in possession suing for declaration of title—Refusal of defendant to admit plaintiff's title—Cause of action, if exists. *See* 1940 Dig., Col. 810. NANAK *v* FAQIRA.
191 I.C. 573=13 R.A. 257.

——**Arts. 120 and 144**—Suit for administration by Mahomedan heir against his co-heirs—Movable and immovable property. *See* 1940 Dig., Col. 808. MAHOMEDALLY TAYEBALLY *v.* SAFIABAI.
67 I.A. 406=I.L.R (1941) Bom. 8=I.L.R. (1940) Kar. (P C.) 410=191 I.C. 113=13 R.P C 113=53 L W. 1=45 C.W N. 226=7 B R. 210=1941 A.W R. (P.C.) 1=43 P L.R 63=1941 O.A. 119=43 Bom.L.R. 388=73 C.L.J. 214=1941 O.W.N. 734=1941 P.W.N. 316=1941 M.W.N. 729=1941 A.L.W. 567=(1941) 1 M.L.J. 594 (P.C.).

——**Art 124**—Applicability—Religious endowment—Management reverting to heir-at-law of founder—Distinction, if any, between movables and immovables. *See* 1940 Dig., Col. 810. DHARAM NARAIN *v.* SURAJ NARAIN.
I.L.R. (1940) All. 815=193 I.C. 697=13 R.A. 435=A.I.R 1941 All. 1.

——**Art. 131**—Applicability—Landlord and tenant—Open assertion by tenant of right to hold land rent-free in presence of landlord—Suit for rent more than 12 years later—If barred—Starting point of limitation—Demand and refusal—Necessity. *See* 1940 Dig., Col. 811. JAGANNATH KISHORE LAL SINGH DEO *v.* BIPAN MAHTO.
A.I.R. 1941 Pat. 116.

——**Art. 131**—Applicability—Periodically recurring right—Mutawalli of mosque—Suit for declaration of right to receive yeomiah allowance as lawful holder of office—Limitation. *See* LIMITATION ACT, ARTS. 120 AND 131.
53 L.W. 325=(1941) 1 M L.J. 374.

——**Art 131**—*Defendant denying plaintiff's right to rent during survey operations—Order of settlement officer upholding defendant's objection—Suit by plaintiff for recovery of rent filed more than 12 years after order—If barred.*

Where during the revisional survey operations the defendant denied the right of the plaintiff to recover rent for the land of which the plaintiff was the proprietor and the settlement officer passed an order upholding the defendant's objection, the plaintiff was "first refused the enjoyment of the right" to realise rent. A suit filed by him more than 12 years from the date of the order for recovery of rent from the defendant would, therefore, be barred by limitation under Art. 131 of the Limitation Act. (*Chatterji, J.*) ABDUL AHAD *v.* HARIKISHUN.
191 I.C 878=13 R.P. 387=7 B.R. 277=A.I.R. 1941 Pat 201.

——**Art. 132**—*Applicability—Mortgage by conditional sale—Suit for money due under—Limitation—Starting point—Deed fixing no date of payment—Money when payable.*

A suit for recovery of money due under a mortgage by conditional sale is governed by Art. 132 of the Limitation Act; and if the deed contains no date for repay-

LIMITATION ACT (1908), Art. 132.

ment, the date of repayment must be deemed to be the date of execution of the deed, as being payable on demand or forthwith. Time therefore begins to run from the date of the deed of mortgage. (*Davis, C.J. and Lobo, J.*) RUPOMAL KODUMAL *v.* MT. JANAT.

I.L.R. (1941) Kar. 124 = 196 I.C. 565 = A.I.R 1941 Sind 158.

——**Art. 132**—Applicability—Principal and agent—Suit to enforce charge created by agent to secure defalcated money. *See* 1940 Dig., Col. 811. MOHINI MOHAN *v.* BIR BIKRAM KISHORE MANIKYA.

195 I.C. 151 = 14 R.C 55 = 72 C.L.J. 480 = A.I.R. 1941 Cal. 257.

——**Art. 134-B** — Applicability — Alienation by manager of math—Suit by successor to set aside—Limitation—Lapse of time between death of manager and appointment of successor — Effect on limitation. *See* LIMITATION ACT, S. 6 AND ARTS. 134-B AND 144.

(1941) 1 M.L.J. 644 (F.B).

——**Art. 139**—*Applicability—Tenancy for indefinite period—Suit for possession—Starting point.*

Art. 139, Limitation Act, applies even to suits brought against the representatives of the original tenant after the determination of the original tenancy to recover the property leased. Where a rent deed in respect of certain houses created a tenancy for an indefinite period in favour of the tenant and it was stated to be terminable at the will of the lessor, it was held that at best a tenancy for life was created in favour of the tenant and that it came to an end with his death and further that a suit by the lessor for recovery of possession of the property would be barred, if not brought within 12 years of the date of the death of the tenant. (*Iqbal Ahmad, J.*) JUMMA *v* MADHUSOODAN DAYAL.

195 I.C. 515 = 14 R.A. 40 = 1941 R.D. 542 = 1941 A.L.W. 555 = 1941 A.W.R (Rev.) 515 = 1941 A W R. (H.C.) 191 = 1941 O.W.N. 747 = 1941 O.A. (Supp.) 397 = 1941 A L.J. 327 = A.I.R. 1941 All. 306.

——**Art. 139**—Tenancy for fixed term—Suit by landlord for possession—Limitation. *See* 1940 Dig., Col. 812. BANWARI LAL *v.* MST HUSSAINI.

191 I. C. 289 = 13 R.L. 284.

——**Art. 141**—*Applicability.*

Art. 141 applies only to cases where the last full owner was in possession at the time of his death, if he himself was dispossessed and time began to run against him the operation of the law of limitation is not arrested by the fact that on his death he was succeeded by his widow. (*Nasim Ali and Pal, JJ.*) FANINDRA NATH DUTTA *v.* SATYA CHARAN DE. **A.I.R. 1941 Cal. 632.**

——**Art. 141**—*Inapplicability—Trespass during last male holder's lifetime.*

When time has once commenced to run against the last male holder, it continues to run and is not suspended or, in any way, affected by the mere circumstance that the owner is succeeded by a female entitled to the usual woman's limited estate. After twelve years have run out from the date of the original entry of the trespasser, which happened in the lifetime of the last male owner all persons claiming through or under him are barred. It is settled law that Art. 141 of the Limitation Act is inapplicable to such a case. (*Tek Chand and Beckett, JJ.*) ATMA SINGH *v.* GIAN DAS.

195 I.C 712 = 14 R.L. 88 = 43 P.L.R. 308 = A.I R. 1941 Lah. 271.

——**Arts. 142 and 144**—Applicability—Conditions—Proof of title and possession—Dispossession or discontinuance of possession. *See* 1939 Dig., Col. 776. MEHERBAN *v.* YUSUFKHAN.

I.L.R. (1941) Nag. 655.

LIMITATION ACT (1908), Art. 142.

——**Art. 142**—*Applicability—Facts to be proved by plaintiff.*

Where a plaint alleges that the defendants were in possession without any right and the plaintiff states that he was in possession of the share in dispute and lost it when his father's name was struck off the mutation register, Art. 142 applies to the case and the plaintiff has to prove possession within twelve years of suit. (*Agarwal, J.*) JWALA PRASAD *v.* LAKSHMI NARAIN.

193 I.C. 686 = 13 R.O. 499 = 1941 O.L.R. 356 = 1941 R.D. 466 = 1941 O.W.N. 615 = 1941 A.W.R. (Rev.) 367 = 1941 A.L.W. 459 = 1941 O.A. 391 = A.I.R. 1941 Oudh 415.

——**Arts. 142 and 144**—Applicability—Mortgage decree—Sale in execution—Purchaser—Suit by, for possession—Burden of proof—Proof of title—Sufficiency. *See* 1940 Dig., Col. 814. OFFICIAL RECEIVER, EAST GODAVARI *v.* GOVINDARAJU. **192 I.C. 488 = 13 R.M. 560 = (1940) 2 M.L.J. 190 (F.B).**

——**Art. 142**—Applicability—Suit for possession of property transferred by pardanashin guardian. *See* LIMITATION ACT, ARTS. 44 AND 142—APPLICABILITY.

1940 O.A. 1251.

——**Art. 142**—*Applicability—Suit for possession—Plaintiff alleging possession of his predecessor in interest, till dispossession by defendant.*

A suit for possession by the plaintiff alleging possession of his predecessor in interest, till dispossession by the defendant, falls under Art. 142 and the plaintiff must prove his possession within twelve years of the alleged dispossession. (*Nasim Ali and Pal, JJ.*) FANINDRA NATH DUTTA *v.* SATYA CHARAN DE.

A.I.R. 1941 Cal. 632.

——**Art. 142**—*Discontinuance of possession—Meaning of.*

Per *Mitter, J.*—The phrase discontinuance of possession in Art. 142 of the Limitation Act connotes abandonment of possession by the owner followed by the taking of possession by another, the wrongdoer. If a wakif continues to be in possession as a mutwalli after the execution of the wakfnama, he does not discontinue possession but only changes the character of his possession. A suit for possession in such a case is, therefore, not governed by Art. 142 of the Limitation Act. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J 261.**

——**Art. 142**—'Dispossession' and 'discontinuance'—Meaning of. *See* 1939 Dig., Col. 777. MEHERBAN *v.* YUSUFKHAN. **I.L.R. (1941) Nag. 655.**

——**Art. 142**—Lands re formed after submergence—Suit for possession—Onus of proof—Plaintiff not in physical possession at time of submergence—Constructive possession—Principle of. *See* 1940 Dig., Col. 814. GADADHAR CHOWDHURY *v.* SARAT CHANDRA.

195 I.C. 412 = 14 R.C 86 = 72 C.L.J. 320 = A.I R. 1941 Cal. 193.

——**Art. 142**—*Suit for possession and ejectment of trespassers—Facts to be proved—Onus.*

In order to be successful in a suit for possession and ejectment of the defendant, it is necessary firstly for the plaintiffs to prove their title to the suit property and secondly to show that they have been in possession of that property within 12 years before date of suit. (*Davies.*) MANGLA *v.* LAKHA. **1941 A.M.L.J. 48.**

——**Art. 142**—*Suit for possession based on dispossession—Burden of proof.*

Where in a suit for recovery of possession the claim of the plaintiff is that he was in possession of the lands in suit but was dispossessed by the defendants, the initial burden of proving possession within 12 years of

LIMITATION ACT (1908), Art. 142.

suit lies upon the plaintiff. (*Akram, J.*) MANTAJADDIN *v.* ALAM. **73 C.L.J. 47.**

———**Art. 142**—Suit governed by—Facts to be proved by plaintiff. *See* 1940 Dig., Col. 815. HAIDER HUSAIN *v.* SUBAN KHAN. **191 I.C. 602=13 R.A. 238.**

———**Art. 144**—Applicability—Alienation by manager of math—Suit by successor to set aside—Limitation applicable—Successor elected or appointed after lapse of time from death of prior manager—Effect—Adverse possession—When commences. *See* LIMITATION ACT, S. 6 AND ARTS. 134-B AND 144. **(1941) 1 M.L.J. 644 (F.B.)**

———**Arts. 144 and 142**—*Applicability—Suit by Government for possession of public street—Adverse possession—Onus.*

In a suit by Government for possession of certain land, the plaintiff pleaded that in 1871 the land was shown as Nazul property, that the title was with Government and that the land was used as "rasta". The plaint presumed that Government remained in possession until 1929 when the defendant by means of an encroachment trespassed thereon.

Held, that the suit was governed by Art. 144 and not by Art. 142 of the Limitation Act, and that when once title was proved to have vested in Government by reason of the fact that the land in suit was part of a public street owned by Government in 1871, the onus shifted on to the person challenging that title to prove that he had subsequently acquired a title by adverse possession and that it was not necessary for Government to prove continued possession because in the circumstances of the case possession would follow title. (*Sale, J.*) PROVINCE OF THE PUNJAB *v.* ASA NAND *alias* PANJU MAL. **195 I.C. 764=14 R.L. 96=43 P.L.R. 222=A.I.R. 1941 Lah. 241.**

———**Art. 144**—Applicability—Suit by Zamindar to recover possession of land, by the removal of structures, newly planted trees, etc. *See* 1940 Dig., Col. 816. MAHOMED MAHDI *v.* JAGAT SINGH. **16 Luck. 223=191 I.C. 157=A.I.R. 1941 Oudh 45.**

———**Art. 144**—*Applicability—Suit for assessment of rent of land—Defendant claiming* lakheraj *right.*

A suit for assessment of fair rent in respect of a plot of land which the defendant claims to hold in *lakheraj* right, is governed by Art. 144 of the Limitation Act. (*Mukherjea and Lodge, JJ.*) SAROJ BASINI DEBI *v.* KUMAR KAMALA RANJAN ROY. **45 C.W.N. 126.**

———**Art. 144**—*Starting point—Alienation by mahant of math without necessity—Suit for possession by successor—Limitation—Starting point—Possession of alienee—When adverse.*

An alienation of debutter property by the mahant of a math, whether it be a sale or a permanent lease, which is not supported by necessity, is not void *ab initio*, but is valid during the tenure of his office, and the possession of the alienee does not become adverse to the Math till after the death of the alienating mahant. A suit by the succeeding mahant for possession of the alienated property within twelve years of the death of the alienating mahants though more than 12 years of the alienation is in time and is not barred; time begins to run only from the death of the alienating mahant. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD. **192 I.C. 789=13 R.P. 535=7 B.R 569=1941 P.W.N. 75=22 Pat L T. 239=A.I R. 1941 Pat. 354.**

———**Arts. 144 and 134-B**—*Wakf property—Transfer by person in one's own right—Article applicable.*

Art. 134-B of the Limitation Act has no application to a transfer of wakf property by a person who professes to make the transfer in his own right and in a secular capacity. The only article which can have any application to such a case is Art. 144, and limitation begins from the date on which the transferor obtained possession of the disputed property in the assertion of a hostile title to the wakf. (*Edgley and Biswas, JJ.*) FATEH NASIB *v.* SWARUP CHAND HUKUM CHAND. **73 C.L.J. 475.**

LIMITATION ACT (1908), Art. 148.

———**Art. 145**—Applicability—Depository's depository. *See* 1940 Dig., Col. 817. LORIND CHAND *v.* PUNJAB NATIONAL BANK, LTD. **191 I C. 830=13 R.L. 336.**

———**Art. 146-A**—*Applicability—Suit by Union Board for possession of land—Land in possession of defendant on date of its creation.*

S. 146-A of the Limitation Act applies only where the local authority suing has been dispossessed or has discontinued its possession : in other words, it contemplates prior possession of the land by the local authority which it subsequently loses by reason of any act done by the defendant or otherwise. The article can obviously have no operation in a case where the local authority is found not to have been in possession at all. Where at the date the Union Board was created, possession of the land was with the defendant, and the Union Board seeks to recover the land as part of a public road to which it became entitled upon its creation under the Act of its incorporation, it must sue for such recovery within 12 years from the date of its establishment under Art. 144. To such a case Art. 146-A has no application. (*Mukherjea and Biswas, JJ.*) DHAJUDHARI GHOSH *v.* UNION BOARD OF KENORAGORIA. **45 C.W.N. 802=73 C L.J. 608.**

———**Art. 146-A and S. 28**—*Municipality not filing suit for possession of land encroached upon for* 30 *years—If loses its right to demand removal of encroachment.*

A Municipality loses its right to demand the removal of an encroachment and to recover the land encroached upon if a suit for possession of the land is not instituted on its behalf within 30 years of its having been dispossessed of it. (*Mir Ahmad, J.*) TILA MAHOMED *v.* MUNICIPAL COMMITTEE, PESHAWAR. **196 I.C. 648=A.I.R. 1941 Pesh. 76.**

———**Art. 146-A**—*Open assertion of hostile title—If necessary to start limitation.*

An open assertion of hostile title is not necessary to start limitation under Art. 146-A. Possession, provided it is not permissive or in the alternative discontinuance of possession by the Municipality is quite sufficient to make limitation run against the Municipality. (*Mir Ahmad, J.*) TILA MAHOMED *v.* MUNICIPAL COMMITTEE, PESHAWAR. **196 I C. 648=A.I.R. 1941 Pesh 76.**

———**Arts. 147 and 132**—Suits on English mortgages executed prior to 1st April, 1930—Article applicable. *See* T. P. ACT, S. 67 (*a*). **74 C.L.J. 61.**

———**Art. 148**—*Applicability and scope—Mortgage in* 1791—*Suits in* 1849 *and* 1863—*Acknowledgment by legal agent in* 1849 *and* 1867—*Sufficiency to save limitation—Suit in* 1933—*If barred—Suit barred in* 1862—*If revived by Limitation Acts of* 1877 *and* 1908.

The law of limitation applicable to a suit is the law in force at the time of the institution of the suit. But this general rule is subject to the proviso that neither the right to the property in question has been extinguished nor the right to sue in respect of it barred before the later law came into force. Once a right to property has been extinguished, or right of suit barred, it cannot be revived by subsequent Limitation Acts in the absence of express words so providing. Three Mahomedan brothers owned an eight annas share in a village. In October,

LIMITATION ACT (1908), Art. 148.

1791, some of the descendants of the three brothers mortgaged this to one *N* in 1849. One of the persons interested in the mortgaged property filed a redemption suit in which the pleader for the mortgagee defendant filed a statement of account of the mortgaged property in 1849, signed by him. Nothing further was known about the suit. In 1863, another interested party, the father of one of the defendants filed a suit to redeem a portion of the mortgaged property from the son of the original mortgagee. A decree for redemption was passed, but no time was fixed for payment and there was no provision for foreclosure. It was confirmed on appeal and in second appeal by the descendant of the original mortgagee in 1867 the existence of the mortgage and the relationship of mortgagor and mortgagee between the parties was admitted as subsisting in the memorandum of second appeal which was signed by the pleader of the appellant therein. The appeal was dismissed, but nothing was done. In 1893, a bolkhat of the property was prepared and the mortgagees were continued to be shown in that register from 1893 to 1913 In 1921 and 1922 a fractional share of the property was sold by the descendants of the original mortgagee to two persons, purporting to sell as owners. In 1933 some of the other descendants of the original mortgagors brought a suit against the purchasers from the mortgagee's descendants and others treating the former as redeeming co-mortgagors for possession of their proportionate share on payment of the proportionate amount of the price stated in the sale deeds. The defendants pleaded that the mortgagors had lost their right to redeem and their title was also extinguished, and that their vendors had become owners of their property.

Held, (1) that the statement of account filed by the mortgagee's pleader in 1849 and the memorandum of appeal signed by the pleader in 1867, would be invalid to save limitation, because under S. 1 (15) of the Limitation Act of 1859, an acknowledgment must be by a mortgagee or some person claiming under him, and as the acknowledgments in this case were by a legal agent, they were invalid, though they would be good under the Act of 1908; in any case, therefore, the suit would have been barred after the beginning of the year 1862; (2) that since the suit was barred at the date when the Limitation Act of 1877 came into force, S. 2 of that Act would apply with the result that the right to sue having been lost could not be revived even though the acknowledgments would have been good under the Act of 1908 which governs the suit. (*Broomfield and Dwarka, JJ.*) YOONUS SHEIKH MOHIDDIN NADKAR *v.* SHEIKH HASAN. **I.L.R. (1941) Bom 260 = 197 I.C. 88 = 43 Bom L.R. 194 = A.I.R. 1941 Bom. 178.**

——**Art. 148**—Applicability—Mortgage—Redemption by co mortgagor—Suit for redemption by other mortgagor—Limitation — Starting point. *See* 1940 Dig., Col. 817. MUKH NARAIN SINGH *v.* RAM LOCHAN TIWARI. **A.I.R. 1941 Pat. 147.**

——**Art. 155 and Cr. P. Code, Ss. 562 and 563**—Conviction and binding over under S. 562, Cr. P. Code—Subsequent sentence under S. 563—Appeal—Limitation—Starting point. *See* 1940 Dig., Col. 818. MAHOMED KHALICK *v.* THE KING. **191 I.C. 169 = 13 R.R. 121 = 42 Cr L.J. 91.**

——**Art. 156**—*Date of decree—Date of pronouncement of judgment or date of signing of decree.*

The date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be. Hence the time for the presentation of the appeal should be computed not from the date of the signing of the decree, but from the date of the pronouncement of the judgment. (*Almond, J.C. and Soofi, J.*) SHIVAN DITTA *v.* RADHA KRISHNA KAPUR. **196 I.C. 654 = A.I.R. 1941 Pesh. 74.**

LIMITATION ACT (1908), Art, 180.

——**Art 164**—*Application for setting aside* ex parte *decree—Starting point for limitation—'Knowledge of decree'—Means of knowledge if equivalent to knowledge—Practice—Summons—"Duly served"—Meaning—Civil Procedure Code (V of* 1908), *O.* 9, *R.* 13.

Where the summons is served on a defendant too late to afford him sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons 'duly served' within the meaning of O. 9, R. 13, C. P. Code. In such cases the Court ought to issue fresh summons. An omission on the part of such a defendant to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful so as to carry with it the consequence of 'knowledge'. Such a defendant will be within time if he applies for setting aside the *ex parte* decree within 30 days of actual knowledge of the decree. (*Krishnaswami Ayyangar, J.*) STOCK AND SHARE EXCHANGE BUREAU, RAWALPINDI *v.* KOTHARI & SONS. **1941 M.W.N. 180 = 53 L.W. 246 = A.I.R. 1941 Mad. 435 = (1941) 1 M.L.J. 319.**

——**Art. 166**—*Applicability—Application to set aside sale under S.* 47, *C. P. Code.*

If a voidable sale raises a question within S. 47 and the application to set it aside is made under the Civil Procedure Code, Art. 166, Limitation Act, will apply, notwithstanding the mention of S. 47. This will be so notwithstanding the fact that the auction-purchaser who is interested in the result of the application to set the sale aside may not have been a party to the suit. (*Dhavle and Meredith, JJ.*) BHAN KUMAR CHAND *v.* LACHMIKANTA RAI. **A.I.R. 1941 Pat. 566.**

——**Art. 166**—Applicability—If restricted to applications under O. 21, Rr. 72 and 89 to 91. *See* 1938 Dig., Col. 950. MAROTI *v.* KISANLAL. **I.L.R. (1941) Nag. 381.**

——**Art. 166**—*Applicability—Void sale.*

Several provisions of O. 21, C. P. Code and Art. 166, Limitation Act, deal with the setting aside of execution sales They affect voidable sales only, for void sales do not require to be set aside. (*Dhavle and Meredith, JJ.*) BHAN KUMAR CHAND *v.* LACHMIKANTA RAI. **A.I.R. 1941 Pat. 566.**

——**Arts. 166 and 181**—Official Receiver's application to declare execution sale void—Article applicable. *See* 1940 Dig., Col. 819. MOTILAL *v.* NATHU. **192 I.C. 183 = 13 R.N. 225.**

——**Art. 179**—*Computation of period—Time taken in prosecution of useless review application—Exclusion of.*

In a case where an application for the review of a judgment sought to be appealed against is summarily rejected, obviously because the grounds did not come in any way within the grounds prescribed by law to justify a review, the time so taken, cannot be excluded in computing the period of limitation for an application for leave to appeal to Privy Council against the said judgment. (*Harper, S.M.*) MAHABIR PRASAD *v.* SHAH MUKHTAR AHMAD. **1941 R D. 792 = 1941 A.W.R. (Rev.) 1090 = 1941 O.A. (Supp.) 880.**

——**Arts. 180 and 182**—*Applicability—Application for possession by decree-holder auction-purchaser.*

An application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, Sch. I, Limitation Act and not by Art. 182. There is nothing to indicate that the Legislature intended Art. 180 to apply only to those auction-purchasers

LIMITATION ACT (1908), Art. 181.

who were strangers. (*Almond, J. C. and Mir Ahmad, J.*) GURMUKH DAS *v.* MAHOMED NAMDAR KHAN.
193 I.C. 337 = 13 R.Pesh. 53 = A.I.R. 1941 Pesh 10.

——**Arts. 181 and 178**—*Applicability—Application to file award passed under Arbitration Act.*

Art. 181 is not restricted to applications under the Civil Procedure Code but extends to all applications not provided for in the schedule. An application to file an award passed under the Arbitration Act is governed by Art. 181 and not by Art. 178 which applies only to applications under the Civil Procedure Code. (*Mir Ahmad and Soofi, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LEKHU RAM. **192 I.C. 758 = 13 R. Pesh. 44 = A.I.R. 1941 Pesh. 3.**

——**Arts. 181 and 182**—*Applicability—Execution sale set aside—Application under O. 21, R. 93, C. P. Code, by unsuccessful auction-purchaser for refund of poundage and interest—Starting point—Appellate order or original order.*

An execution sale was set aside by the original Court on 15—11—1934. The matter was carried in appeal up to the High Court by the auction-purchaser and by others, and the appeals were finally disposed of on 6—10—1937. In 1938, the auction-purchaser applied under O. 21, R. 93 for refund of the poundage and interest on the purchase-money, the actual purchase-money having been recovered by him through the Court earlier.

Held, that the date of the appellate Court's decree and not the date of the original Court's order setting aside the sale should be taken as the starting point of limitation, and the application was therefore not barred.

Quaere, whether Art. 181 or 182 of the Limitation Act should be applied to such a case? (*Pandrang Rao and King, JJ.*) VEERASWAMI *v.* NAMMAYYA
54 L.W. 98 = 1941 M.W.N. 759 = A.I.R. 1941 Mad. 751 = (1941) 2 M.L.J. 121.

——**Art. 181**—Applicability—Restitution proceedings—Starting point of limitation. *See* 1940 Dig., Col. 820. UJAGAR SINGH *v.* LIKHA SINGH.
193 I.C. 387 = 13 R.A. 405 = A.I.R. 1941 All. 28.

——**Arts. 181 and 183**—Applicability — Award under Arbitration Act filed in High Court—Execution—Limitation. *See* ARBITRATION ACT, S. 15.
43 Bom.L.R. 1006.

——**Arts. 182 and 183**—Applicability—Decree of Presidency Small Cause Court—Execution by Civil Court of original jurisdiction—Limitation. *See* C. P. CODE, S. 48. **7 Cut.L.T. 45.**

——**Art. 182**—Continuation—General application against rent and movables—Second application against movables. *See* 1940 Dig., Col. 820. MOHABBE ALI KHAN *v.* CHHOTEY. **1941 A.L.J. (Supp.) 5.**

——**Art. 182**—*Continuation of execution application—Execution in respect of crops in different plots.*

Where the original application asked for execution against the movable property to be pointed out by the servants of the decree-holder and attachment of crops in the following plots, and the subsequent application referred to the attachment of different crops in different plots, it was held that the later one was not in continuation of the prior one. (*Harper, S. M. and Sathe, J. M.*) TIRKHA *v.* NAZEER BEGAM.
1941 A.L.J. (Supp.) 19 = 1941 A.W.R. (Rev.) 185 = 1941 O.A. (Supp.) 129 = 1941 R.D. 105.

——**Art. 182**—Final decree in partition suit—Execution—Limitation—Starting point. *See* 1940 Dig., Col. 821. RAM NARAIN *v.* MAHARAJ NARAIN.
192 I.C. 93 = 13 R.L. 354.

——**Art. 182**—Final decree in partition suit—Execution—Suspension of limitation—Dispute relating to adequacy of stamped paper. *See* 1940 Dig., Col. 821. RAM NARAIN *v.* MAHARAJ NARAIN.
192 I.C. 93 = 13 R.L. 354.

LIMITATION ACT (1908), Art 182.

——**Art. 182 (1)**—*Award—Execution—Limitation—Starting point—Co-operative Societies Rules, R. 22.*

Awards under R. 22 of the Co-operative Societies Rules are executable as decrees and this being the case, the provisions of Art. 182 (1) of the Limitation Act are applicable. Under that article the period of limitation is three years from the date of the award. The date of the award does not mean the date written therein but the date on which such award is officially communicated to the person or persons affected thereby. (*Edgley, J.*) LAKSHMI NARAYAN KOLEY *v.* LALIT MOHAN BHATTACHARJYA. **I.L.R. (1940) 2 Cal. 460 = 194 I.C. 35 = 13 R.C. 473 = A.I.R. 1941 Cal. 152.**

——**Art. 182 (2)**—Starting point. *See* 1940 Dig., Col. 822. PANDURANG *v.* KUNWAR LAL SINGH.
I.L.R. (1941) Nag. 199 = 192 I.C. 270 = 13 R.N. 229 = A.I.R. 1941 Nag. 19.

——**Art. 182 (2)**—"Appeal"—Meaning of—Appeal against order dismissing judgment-debtor's application to record satisfaction of decree—If saves limitation for execution. *See* 1940 Dig., Col. 821. SEETHARAMA CHETTIAR *v.* ABDUL RAHIMAN SAHIB.
A.I.R. 1941 Mad. 40 = (1940) 2 M.L.J. 371.

——**Art. 182 (3)**—*Applicability—Rejection of review application—Time—If enlarged.*

Art. 182 (3) of the Limitation Act is not applicable to cases where an application for review has not been granted but rejected, and in such cases limitation is not enlarged under the article. (*Fazl Ali and Rowland, JJ.*) MAHOMED NAZIR *v.* ALAUDDIN AHMAD.
20 Pat. 513 = 194 I.C. 608 = 14 R.P. 10 = 1941 P.W.N. 477 = 7 B.R. 799 = 22 Pat.L.T. 26 = A.I.R. 1941 Pat. 213.

——**Art. 182 (4)**—*Amendment of time-barred decree—Execution—Limitation.*

Art. 182 (4) of the Limitation Act lays down clearly and without reservation that when a decree has been amended the period of limitation is three years from the date of the amendment. It is not stated that the amendment should have been made within three years from the date of the original decree or at a time when the original decree was subsisting. It is not the function of the executing Court to question the correctness or propriety of the amendment of the decree. (*Tek Chand and Sale, JJ.*) IMAM DIN *v.* PEOPLES INSTALMENT AND SAVING BANK, LTD.
I.L.R. (1941) Lah. 659 = 195 I.C. 250 = 14 R.L. 51 = 43 P.L.R. 11 = A.I.R. 1941 Lah. 131.

——**Art. 182 (5)**—"*Appeal*"—*Meaning of—Application by judgment-debtor to record satisfaction of decree—Dismissal—Appeal—If saves limitation for execution of decree.*

An appeal against an order dismissing the application of the judgment-debtor to record satisfaction of the decree does not amount to an "appeal" within the meaning of Art. 182 (5) of the Limitation Act, and would not save limitation for execution of the decree. (*Leach, C.J. and Happell, J.*) SEETHARAMA CHETTIAR *v.* SHEIKH ABDUL RAHIMAN SAHIB.
I.L.R. (1941) Mad. 703 = 1941 M.W.N. 438 = 53 L.W. 545 = A.I.R. 1941 Mad. 616 = (1941) 1 M.L.J. 614.

——**Art. 182 (5)**—*Application in accordance with law—Application neither signed nor verified but Court acting upon it.*

An application is required under the provisions of O. 21, R. 11, C. P. Code, to contain certain particulars and to be signed and verified. It is the duty of the

LIMITATION ACT (1908), Art. 182.

Court when it is presented to check the application to see that the necessary particulars are given under O. 21, R. 17 and the Court is then empowered either to reject the application or require its immediate amendment or its amendment within a fixed time. If the Court takes none of these actions but acts also upon the application the Court must be deemed to hold the application to be in accordance with law. (*Almond, J C.*) SUNDAR SINGH *v.* KHILANDA RAM. **A.I.R. 1941 Pesh. 103.**

——**Art. 182 (5)**—Construction — Insolvency of judgment-debtor—Time spent in Insolvency Court—Deduction if permissible. *See* 1940 Dig., Col. 822. SETH NANDLAL *v.* RAMDATTA. **191 I.C. 554 = 13 R.N. 201 = A.I.R. 1941 Nag. 60.**

——**Art. 182 (5)**—*Final "order"—Meaning of.*

The words "final order" in Art. 182 (5) of the Limitation Act mean only the order by which an execution application is finally disposed of. (*Pandrang Row and King, JJ.*) ALAGAPPA CHETTIAR *v.* RAMA KRISHNA AYYAR. **54 L.W. 317 = A.I.R. 1941 Mad. 858 = (1941) 2 M.L.J. 493.**

——**Art. 182 (5)**—*"Final order"—Order requiring applicant to comply with directions of Court—Application returned for attending to directions of Court—Failure to re-present within reasonable time—Subsequent re presentation after decree had become barred along with fresh application—Limitation, if saved—Revival.*

A "final order" within the meaning of Art. 182 (5) of the Limitation Act means an order putting an end to the application in respect of which it is made and not merely the last order in point of time. An order requiring the applicant to do something in order that the Court may proceed with his application does not even contemplate the end of the petition, and such an order is in no sense a final order. An application returned for complying with certain requirements and not re-presented within a reasonable time, even if none was fixed by the Court, cannot be held to be of any avail, and no question of improper dismissal or illegal dismissal would arise in such a case, such an application cannot be deemed to be pending or revived so as to save limitation under Art. 182 (5). A final decree for sale on a mortgage was passed on 21st October, 1932, and an application for execution was filed in 1933. Notice was ordered and the petition was dismissed for non-payment of batta. On 23rd August, 1934, another petition was filed by the Official Receiver in whom the estate of the decree-holder had vested and it was returned on 13th September, 1934, for complying with certain requirements. After various re-presentations and returns, the petition which was unregistered was again returned on 15th January, 1935, with the endorsement that the directions of the Court had not been attended to, and it was not again re-presented until 18th August, 1937, when it was presented along with a fresh execution petition. It was not, however, accompanied by any application to excuse the delay nor was the Court requested to excuse the delay. The reason for the delay was not stated, and execution of the decree was barred by that time.

Held, that the order of 15th January, 1935, was in no sense a "final order" within the meaning of Art. 182 (5) of the Limitation Act. The suspension of the proceedings till then was due to the act or default of the decree-holder in not re-presenting the petition, and in the circumstances it could not be deemed to be pending or revived, and hence the fresh execution petition filed on 18th August, 1937, was barred by limitation. (*King and Lakshmana Rao, JJ.*) OFFICIAL RECEIVER, RAMNAD *v.* NARAYANASWAMI THEVAR. **54 L.W. 708 = (1941) 2 M.L.J. 1018.**

LIMITATION ACT (1908), Art. 182.

——**Art. 182 (5)**—*Final "order"—Order returning application for transmission of decree to another Court as decree had not been received from transferee Court—If saves limitation.*

In 1932 the decree-holder applied to the Court which passed the decree to transmit the decree for execution to Bombay. On 30—8—1932, the Court passed an order directing transmission In February, 1935, another application was made to the Court again praying that the decree should be transferred to Bombay for execution. The order endorsed on that application on 27—2—1935, was: "copy of the decree has not been received from the High Court, Bombay—returned." On 22—3—1935, this application was again presented before the Court, but the Court held that it was barred by limitation.

Held, that the order passed by the Court on 27—2—1935 was a "final order" within the meaning of Art. 182 (5) of the Limitation Act, as by that order the Court decided that it would have nothing further to do with the application, and the application, filed in 1937, even taken as a fresh application was in time. (*Pandrang Row and King, JJ.*) KANDASAMI CHETTIAR *v.* GOKULDAS MADANJI & CO. **54 L.W. 34 = 1941 M.W.N. 627 = A.I.R. 1941 Mad. 731 = (1941) 1 M.L.J. 837.**

——**Art. 182 (5)**—*"Final order"—Order stating that appeal has abated—If final order.*

An order stating that an appeal from an order allowing execution of decree has abated comes within Cl. (5) of Art. 182 of the Limitation Act and time runs from the date of such order for the execution of the decree. (*Pandrang Row and King, JJ.*) KUNJITHAPATHAM PILLAI *v.* SARASWATHI AMMAL. **196 I.C. 94 = 14 R.M. 247 = 53 L.W. 726 = 1941 M.W.N 633 = A.I.R. 1941 Mad. 671 = (1941) 2 M.L.J. 66.**

——**Art. 182 (5)**—*Final order—Order that Letters Patent appeal has abated.*

An order by which the High Court declares a Letters Patent appeal to have abated is a final order within the meaning of Art. 182 of the Limitation Act. It is in effect an affirmation of the decree of the learned Judge of the High Court and limitation only begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal. (*Iqbal Ahmad, C.J. and Collister, J.*) MURLIDHAR *v.* MAHABIR SINGH. **1941 A.L.J. 480 = 1941 O.A. (Supp.) 685 = 1941 A.W.R. (H.C.) 255 = 1941 R.D. 767 = 1941 A.L.W. 835 = A.I.R. 1941 All. 371.**

——**Art. 182 (5)**—*"In accordance with law"—Application for larger amount than is due under decree—If saves limitation.*

An application by a decree-holder to execute his decree for more than is due to him is not in itself an application not in accordance with law. The appellant obtained a decree for Rs 1,600 *ex parte* against three defendants on 1st October, 1929. The first defendant applied to have the decree set aside and an order was passed in his favour that it would be set aside if he deposited a sum of Rs. 1,100 and odd. Some of this money was deposited but not all on 27th June, 1930. A revised decree was passed by the Court taking into account the amount paid by the first defendant. The appellant filed a number of execution applications from 1932 to 1936, on the assumption that the liability of the defendants was that recorded in the original *ex parte* decree. In execution in February, 1937, the first defendant's properties were brought to sale, but an application was filed to set aside the sale by the guardian of the first defendant's children. Pending this, the decree-

holder also asked the Court to set aside the sale on the ground that the sale fetched an amount larger than was due to him. The sale was set aside. In July, 1937, the appellant applied again for execution, basing his claim on the revised decree of 1930. The plea of limitation was raised.

Held, that the applications of the appellant between 1932 and 1936, must be deemed to have been made in accordance with law within the meaning of Art. 182 (5) of the Limitation Act, and the application of July, 1937, must therefore be held to be in time. (*King, J.*) SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **53 L.W. 155 = 1941 M.W.N. 171 = A.I.R. 1941 Mad. 528 = (1941) 1 M.L.J. 267.**

——**Art. 182 (5)**—"In accordance with law"—Assignment of decree to several persons jointly—Application by one alone for execution—If saves limitation. *See* C. P. CODE, O. 21, R. 15. **43 Bom.L.R. 883.**

——**Art. 182 (5)**—"In accordance with law"—Decree against family property in the hands of defendant—Application for arrest of defendant—If saves limitation. *See* 1940 Dig., Col. 824. NANJUNDA CHETTY *v.* LAKSHMANAN CHETTIAR. **192 I.C. 210 = 13 R.M. 538 = A.I.R. 1941 Mad. 30 = (1940) 2 M.L.J. 502.**

——**Art. 182 (5)**—"In accordance with law"—Execution application by assignee of decree—Assignment subsequently declared void—Application by assignee—If saves limitation. *See* 1940 Dig., Col. 824. RAMCHANDRA KRISHNAJI *v.* VITHU GOVIND. **13 R.B. 304 = 193 I.C. 79 = A.I.R. 1941 Bom. 65.**

——**Art. 182 (5)**—"In accordance with law"—Meaning of—Application for transfer of decree to Court of another District which for the time being has no jurisdiction to execute the decree—If saves limitation. *See* 1940 Dig., Col. 824. BISHUNDEO NARAIN MISSIR *v.* RAGHUNATH PRASAD. **191 I.C. 695 = 13 R.P. 339 = 7 B.R. 245.**

——**Art. 182 (5)**—"In accordance with law"—Mortgage decree—Assignment—Deed not registered—Effect—Application by transferee—If saves limitation for subsequent application after taking registered deed. *See* 1940 Dig., Col. 824. VYTHINATHA PADAYACHI *v.* AMMALU AMMAL. **191 I.C. 795 = 13 R.M. 508 = (1940) 1 M L.J. 595.**

——**Art. 182 (5)**—"*Proper Court*"—*Court transmitting decree to another Court for execution—Subsequent application to Court transferring decree—If one made to proper Court.*

A Court which transmits its decree for execution to another Court does not thereby divest itself of all its jurisdiction but has jurisdiction to take certain measures in execution. It is therefore a "proper Court" within the meaning of Art. 182 (5) of the Limitation Act, and an application made to it is a valid application which would save limitation under Art. 182 (5). (*Pandrang Row and King, JJ.*) KANDASAMI CHETTIAR *v.* GOKULDAS MADANJI & CO. **54 L.W. 34 = 1941 M.W.N. 627 = A.I.R. 1941 Mad. 731 = (1941) 1 M.L.J. 837.**

——**Art. 182 (5)**—Step-in-aid — Application for transfer of decree to another Court for execution—If saves limitation. *See* 1940 Dig., Col. 825. BISHUNDEO NARAIN MISSIR *v.* RAGHUNATH PRASAD. **191 I.C. 695 = 13 R.P. 339 = 7 B.R. 245.**

——**Art. 182 (5)**—*Step-in aid — Application for transfer of decree — Judgment-debtor known to be dead.*

An application for transfer of a decree to another Court for execution made at a time when the judgment debtor is known to the decree-holder to be dead, is a valid step-in-aid of execution and would save limitation. (*Henderson, J.*) RADHABALLAV BASAK *v.* MAHENDRA KUMAR SEN. **45 C.W.N. 342.**

——**Art. 182 (5)**—*Step-in-aid—Application for withdrawal of money awarded upon rateable distribution—Order on—If gives fresh start of limitation.*

An application by a decree-holder for withdrawal of the money awarded to him upon rateable distribution is not a step-in-aid of execution, and the order on such an application, being merely a ministerial order, does not furnish a fresh starting point of limitation. (*Harries, C.J. and Shearer, J.*) NOORUL HODA *v.* RAI NOHAR PRASAD VARMA. **193 I.C. 566 = 13 R.P. 606 = 22 Pat.L.T. 792 = 1941 P.W.N. 559 = 7 B R. 565 = A.I.R. 1941 Pat. 428.**

——**Art. 182 (5)**—Step-in-aid—Application in partition suit for preparation of formal decree sheet on stamped paper. *See* 1940 Dig., Col. 825. RAM NARAIN *v.* MAHARAJ NARAIN. **192 I.C. 93 = 13 R.L. 354.**

——**Art. 182 (5)**—*Step-in-aid—Application to record part payment or adjustment of decree debt under O. 21, R. 2, C. P. Code—If saves limitation.*

An application made to the Court to record a part payment or adjustment of the decretal debt under O. 21, R. 2, C. P. Code, is not a step-in aid of execution which will prevent limitation running under Art. 182 (5) of the Limitation Act. Such an application to record an adjustment under O. 21, R. 2, is a mere certificate and is no application at all under Art. 181 or Art. 182. (*Beaumont, C.J. and Sen, J.*) ATMARAM NEMCHAND *v.* MALLAPPA APPAYYA. **43 Bom L.R. 880.**

——**Art. 182 (5)**—Step-in-aid—Application to transfer decree to another Court for execution—No execution application pending. *See* 1940 Dig., Col. 826. RAMNARAYAN JAGANNATH *v.* RADHAGOBINDA DEBNATH. **191 I.C. 574 = 13 R.C. 269.**

——**Art. 182 (5)**—*Step-in-aid—Claim to attached property—Order allowing—Suit by decree-holder—If step-in-aid—Suit finally dismissed—Execution application within three years but beyond three years of prior execution petition—If barred.*

An application, to constitute a step-in-aid of execution, has to be filed in the execution proceeding itself, and not in any other suit or proceeding, however, intimately connected the latter might be with the proceedings of the former. Where a claim to attached property is allowed, a suit by the decree holder to set aside the order allowing the claim cannot be regarded as a step-in-aid of execution so as to save limitation for a fresh execution application filed beyond three years of the dismissal of the prior execution petition, though within three years of the final dismissal of his declaratory suit. The wording of O. 21, R. 63 does not alter the nature or character of the claim order or of the suit. The words "subject to the result of such suit" in the rule, come into operation only when the result of the suit is different from the result arrived at by the executing Court. It would be different if the suit of the decree holder succeeds. The finality or conclusiveness of the order allowing the claim in execution is not disturbed by the decision of the Civil Court in the declaratory suit, particularly when the result of the adjudication by both the tribunals is the same. The suit cannot be regarded as a continuation of the execution proceedings. (*Venkataramana Rao and Abdur Rahman, JJ.*) RAMA SUBBAYYA *v.* THIMMIAH. **51 L.W. 45 = 1941 M.W.N. 752 = (1941) 2 M.L.J. 754.**

——**Art. 182 (5)**—*Step-in-aid—Decree of British Indian Court—Application for transfer for execution to*

LIMITATION ACT (1908), Art. 182.

Native State having reciprocal arrangement with Government of India—If step-in-aid.

Held by the Full Bench, Horwill, J., dissenting.—An application to a Court in British India to send a decree passed by it for execution to a Court in a Native State, there being reciprocal arrangement between that state and the Government of India whereby the decrees of the state shall be executed in British India and the decrees of British Indian Courts shall be executed by the Courts in that state, is a step-in-aid of execution under Art. 182 (5), Limitation Act, and the order on such application starts a fresh period of limitation. (*Leach, C. J., Venkataramana Rao, Abdur Rahman, Krishnaswamy Aiyangar and Horwill, JJ.*) CHINNASAMI PILLAI *v.* ANNAMALAI CHETTY.

I.L.R. (1941) Mad. 574 = 195 I.C. 576 = 14 R.M. 214 = 1941 A.W.R (Supp) 7 (2) = 1941 O.A. (Supp.) 297 = 53 L.W. 145 = 1941 M.W.N. 127 = A.I.R. 1941 Mad. 309 = (1941) 1 M.L.J. 242 (F.B.).

——Art. 182 (7)—*Instalment decree—Default clause—Execution on default—Limitation.*

Where it is provided in a decree for the payment of money by instalments that 'in case of any default the whole shall accrue due at once,' as soon as there is a default the decree holder is entitled to enforce his claim for the payment of the entire amount due except in respect of such amount as has become time barred. The execution application would be within time so far the instalments falling due within three years of the application are concerned. (*Bennett, J.*) MATA DIN *v.* SITA RAM. **1941 O.A. 915 = 1941 A.W.R. (C.C.) 340 = 1941 O.W.N. 1205.**

——Art. 182 (7)—*Instalment decree — Default clause—Execution—Limitation—Principle governing.*

In the case of a decree payable by instalments which provides that in default of payment of any one instalment the whole amount due would become payable, the decree-holder applying for execution, can rely on the decree as a whole for the purpose of limitation, even though his application for enforcement of the default clause may be barred. (*Bennett and Madeley, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* AIJAZ ALI. **1941 O.W.N. 1313 = 1941 A.W.R. (C.C.) 382 = 1941 O.A. 987.**

——Art. 183—Applicability — Arbitration Act—Award filed in High Court—Execution—Limitation. *See* ARBITRATION ACT, S. 15. **43 Bom L.R. 1006.**

LOCAL AUTHORITIES LOANS ACT (IX OF 1914) S. 4—*Scope—Loan by Panchayat Board without sanction—Effect—Right of creditor to return of money—Contract Act, S.* 65.

Where a Panchayat Board contracts a loan without obtaining the sanction of the Local Government as required by the rules framed under S. 4 of the Local Authorities Loans Act, the contract is void and no suit to enforce it would lie. But the creditor may in a proper case be entitled to the restoration of his money under S. 65 of the Contract Act. (*King, J.*) SUBBA RAO *v.* VENKATAPURAM PANCHAYAT BOARD.

1941 M.W.N. 885 = 54 L.W. 488 = (1941) 2 M.L.J. 216.

LOWER BURMA LAND AND REVENUE ACT (II OF 1876), Ss. 55 and 56—*Jurisdiction of Civil Court—Sale by township officer for arrears of land revenue—Suit to set aside.*

With regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the revenue officer, and accordingly this question is one for him to determine. In view of Ss. 55 and 56, the Civil Court has no jurisdiction to decide the question as to arrears of land revenue or default or both and consequently it cannot entertain a suit to set aside a sale by a township officer for arrears of land revenue. (*Roberts, C.J., Mosely and Dunkley, JJ.*) AH TWE *v.* MA MAI SEIN.

1941 Rang.L.R. 7 = 193 I.C. 372 = 13 R.R. 248 = A.I.R. 1941 Rang.97 (F.B.).

MADRAS AGRIC. RELIEF ACT (193) 8.

——S. 56—*Applicability—Suit to set aside revenue sale at which Government was purchaser.*

Per *Dunkley, J.*—Where the Government purchases a land at a revenue sale and settles the holder of the land as a licensee, the Government is a necessary party to a suit to set aside the aforesaid sale and consequently S. 56 would apply. (*Roberts, C.J., Mosely and Dunkley, JJ.*) AH TWE *v.* MA MAI SEIN.

1941 Rang.L.R. 7 = 193 I.C. 372 = 13 R.R. 248 = A.I.R. 1941 Rang. 97 (F.B.).

MADRAS ACTS.

Agriculturists' Relief Act (IV of 1938).
Board of Revenue Standing Orders.
Borstal Schools Act (V of 1926).
Children Act (IV of 1920).
City Municipal Act (IV of 1919).
City Police Act (III of 1888).
City Tenants' Protection Act (III of 1922).
Civil Rules of Practice (High Court).
Co-operative Societies Act (VI of 1932).
Court of Wards Act (I of 1902).
Criminal Rules of Practice (High Court).
Debt Conciliation Act (XI of 1936).
District Municipalities Act (V of 1920).
Electoral Rules.
Estates Land Act (I of 1908).
Forest Act (V of 1882).
Gaming Act (III of 1930).
General Sales Tax Act (IX of 1939).
Hereditary Village Offices Act (III of 1895).
High Court Rules (Original Side).
Hindu Religious Endowments Act (II of 1927).
Impartible Estates Act (II of 1904).
Land Encroachment Act (III of 1905).
Local Boards Act (XIV of 1920).
Malabar Tenancy Act (XIV of 1930).
Marumakkathayam Act (XXII of 1933).
Motor Vehicles Taxation Act (III of 1931).
Nambudri Act (XXI of 1933).
Prevention of Adulteration Act (III of 1918).
Prohibition Act (X of 1937)
Revenue Recovery Act (II of 1864).
Survey and Boundaries Act (IV of 1897).
Town Nuisance Act (III of 1889)
Village Courts Act (I of 1899).

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—Applicability—Suit by usufructuary mortgagee for possession—If one to enforce debt—Lessee from mortgagor subsequent to mortgage—Right to raise plea that debt should be scaled down. *See* 1940 Dig., Col. 829. VARAHALAYYA *v.* MATTAPALLI RAJU.

A.I.R. 1941 Mad. 21 = (1940) 2 M.L.J. 290.

——*Applicability—Surety for debtor—Amount scaled down as against debtor under Act—Surety not agriculturist—Right to claim benefit of* pro tanto *discharge—Contract Act, Ss.* 128 *and* 134.

S. 128 of the Contract Act lays down only the general principle governing the interpretation of contracts of guarantee and does not purport to govern the relations between parties as a result of subsequent events after the contract has been entered into. While the release of the

principal debtor by the act or omission of the creditor has the legal consequence of discharging the surety under S. 134 of the Contract Act, no such result can follow when the principal debtor is discharged by operation of a law or statute subsequently enacted; in such a case the surety cannot claim discharge *pro tanto* with the principal debtor. Hence a non-agriculturist surety is liable for the full amount of the debt even though the principal debtor who is an agriculturist would be liable only for the amount as scaled down in accordance with Madras Act IV of 1938. (*Wadsworth and Patanjali Sastri, JJ.*) SUBRAMANIAN CHETTIAR *v.* CHINNAMUTHU BATCHA ROWTHER. **54 L.W. 553= 1941 M.W.N. 992=(1941) 2 M.L.J. 751.**

———Mortgage decree debt due by Hindu joint family —Application for scaling down by one member—Relief under Act if restricted to his share—Relief if restricted only to agricultural land included in mortgage. *See* 1940 Dig., Col. 829. SUBBU PANDARAM *v.* LAKSHMINARAYANA CHETTIAR. **192 I.C 62= 13 R.M. 523 (1)=(1940) 1 M.L.J. 300.**

———*Scope—If invalid as affecting rights under Negotiable Instruments Act—Government of India Act.*

The provisions of the Madras Agriculturists' Relief Act are not invalid even though they may affect the rights of parties under the Negotiable Instruments Act. (*Wadsworth and Patanjali Sastri, JJ.*) KARUPPA GOUNDAN *v.* T. R. NARAYANASWAMI & CO. **4 F.L.J. (H.C.) 398=54 L.W 577= (1941) 2 M.L.J. 808.**

———Scope—If invalid or inoperative to affect decree or order of Privy Council—Competency of Provincial Legislature. *See* GOVERNMENT OF INDIA ACT (1935), SS. 99 AND 100. **54 L.W. 107= (1941) 2 M.L.J. 125.**

———*Scope—If* ultra vires—*Decree on promissory note passed before Act—Scaling down provisions—Validity of—Government of India Act, S.* 100—*Construction—Pith and substance theory.*

Per *Gwyer, C. J. and Varadachariar, J.*—It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule has been evolved whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character," for the purpose of determining whether it is legislation with respect to matter in this list or in that This rule of interpretation is equally applicable to the Indian Constitution Act, and may be accepted as a guide for the interpretation of the Government of India Act. It is clear that the pith and substance of the Madras Act IV of 1938, whatever it may be, cannot at any rate be said to be legislation with respect to negotiable instruments or promissory notes; it is immaterial that many or most of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect the question. The validity or invalidity of the Act cannot vary with money-lenders' practice. The Act cannot therefore be challenged as invading the forbidden field of List I referred to in S. 100 (1) of the Government of India Act, and is therefore *intra vires*. Further, where the liability on which the Act operates is a liability under a decree of Court passed before the Act in a suit on a promissory note, it ceases to be a debt evidenced by or based on a promissory note, as that is merged in the decree and has become a judgment-debt. The judgment-debt being already in existence when the Act was passed, the Act neither affects nor purports to affect any liability on a promissory note. The provisions of the Act in their application to a decree obtained on the promissory note are within the competence of the Madras Legislature to enact. It cannot be broadly stated that the Act does not really affect the principles embodied in the Negotiable Instruments Act. It is doubtful whether any Provincial Act could, in the form of a Debtors' Relief Act fundamentally affect the principle of negotiability, or the rights of a *bona fide* transferee for value.

Sulaiman, J.—There can of course be no doubt that the doctrine of pith and substance is of a general application. The substance of the impugned Act is to give relief to agriculturists in respect of interest accruing upon the debts due from them and the scheme of the Act is without doubt to benefit agriculturists as a class and relieve them from the onerous burden of high interest. Taking all the provisions together and considering the Act as a whole, it cannot be doubted that it is with respect to matters in Lists II and III and it is most difficult to place it outside these two Lists. But List I, entry No. 28, specially and expressly assigns cheques, bills of exchange, promissory notes and other instruments to the Federal legislature and it is impossible to deny that the Act encroaches upon the field covered by such instruments. A legislation which is with respect to decrees passed on promissory note is necessarily also with respect to promissory notes. The effect of Ss. 8 and 19 of the Madras Act IV of 1938 is to compel Courts to reopen decrees passed on the basis of promissory notes before the Act came into force, and recalculate the amounts due on them disallowing all interest outstanding on 1—10—1937, and even the principal if double the amount has already been paid by way of interest. The Act thus being repugnant to an existing Indian law relating to promissory-notes, which is really a Federal subject, is void to that extent. There is, however, nothing in the Act which really conflicts with any provision of Hindu Law and any repugnancy to the Contract Act is cured by the assent of the Governor-General.

Varadachariar, J.—As there is no provision in the Act dealing *in terms* with negotiable instruments, any objection based on the wide scope of the Act may be obviated by so interpreting the *general* terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **I.L.R. (1941) Kar (F.C.) 25=192 I.C. 225= 13 R.F.C 47=53 L.W. 109= 1941 M.W.N. 100= 45 C.W.N. (F.R.) 1=1941 O.A 237= 1941 A.W.R. (Rev.) 192=73 C.L.J. 1= 1941 O.W.N. 425=22 Pat.L.T 155= 1941 P.W.N. 98=1941 O.L.R. 157=3 F.L.J. 157= 1941 R.D 205=7 B.R 523=1941 A.L.W. 329= A.I.R. 1941 F.C. 47=(1941) 1 M.L.J. (Supp.) 1.**

———**S. 3**—*Firm of money-lenders—Claim to be "agriculturist"—Sustainability.*

It is clear with reference to the definition in S. 3 of Madras Act IV of 1938 that a firm of money lenders cannot be an agriculturist. (*Wadsworth and Patanjali Sastri, JJ.*) RAMANATHAN CHETTIAR *v.* SEETHARAMA AIYAR. **1941 M.W.N. 166=53 L.W. 105= A.I.R 1941 Mad. 537=(1941) 1 M.L.J. 172.**

———**S. 3, Proviso A**—*Partnership—Assessment to income-tax—Claim by partner to be agriculturist—Sustainability.*

Where a partnership is assessed to income-tax, what is really assessed is the income of the individual

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partners and an individual partner cannot therefore claim the benefit of Madras Act IV of 1938. Whether the individual partner's income falls below the taxable minimum or not, he is undoubtedly subjected to income-tax when the partnership is assessed, and he therefore comes within the proviso A to S. 3 of the Act. Hence he cannot be deemed to be an agriculturist. (*King and Patanjali Sastri, JJ.*) SOMAPPA *v.* VENKATASWAMY CHETTY. **1941 I T.R. 284 = 53 L.W. 685 = 1941 M.W.N. 488 = A.I.R. 1941 Mad. 672 = (1941) 1 M.L.J. 782.**

——**S. 3 (i)**—*Re-united Hindu family—If "undivided Hindu family" for purposes of Act IV of* 1938.

The words "undivided Hindu family" in the definition of "person" in S. 3 of Madras Act IV of 1938 will cover a re-united Hindu family which therefore will be disqualified from receiving the benefits of Act IV of 1938 where it pays more than Rs. 100 as *kattubadi*. (*Wadsworth, J.*) RAJESWARA RAO *v.* VENKATA RAYANIM GARU. **54 L W. 223 = 1941 M.W.N. 776 = A.I.R. 1941 Mad 846 = (1941) 2 M L J. 304.**

——**Ss 3 (2) and 23**—Person owning agricultural lands outside Municipality in addition to other lands within the Municipality—If excluded from the definition of "Agriculturist"—Sale in execution of judgment debtor's property—Expiry of thirty days without application for confirmation of sale—Debtor if still has saleable interest in the property to apply under S. 23 of Act IV of 1938. *See* 1940 Dig., Col. 829. RAMASWAMI IYER *v* KOMALAVALLI AMMAL.

195 I.C 165 = 14 R M. 141 = 1941 M.W.N, 176 = A.I R. 1941 Mad. 277 = (1940) 2 M.L.J. 1055.

——**S. 3 (ii), Proviso**—Burden of proof. *See* 1940 Dig., Col. 830. PERIASAMI PILLAI *v.* SIVATHIA PILLAI. **A.I.R 1941 Mad. 112 = (1940) 2 M.L J. 498.**

——**S. 3 (ii), Proviso A** — Applicability—Assessment to income-tax in 1936-37 in respect of income of previous year—If brings assessee within the proviso—Test to decide. *See* 1940 Dig., Col. 830. RAJOO *v.* PALANIAPPA CHETTIAR. **193 I.C. 547 = 13 R.M. 680 = A I.R. 1941 Mad. 289 = (1940) 2 M.L.J. 817.**

——**S. 3 (ii), Proviso A**—Debtor assessed to income-tax as manager of Hindu joint family—Other members of family—If also disqualified. *See* 1940 Dig., Col. 830. RAJOO *v.* PALANIAPPA CHETTIAR.

193 I.C. 547 = 13 R.M. 680 = A.I.R. 1941 Mad. 289 = (1940) 2 M.L.J. 817.

——**S. 3 (ii), Proviso B**—Applicability —No assessment in two half years preceding 1—10—1937—Assessment in 1938 retrospectively covering half year commencing 1—4—1939—If excluded from benefit of Act—Test to decide. *See* 1940 Dig., Col. 830. SARVESWARA RAO *v.* UMAMAHESWARA RAO.

I.L.R. (1941) Mad. 383 = 196 I.C. 288 = 14 R.M. 280 = A.I.R. 1941 Mad. 152 = (1940) 2 M L J. 841.

——**S. 3 (2), proviso (c)**—*Applicability—Usufructuary mortgagee of house bound to pay house-tax—Demand made on mortgagee—Tax paid by owner for the two relevant years—Mortgagee—If assessed to tax.*

Where the municipal register indicated that the assessee in respect of a house was a mutt to which it belonged and the receipts showed that the tax had been paid by the mutt for the two years immediately preceding 1—10—1937, though the demand had in the first instance been made on a usufructuary mortgagee of the house who was liable to pay the tax under the contract of mortgage and had in fact so paid for some years, it cannot be said that a finding that the mortgagee was assessed to tax in the two relevant years is unjustified. Such a finding cannot be said to be perverse or to involve an irregularity relating to jurisdiction so as to justify interference in revision. It was difficult to treat the entries in the register as the sole criterion of assessment or to regard the demand for the tax as the sole criterion of assessment. (*Wadsworth and Patanjali Sastri, JJ.*) TIRUGNANAVALLI AMMAL *v* VENUGOPAL PILLAI. **54 L W. 283 = A.I.R. 1941 Mad. 831 = (1941) 2 M.L.J. 497.**

——**S. 3 (ii), Proviso C**—Construction and scope—Mere interest in property in respect of which some one is assessed—If sufficient to exclude person interested—Actual assessment—Necessity. *See* 1940 Dig., Col. 831. SARVESWARA RAO *v.* UMAMAHESWARA RAO.

I.L.R (1941) Mad. 383 = 196 I C. 288 = 14 R.M. 280 = A.I R. 1941 Mad. 152 = (1940) 2 M.L.J. 841.

——**S. 3 (ii), Proviso C, Expl.**—*Assessment based on capital value—Rental value—Calculation—Basis.*

Where the assessment on properties is on the basis of capital value, under the Expl, to S. 3 (*ii*), Proviso C of the Madras Act IV of 1938, the rental value must be calculated at 5 per cent of the capital value It is not open to the Court to take evidence of actual rent paid, capitalise this on the 5 per cent. basis, and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated. (*Wadsworth, J.*) SUBBARAMAYYA *v.* SUBBIAH. **53 L.W. 391 = 1941 M.W.N. 291 = A I.R. 1941 Mad 448 = (1941) 1 M.L.J. 466.**

——**Ss. 3 (ii) Proviso D and 15**—Applicability—Kanom held by tarwad paying over Rs. 500 as land revenue—Suit for redemption—Par ition of tarwad pending suit—Kanom allotted to tavazhi paying less than Rs. 500 as land revenue—Application by tavazhi for scaling down arrears of rent or michawaram—Maintainability. *See* 1940 Dig., Col. 831. SOOLAPANI MOOPIL VARIAR *v.* VEETTIL VELOOR.

A.I.R. 1941 Mad. 196 = (1940) 2 M.L.J. 788.

——**S. 3 (ii), Proviso D**—*Construction—Jenmi—Payment of land revenue—If should be as jenmi.*

The plain words of proviso D to Sec. 3 (ii) of Madras Act IV of 1938 apply to any jenmi who pays more than Rs. 500 as land revenue. It is not necessary that he should pay as jenmi; and it cannot therefore be held that one who pays land revenue under a kanom deed does not pay land revenue for himself merely because the payment enures for the benefit of his jenmi. Where a jenmi pays as a jenmi land revenue of Rs. 430 and is also liable to ryotwari assessment amount to about Rs. 300, he cannot be deemed to be an agriculturist under Act IV of 1938. The same rule applies also to the case of a jenmi who pays land revenue exceeding Rs. 500 partly in respect of jenmam land and partly in respect of land held on kanom tenure. (*Wadsworth, J.*) NARAYANAN NAMBUDIRIPAD *v.* ACHUTHAN NAYAR. **1941 M.W.N. 914 = 54 L.W. 466 = (1941) 2 M.L.J. 584.**

——**S. 3 (ii), Proviso D**—Construction — Person being landholder in respect of several estates and paying over Rs. 500 as peshkash in all—If excluded from 'agriculturist'. *See* 1940 Dig., Col. 831. NARAYANASWAMI REDDY *v* VEERASAMI REDDY.

A.I.R. 1941 Mad. 244 = (1940) 2 M.L.J. 711.

——**S. 3 (ii), Proviso D**—*Owner of share in shrotriem paying less than Rs.* 100 *as proportionate jodi—If "agriculturist."*

Where the debtors are owners of only a share in a shrotriem and the proportionate *jodi* payable by them is

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less than Rs. 100, they are not excluded from the category of "agriculturists" entitled to relief under Madras Act IV of 1938, even though there may be a theoretical liability for the whole of the *jodi* laid upon each of the shares so far as the Government is concerned. (*Wadsworth and Patanjali Sastri, JJ.*) SRINIVASAYYA *v.* OBULA RAJU. **54 L.W. 118 = 1941 M.W.N. 746 = A.I.R. 1941 Mad. 741 = (1941) 2 M.L.J. 164.**

——**S. 3 (ii), Proviso D**—"Quit rent, jodi, kattubadi, poruppu or the like"—Meaning of—If include kaval fees, road cess and water charges. *See* 1940 Dig., Col. 831. CHANDRASEKARA AYYAR *v.* OFFICIAL RECEIVER, WEST TANJORE. **192 I.C. 336 = 13 R.M. 540 (1) = (1940) 2 M.L.J. 461.**

——**S. 3 (ii), Proviso D**—Total payments of land revenue by jenmi exceeding Rs. 500 only if other payments as ryotwari pattadar are included—Proviso D, applicability of. *See* 1940 Dig., Col. 832. NALUPURAPPATTI MAMMAD *v.* NARAYANA PATTAR. **1941 M.W.N. 34 = A.I.R. 1941 Mad. 305 = (1940) 2 M.L.J. 934.**

——**S. 3 (ii) (a)**—Applicability—Holder of vendor's lien in agricultural land—Right to benefit of Act. *See* 1940 Dig., Col. 832. SINGARACHARIAR *v.* PAPATHI AMMAL. **193 I.C. 896 = 13 R.M. 737 = A.I.R. 1941 Mad. 127 = (1940) 2 M.L.J. 501.**

——**S. 3 (ii) (a)**—Simple mortgagee—If agriculturist *See* 1940 Dig., Col. 832. PERIASWAMI CHETTIAR *v* RAMASWAMI GOUNDAN. **I.L.R. (1941) Mad. 53 = 195 I.C. 697 = 14 R.M. 219 = A.I.R. 1941 Mad. 113 = (1940) 2 M.L.J. 513.**

——**S. 3 (ii) (a)**—Simple mortgagee—If agriculturist. *See* 1940 Dig., Col. 832. SUBBURAMIER *v.* VENKATACHALAPATHI AIYAR. **192 I.C. 100 = 13 R.M. 534 = (1940) 2 M.L.J. 516.**

——**S. 3 (3)**—"*Debt*"—*Advance by one partner to partnership—If can be scaled down.*

An advance made by one partner to the partnership does not entail a liability by the partners to repay that advance but rather a mere right in equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. Consequently such an advance cannot be scaled down as a debt even where the partners of the firm are shown to be agriculturists within the meaning of Madras Act IV of 1938. There is no reason to suppose that "debt" in S. 3 (3) of the Act is meant to include, contrary to usage, an unascertained amount. "Liability" in that clause means a legal liability, a liability enforceable at law. (*Horwill, J.*) SATTIRAJU *v.* VENKATASATYAM. **1941 M.W.N. 49 = 53 L.W. 191 = A.I.R. 1941 Mad. 410 = (1941) 1 M.L.J. 36.**

——**S. 3 (iii)**—*Debt—Liability to make restitution—Claim for restitution against son of original party—Liability to be scaled down—Insolvency of father—Application by son—S.* 21.

The liability to make restitution is a debt, and it is no less a debt when due from the son of original party by reason of his possession of family property after partition. Nor would the insolvency of a Hindu father prevent his son from applying for the benefits of Madras Act IV of 1938, by reason of S. 21 of the Act. Clearly S. 21 only bars an application by the insolvent and not by some other non-insolvent person liable for the same debt. (*Wadsworth and Patanjali Sastri, JJ.*) VINAYAKA RAO *v.* JUNIOR PRINCE'S ESTATE. **I.L.R (1941) Mad. 496 = 53 L.W. 69 = 1941 M.W.N. 95 = (1941) 1 M.L.J. 467.**

——**Ss. 3 (3) and 7**—Puisne mortgagee—Right to apply to scale down—Person liable to pay debt. *See* 1940 Dig., Col. 832. PERIASWAMI CHETTIAR *v.* RAMASWAMI GOUNDAN. **I.L.R. (1941) Mad. 53 = 195 I.C. 697 = 14 R.M. 219 = A.I.R. 1941 Mad. 113 = (1940) 2 M.L.J. 513.**

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——**Ss. 3 (iii), Proviso and 8, Expl.**—*Applicability—Sole legatee executing promissory note in* 1936 *of debts under earlier notes by testator—Testator dying in* 1935*—Right of legatee to benefit of Act—Legatee agriculturist, but testator not agriculturist when he died—Effect.*

In 1936, the sole legatee under a will executed a consolidated promissory note in discharge of earlier promissory notes executed by the testator who died in 1935. In a suit on the note, the legatee who was an agriculturist himself applied for scaling down the debt.

Held, (1) that in order to treat the suit promissory note as a renewal of the earlier promissory notes so as to enable the applicant to take advantage of the Explanation to S. 8 of Madras Act IV of 1938, the debtor had to show that the prior debts were due by an agriculturist and that the maker of the earlier notes (the testator) was an agriculturist on and after 1—10—1937, and the testator having died in 1935, *i.e.*, before the relevant period, could not be treated as an agriculturist on 1—10—1937, and the Court could not go behind the suit promissory note in scaling down; (2) that the debt must consequently be scaled down under S. 9 as a fresh debt of 1936.

Quaere, whether if the testator had lived long enough to make the definition of agriculturist applicable to him, the legatee who was obliged to pay his testator's debts could claim that a fresh document in discharge of the testator's debts was a renewal thereof? (*Wadsworth, J.*) NAGABHUSHANAM *v.* VENKAYYA. **54 L.W. 225 = 1941 M.W.N. 863 = A.I.R. 1941 Mad. 854 = (1941) 2 M.L.J. 261.**

——**S. 3 (iii), Proviso C**—*Applicability—Assessment—Propriety of—If can be questioned or gone into.*

For the purpose of Proviso C to S. 3 (*iii*) of Madras Act IV of 1938, the Court can go into evidence as to the correctness of the certificate under S. 27 of the Act, but not as to the propriety of the assessment on the basis of which the person is to be qualified or disqualified as an agriculturist. If in fact there has been an assessment at a certain date it is this assessment which must govern the application of the proviso and not some theoretical figure which might have been, but was not, adopted. (*Wadsworth and Patanjali Sastri, JJ.*) SATYANARAYANAMURTHI, *In re.* **53 L.W. 108 = 1941 M.W.N 173 = A.I.R. 1941 Mad 413 = (1941) 1 M.L.J. 185.**

——**S. 3 (v)**—"*Creditor*" —*Promissory note—Endorsee—If creditor.*

There can be no doubt that the endorsee of a promissory note is the assign of the original promisee even though he has greater rights than an assign by deeds and the endorsee is therefore a "creditor" within the meaning of S. 3 (*v*) of Madras Act IV of 1938. (*Wadsworth and Patanjali Sastri, JJ.*) KARUPPA GOUNDAN *v.* T. R. NARAYANASWAMI & CO. **4 F.L.J. (H.C.) 398 = 54 L.W. 577 = (1941) 2 M.L.J. 808.**

——**Ss. 3 (v) and 8**—'Creditor'—If includes successive assignees—Renewal in favour of assignee from creditor—If renewal to same creditor. *See* 1940 Dig. Col. 832 KODANDARAMAYYA *v* VENKATA REDDI. **A.I.R 1941 Mad. 74 (1) = (1940) 2 M.L. J. 553.**

——**S. 4 (d)**—*Applicability and scope—Debt on security of house property alone in Municipality in existence on* 1—10—1937*—Subsequent addition of agricultural property as security after Act—Liability of debt to be scaled down.*

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Where on the 1st of October, 1937, there is a debt already contracted on the security of house property alone in a Municipality, which by the terms of S. 4 (*d*) of Madras Act IV of 1938 is excluded from the operation of the Act, the addition of further security of agricultural property at a date after the Act came into force cannot retrospectively make it a debt contracted on the security of property other than municipal house property so as to exclude S. 4 (*d*) and to bring into force Ss. 7 and 8 of the Act. (*Wadsworth and Patanjali Sastri, JJ.*) MUTHUKARUPPAN CHETTIAR *v.* SUBBIAH CHETTIAR. **54 L.W. 468 = 1941 M.W.N. 991 = (1941) 2 M.L.J. 653**

——**S. 4 (e)**—Corporation—Society formed under Societies Registration Act. *See* 1940 Dig., Col. 833. RUKMINAMMA *v.* VENKATARAMADAS. **191 I.C. 816 = 13 R.M. 512 = (1940) 2 M.L.J. 554.**

——**S. 4 (f)**—*Applicability—Surety for next friend of minors—Liability of—If one arising out of breach of trust.*

The liability towards the beneficiary of a surety for the due discharge by a person under a fiduciary relationship of his duties such as a surety for the next friend of a minor is a contractual liability enforceable only in case the trustee commits a breach of trust, and is not one "arising out of a breach of trust" excluded from the operation of Madras Act IV of 1938 by S. 4 (*f*) of the Act. (*Wadsworth and Patanjali Sastri, JJ.*) LINGA REDDI *v.* SUBBARAMI REDDI. **54 L.W. 697 = 1941 M.W.N. 1042 = (1941) 2 M.L.J. 1008.**

——**Ss. 4 (f) and 10 (2) (ii)**—Applicability—Vendee of mortgaged property agreeing to discharge mortgage—Promissory note to vendee—Debt—If falls under S. 10 (2) (ii)—Breach of trust, if any. *See* 1940 Dig., Col. 833. DORAIKANNU ODAYAR *v.* VEERASAMI PADAYACHI. **196 I.C. 276 = 14 R.M. 274 = A.I.R. 1941 Mad. 59 = (1940) 2 M.L.J. 651.**

——**S. 4 (h)**—Construction—Half share in another mortgage—Whether "other property" or "debt". *See* 1940 Dig., Col. 833. RAMASWAMI REDDI *v.* ALAGAYAMMAL. **192 I.C. 386 = 13 R.M. 547 = (1940) 1 M.L.J. 534.**

——**S. 4 (h)**—*Promissory note standing in favour of men—Evidence to show that debt is really owed to a woman to invoke S. 4 (h)—Not permissible.*

Where a decree was obtained by the holder of a promissory note which at least since 1935 stood in the name of men it will not be permissible for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4 (*h*) of Act IV of 1938. The liability of the judgment-debtor is to the decree-holder and to no one else, though the decree-holder may himself be liable to pay the realisation to a woman (*Wadsworth, J.*) SUBBA REDDI *v.* VENKATAPPA REDDI. **53 L.W. 245 = 1941 M.W.N. 203 = A.I.R. 1941 Mad. 596 = (1941) 1 M.L.J. 313**

——**S. 4 (h)**—"*Property*"—*Maintenance allowance decreed to Hindu daughter against father's heirs or devisees.*

Maintenance allowance decreed to a Hindu daughter against the heirs or devisees of her father is "property" within the meaning of S. 4 (*h*) of the Madras Act IV of 1938 and a woman in receipt of such allowance is not entitled to the immunity afforded by that section (*Wadsworth and Patanjali Sastri, JJ.*) CHINNABBI *v.* VENKATASUBBAMMA. **I.L.R. (1941) Mad. 567 = 1941 M.W.N. 296 = 53 L.W. 75 (2) = A.I.R. 1941 Mad. 507 = (1941) 1 M.L.J. 123**

——**Ss. 7, 8 and 9**—Applicability—Decrees passed after Act came into force—Liability to be scaled down.

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See 1940 Dig., Col. 834. KOTAYYA *v.* VENKATA PUNNAYYA. **194 I.C. 753 = 14 R.M. 56 = (1940) 2 M.L.J. 202.**

——**Ss. 7, 8, 9 and 19**—Compromise decree—Scaling down on basis of original debt—Uncertified payment—If provable. *See* 1940 Dig., Col. 834. RAMAMURTHI *v.* SITARAMAYYA. **195 I.C. 752 = 14 R.M. 224 = A.I.R. 1941 Mad. 56 = (1940) 2 M.L.J. 293.**

——**Ss. 7, 8 and 9**—"*Decree*"—*Preliminary decree in mortgage suit passed after Act—Scaling down—Power of Court.*

The word "decree" in Ss. 7, 8 and 9 refers to decrees passed before the commencement of Madras Act IV of 1938 and not decree passed after the Act. A preliminary decree in a mortgage suit passed after the coming into force of the Act is not liable to be scaled down subsequently. The fact that no final decree has yet been passed in the mortgage suit makes no difference, because it is the preliminary decree which fixes the rights and liabilities of the parties. The final decree does not change the position except that it gives the mortgagee the right to sell the property for the amount declared to be due in the preliminary decree. (*Leach, C.J. and Happell, J.*) VARADARAJA PILLAI *v.* RUKMANI AMMAL. **54 L.W. 306 = A.I.R. 1941 Mad. 891 (1) = (1941) 2 M.L.J. 359.**

——**Ss. 8 and 9**—Applicability—Abortive sale of trees in 1931—Suit for refund of purchase price by vendee after 1932—Decree—Application for scaling down—Date of liability—Date of decree or date of payment of purchase-money. *See* 1940 Dig., Col. 835. PARAVAN *v.* GOPALAN NAIR. **194 I.C. 408 = 13 R.M. 769 = (1940) 2 M.L.J. 273**

——**S. 8**—*Applicability—"Hawala"—Debt due by A to B cancelled and debt to C substituted—If "renewal" to same creditor.*

Where by a trepartite agreement known as "*havala*" a debt due by *A* to *B*, is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B's* separate obligation to *C*, this cannot clearly enable *A* to claim under S. 8 of Madras Act IV of 1938 that his debt to *C* is a renewal of the debt to *B*. *C* is not the same creditor as *B*, nor is he an assignee of *B* in respect of *A's* original debt. (*Wadsworth, J.*) PAPAIAH *v.* RAMAPUNNIAH. **54 L.W. 471 = 1941 M.W.N. 946 = (1941) 2 M.L.J. 566.**

——**Ss. 8 and 9**—*Applicability—Promissory note in favour of two persons before* 1932—*Partition of debt and execution of separate promissory note in favour of each of the sharers after* 1932—*If renewal of prior one.*

A debtor executed a promissory note on 15—5—1930 in favour of two brothers, *A* and *B*. *B* died and after his death, *A* and *B's* son agreed that the amount due under the promissory note should be divided between them in equal shares. The debtor accordingly executed two fresh promissory notes, one in favour of *A* and another in favour of *B's* son on 29—9—1934. In an application by the debtor for scaling down the debt,

Held, that where a single debt was superseded by two new and separate debts, each in favour of one of the two persons who were jointly entitled, the fresh promissory notes could not be regarded as renewals of the earlier promissory note within the meaning of the Explanation to S. 8 of the Madras Act IV of 1938, and the debt had therefore to be scaled down under S. 9 of the Act. The principle was the same whether the new debts were equal or unequal (*Wadsworth and Patanjali Sastri, JJ.*) VENKATESWARLU *v* VENKATRAJU. **53 L.W. 642 = 1941 M.W.N. 501 = A.I.R. 1941 Mad. 628 = (1941) 1 M.L.J. 718.**

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——**S. 8**—Appropriations made by creditor in plaint filed before 1-10-1937—If can be ignored or re-opened. *See* 1940 Dg., Col. 836. PERIAKARUPPAN CHETTIAR *v.* MARAPPA GOUNDAN.
A.I.R. 1941 Mad. 67 (1)=(1940) 2 M.L.J. 654.

——**Ss. 8 and 9**—Appropriation—Right of creditor—Payment towards debt generally without appropriation prior to October, 1937—If can be treated as towards interest after application by debtor for relief. *See* 1940 Dig., Col. 836. DURAISWAMY AIYANGAR *v.* RAGHAVACHARIAR. **I.L.R. (1941) Mad. 57=195 I.C. 853=14 R.M. 238=A.I.R. 1941 Mad. 107=(1940) 2 M.L.J. 648.**

——**S. 8**—*Burden of proof—Payments made before 1st October*, 1937 *and adjusted towards debt before 1st October*, 1937—*Right of debtor to benefit of section.*

Where it is conceded that certain payments made by the debtor had been adjusted towards the debt prior to 1st October, 1937, the adjustments must have been in reduction of either interest or principal. If the debtor is not able to show that they are in reduction of principal leaving interest outstanding on 1st October, 1937, he must fail, as the burden is on him to show that interest was outstanding on 1st October, 1937, and was wiped out by S. 8 of the Act. In this respect there is no difference in principal between the case of bankers charging compound interest and other creditors charging simple interest. (*Wadsworth and Patanjali Sastri, JJ.*) VENKITESWARA AIYAR *v.* RAMASWAMI AYYAR. **53 L.W. 24=1941 M.W.N. 326=A.I.R. 1941 Mad. 403=(1941) 1 M.L.J. 9.**

——**S 8**—Compromise decree—If renewal of pre-existing debt—Basis for scaling down. *See* MADRAS AGRICULTURISTS' RELIEF ACT, SS. 8, 9 AND 19, PROVISO. **(1941) 2 M.L.J. 658.**

——**S. 8**—Compromise decree—Mortgage to stakeholder of chit fund for payment of Rs. 9,000 in 18 instalments of Rs. 500 each—Suit on mortgage—Compromise decree for payment of smaller amount in five instalments—Liability of decree to be scaled down—Date on which liability to be regarded as incurred. *See* 1940 Dig., Col. 836. KANNAN NAMBIAR *v.* SUBRAMANIA PATTAR. **I.L.R. (1941) Mad. 486=196 I.C. 291=14 R.M. 282=1941 M.W.N. 76=A.I.R 1941 Mad. 231=(1940) 2 M.L.J. 927.**

——**Ss. 8 and 19**—Compromise decree—Scaling down—If can be scaled down on basis of original principal amount as renewal of pre-existing liability. *See* 1940 Dig., Col. 837. VENKATAMMAL *v.* RAMASWAMI IYER. **A.I.R. 1941 Mad. 62=(1940) 2 M.L.J. 685.**

——**Ss. 8 and 9**—Debt incurred before 1st October, 1932—Suit on and decree after 1st October, 1932—Scaling down—Starting point—Date of decree or date of debt. *See* 1940 Dig., Col. 837. RAMASESHAYYA *v.* KUTUMBA RAO. **194 I.C. 655=14 R.M. 27=(1940) 2 M.L.J. 235.**

——**Ss. 8, 9 and 16**—*Decree for rent—Award of costs—Interest on costs—If can be scaled down.*

Although the definition of "rent" includes rent covered by a decree, the terms of S. 16 of Act IV of 1938 make it quite clear that costs awarded in a decree for rent are something quite apart from the rent, and the decree for costs is liable to be scaled down under Ss. 8 and 9, as regards interest. Even apart from the claim of an applicant to be entitled to the benefits of the Act under S. 15 as regards rent, he would be entitled to the benefits of the Act under Ss. 8 and 9 as regards interest on costs. (*Wadsworth and Patanjali Sastri, JJ.*) VENKATARATNAM *v.* SURYA RAO. **1941 M.W.N. 96=53 L.W. 86=A.I.R. 1941 Mad. 500=(1941) 1 M.L.J. 156.**

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——**Ss. 8, 9 and 19 Proviso**—*Decree on promissory note of* 1933 *for principal, interest and costs—Execution sale before Act realising more than sufficient to cover all interest and costs and part of principal—Effect—Right of judgment debtor.*

There was a decree on a promissory note for Rs. 3,000 dated 27-6-1933. On the date of the decree the amount due for principal and interest was Rs. 3,400 with Rs. 337 for costs. On 23-2-1937, the respondent purchased in execution sale the property of the judgment-debtor for Rs. 3,406 for which amount part satisfaction was entired on 17-7-1937. On 30 8 1937, a fresh execution petition was filed for Rs. 662-7-6, as the balance due under the decree. The judgment-debtor claimed relief under Ss. 8, 9 and 19 of the Madras Act IV of 1938.

Held, that the payment of Rs. 3,406, being the sale proceeds of execution could not be regarded as a payment to the debt generally kept in suspense and not appropriated, as it was actually applied in satisfaction of the decree and a *pro tanto* discharge was given. There was no presumption that it was appropriated first towards principal, and the payment being more than sufficient to cover all the interest on the debt, the judgment debtor could not claim that there was on 1 10-1937 any interest outstanding; he would not therefore be benefited by any re-appropriation from principal to costs under the proviso to S. 19 of the Act. (*Wadsworth and Patanjali Sastri, JJ.*) RAMASWAMI AYYAR *v.* RAMAYYA SASTRIGAL. **53 L.W. 190=1941 M.W.N. 204 (2)=A.I.R. 1941 Mad. 571=(1941) 1 M.L.J. 295.**

——**S. 8**—*Mortgage in* 1922—*Assignment by mortgagee in* 1928 *for amount higher than principal amount of mortgage—Assignee transferring rights to another—Suit by latter—Decree against heirs of first assignee only—Application for scaling down—Basis for scaling down.*

M executed two mortgages to *T* one for Rs. 2,000 in 1921 and another for Rs. 1,000 in 1922. In 1928 *T* having purchased certain properties from *R*, assigned to *R*, her rights under the two mortgages from *M* by way of making up part of the sale price due to *R*, the value of the mortgages being estimated at Rs. 5,290 at the time. In 1931 *R* assigned his rights under these two mortgages to the appellent, who in 1935 brought a suit to enforce the mortgages as against the heirs of *M*, and against the heirs of *T* on the basis of the covenants of title contained in the deeds of assignment. The Court found that *M* had no title to the lands mortgaged and dismissed the suit as against his heirs, but passed a decree for Rs. 5,290 against the heir of *T* on the ground of breach of covenants of title contained in the assignment deeds by *T*. After the coming into force of Madras Act IV of 1938, one of the heirs of *T* applied under S. 19 of the Act to scale down the decree debt.

Held, that the liability of the heirs of *T* could not be traced to the original mortgages by *M*, but only to the assignment by *T*, and the basis for scaling down the decree debt was not the original principal of the two mortgage deeds by *M* but Rs 5,290, the amount for which the assignments by *T* were made to *R*. (*Wadsworth and Patanjali Sastri, JJ.*) KUPPAN CHETTIAR *v.* KALIAMMAL. **54 L.W. 281=A.I.R. 1941 Mad. 886=(1941) 2 M.L.J. 360.**

——**Ss. 8 and 19**—*Mortgage of* 1914—*Payment of more than double the principal—Preliminary decree for redemption—Purchasers of portions of hypotheca parties to suit and decree—Application by mortgagor to scale down—Purchasers not agriculturists—Full satisfaction of decree—If can be entered.*

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The respondents who had executed a mortgage to the petitioner in 1914 sued for redemption of the mortgage joining as co-plaintiffs the purchasers of portions of the hypotheca, and obtained a preliminary decree. The petitioners were agriculturists, but the other decree-holders (purchasers) were not agriculturists. The respondents applied for scaling down the decree under Ss. 8 and 19 of Madras Act IV of 1938. It was found that the amount already paid to the decree-holder was more than twice the principal sum payable by the respondents under the mortgage and the Court therefore ordered under S. 19 read with S. 8 of the Act full satisfaction of the decree as a whole to be entered. The petitioner decree-holder contended, in revision, that since some of the other judgment-debtors who were purchasers of portions of the hypotheca were not agriculturists, the Court below should not have entered full satisfaction of the decree even as against them as they were not entitled to the benefits of the Act.

Held, that the order entering full satisfaction was correct, by entering satisfaction of the decree as a whole the Court was only allowing to the agriculturist mortgagors the full benefits of the Act and not necessarily benefiting the non agriculturist purchasers of portions of the hypotheca. (*King and Patanjali Sastri, JJ.*) MARINA AMMAYI *v.* MIRZA BAKHAR BEG SAHEB.

1941 M.W.N. 386 = 53 L.W. 490 = A.I.R 1941 Mad. 557 = (1941) 1 M.L.J. 547.

——**Ss. 8 and 9**—Mortgage of 1929—Promissory note in 1937 for interest due under mortgage—Decree in suit on promissory note—Scaling down—Procedure—Debt—If incurred before or after 1932. *See* 1940 Dig., Col. 838. SANKARA AIYAR *v.* YAGAPPAN SERVAI.

A.I.R. 1941 Mad. 193 = (1940) 2 M.L.J. 874.

——**Ss. 8 and 19**—*Mortgage—Suit on against mortgagor as well as Court auction purchaser of equity of redemption—Application by mortgagor for scaling down—Right of mortgagee to claim decree for full amount against purchaser—Relinquishment of claim to personal decree—Effect.*

A mortgagee who sues to enforce his mortgage is not entitled to a decree for the whole amount due under the mortgage against a non agriculturist Court auction purchaser of the mortgaged property, when the agriculturist mortgagor claims to have the debt scaled down under Madras Act IV of 1938. It is true that agriculturist debtors alone are entitled to the relief provided in the Act which does not contemplate any scaling down of debts due by others but it does not follow that a non-agriculturist debtor can in no circumstances be benefited by the scaling down of a debt under the Act. The properties in the hands of the purchaser are liable only as security for the debt due to the mortgagor, and if, as a result of the Act, there is a statutory discharge or reduction of the debt, the properties cannot be proceeded against for anything more than the scaled down amount of the debt. If the burden on the property purchased by the purchaser is reduced without payment by reason of the provisions of S. 8 of the Act, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit of the scaling down not because the Act applies to him, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. The mortgagee's relinquishment of his right to a personal decree against the mortgagor after the coming into force of the Act and the mortgagor's application for relief under the Act cannot affect the position arising under the Act with reference to a date long prior to such relinquishment. (*King and Patanjali Sastri, JJ.*) ARUNACHALAM PILLAI *v* SEETHARAM NAIDU.

I L.R. (1941) Mad. 930 = 1941 M.W.N. 390 = 53 L.W. 515 = A.I.R. 1941 Mad. 584 = (1941) 1 M.L.J 561.

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——**Ss. 8 and 9**—Promissory note of 1924—Endorsement by payee in 1933—Suit by endorsee—Decree against executant and indorser—Application by indorser to scale down—Procedure—Debt—If incurred before or after 1—10—1932. *See* 1940 Dig., Col. 838. POOVANALINGAM PILLAI *v.* NAGARATHNAM PILLAI.

191 I.C. 846 = 13 R.M. 516 = (1940) 2 M.L.J. 575

——**Ss. 8, 9 and 19, Proviso**—*Promissory note of 1931—Letter of guarantee in 1933—Compromise decree in suit—Application for scaling down—Liability of surety—If to be scaled down under S. 8 or under S. 9—Scaling down as against principal debtor—Procedure—Costs—If can be allocated.*

In respect of a promissory note executed by defendants 1 and 2 on 4-1-1931, the 3rd, 4th and 5th defendants gave a letter of guarantee on 7-8-1933. In a suit on the promissory note, a compromise decree was passed for about Rs. 5,000 for principal, interest and costs. The 1st and the 5th defendants applied for relief under Madras Act IV of 1938. The other defendants were not made parties to these applications.

Held, (1) that as the 5th defendant became liable under the letter of guarantee only on 7-8-1933, he was entitled to have his liability scaled down with reference to S. 9 of Madras Act IV of 1938, and not under S. 8, although under the general law he may have a right to resist execution on the ground that the full amount due from the principal debtors have been paid; (2) that a decree on a compromise was substantially the same as a decree on any other contract and to the extent to which the compromise was a renewal of a pre-existing debt the decree had to be scaled down on the basis of the original principal; (3) that since the compromise did not separately allocate any portion of the amount towards the costs in the suit, it was not proper for the Court to reopen the compromise, tax the costs and treat the payment of the sum so taxed as the amount first to be provided for under the proviso to S. 19 of the Act, which related only to costs as originally decreed to the creditor; (4) that the proviso to S. 19 applied only to costs as decreed and to costs in execution, and the Court should not therefore direct payment to be made towards execution costs before the scaling down process was to start. (*Wadsworth and Patanjali Sastri, JJ.*) NARAYANAN CHETTIAR *v.* VEERU GOUNDAR.

54 L.W. 461 = 1941 M.W.N. 922 = (1941) 2 M.L.J. 658

——**Ss. 8 and 9**—*Promissory note in renewal of earlier notes—Payments specially made towards interest and for principal—If can be reopened—Mode of scaling down.*

The respondent on 26—6—1932, executed a promissory note for Rs. 463 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26—6—1934, Rs. 111-8-0 was paid for interest and Rs. 323 was paid for principal leaving a balance of Rs. 140 due. On 15—12—1934, Rs. 8 was paid for inerest and Rs. 40 for balance, leaving a balance of Rs. 100. The suit was filed in December, 1937, for Rs. 100 and subsequent interest and ended in a decree on 4—3—1938.

Held, that in scaling down the decree under S. 19 of of Madras Act IV of 1938, the debtor could not prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes so as to be cancelled on 1—10—1937, under S. 8. The parties actually intended to appropriate the payments towards the real principal of the suit note

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which comprised both principal and interest of the earlier notes. The creditor was therefore entitled to a decree for Rs. 100 with interest at 6¼ per cent. from 1—10—1937 up to the date of decree and subsequent interest at 6 per cent. and costs and interest thereon at 5 per cent. from the date of the decree to 22—3—1938. date of the Act, and thereafter at 6 per cent. (*Wadsworth, J*) RAMAN CHETTIAR *v.* PERUMAL UDAYAR.

53 L.W. 103=1941 M.W.N 328= A.I.R. 1941 Mad. 397=(1941) 1 M.L.J. 256.

——**S. 8**—Promissory note—Suit by endorsee—Plea that part consideration represented interest on prior mortgage—If open—Negotiable Instruments Act. S. 120, *See* NEGOTIABLE INSTRUMENTS ACT, S. 120.

(1941) 2 M.L.J. 808

——**Ss. 8 and 9**—*Pronote in favour of* A *the brother of* B *in* 1931 *when they were undivided—Fresh note of* 1933 *in favour of* B *in discharge of the earlier one—Partition between* A *and* B *in* 1932—*Note assigned in* 1937 *to* A *who sued on it—If suit can be dismissed on failure of* A *to produce the earlier note—Scaling down —Principles.*

The plaintiff sued on a note executed by the second defendant in favour of the plaintiff's brother the first defendant on 14th April, 1933, which was assigned to the plaintiff on 2nd August, 1937. It was found that the second defendant was an agriculturist. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931, executed in favour of the plaintiff himself at a time when the family of the plaintiff and first defendant was undivided, the partition being in 1932. The lower appellate Court found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and that in the absence of proof of the documents necessary in order to ascertain the original principal no decree could be given against the second defendant. On revision,

Held, that no doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt the Court would be entitled to draw an inference adverse to the creditor from the non production of those documents [Error in report of C. R. P. No. 331 of 1939 in *Suryanarayana* v. *Viswanadham*, (1940) 2 M.L.J. (N.R.C.) 27, pointed out]. But as the suit note itself was executed in favour of the first defendant in discharge of an earlier note executed in favour of the plaintiff, the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. As the first note was executed in favour of the plaintiff as representing the joint family and the second one was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition it could not be said that the creditors were the same in the two transactions. If the note of 1931 had been assigned to plaintiff before it was discharged by the note of 1933 there would be a renewal in favour of the same creditor but no such case was pleaded. Accordingly the suit ought not to be dismissed solely for the reason that plaintiff had not produced the materials necessary to scale down the debt but must be decreed as scaled down under S. 9 of the Act. (*Wadsworth, J.*) MALLAYYA *v.* MALLAYYA.

(1941) 2 M.L.J. 1085.

——**S. 8, Expl.**—Applicability—Conditions for. *See* MADRAS AGRICULTURISTS' RELIEF ACT, SS. 3 (*iii*), PROVISO AND 8, EXPLANATION.

(1941) 2 M.L.J. 261.

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——**S. 8, Expl**—*Applicability—Debt due by Hindu joint family under promissory note by two members—Partition—Debt allotted to another member—Fresh promissory note by that member—If renewal.*

Where there is a debt due by a Hindu joint family, which is a "person" under S. 3 (1) of the Madras Act IV of 1938, for which is substituted another debt due by an individual who formerly constituted part of that statutory person, there is a different debtor, and it would be carrying the theory of property liability too far to treat this different debtor as merely renewing his own liability which had resulted from an interest in the joint family property. Where on a partition in the defendant's family, a debt under a promissory note dated 2—3—1925 executed by the defendant's father and brother was allotted to the defendant who thereafter executed a promissory note on 12—7—1932, in discharge of the prior note.

Held, that the defendant's debt was not due from the same debtor as the original debt and could not therefore be regarded as a renewal or inclusion in a fresh document of that debt within the meaning of the Explanation to S 8 of the Madras Act IV of 1938. (*Wadsworth and Patanjali Sastri, JJ.*) KARUPPANNA GOUNDAN *v.* MARUTHA PILLAI.

196 I.C. 474= 14 R.M. 301=53 L.W. 673=1941 M W.N. 487= A.I.R. 1941 Mad. 663=(1941) 1 M L.J. 773.

——**S 8, Explanation**—*Applicability—Debt due to father—Allotment in unequal portions to sons at partition after death of father—Debtor executing fresh documents to sons separately for portions of debt allotted to them—If renewal or inclusion.*

The Explanation to S. 8 of Madras Act IV of 1938 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not strictly be identical. This requirement cannot be satisfied when the debt is divided among the heirs of the creditor and the debtor executes a fresh document for a part of the debt in favour of each of such heirs. Where at a partition between the sons of the creditor after the latter's death, the debt is split up into unequal parts and the sons of the deceased creditor get the debtor to execute separate vouchers for the portions of the debt allotted to each of them, it cannot be said that the documents executed by the debtor separately in favour of the sons of the original creditor for the portions of the original debt allotted to them at the partition represent a renewal of the original debt or its inclusion in fresh documents within the meaning of the Explanation to S. 8, although the sums for which the documents are given are equal in the aggregate to the amount of the original debt. (*Wadsworth and Patanjali Sastri, JJ.*) RAMASUBBIER *v.* RAMA IYER.

52 L.W. 963= 1941 M.W.N. 54=A.I.R. 1941 Mad 356= (1941) 1 M.L.J. 39.

——**S. 8, Expl.**—Applicability—Debt incurred by member of joint Hindu family for family—Execution of fresh document by another member of family—If renewal of previous debt. *See* 1940 Dig., Col. 838. DORAIKANNU ODAYAR *v.* VEERASAMI PADAYACHI.

196 I.C 276=14 R.M. 274= A.I.R. 1941 Mad. 59=(1940) 2 M.L.J. 651.

—— **Ss 8, Expl. and 19**— *Applicability—Decree against* A *and* B *on basis of contract anterior to* 1932—*Fresh promissory note in* 1933 *by* A *and* C—*Scaling down—Rule to be applied.*

The 1st defendant and another were indebted under contract which was anterior to 1932 and which ripened into a decree in 1933. To discharge this decree a fresh promissory note was executed by the 1st defendant, and

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the second defendant who was not concerned in the earlier debt. Both the defendants were agriculturists and applied for scaling down the debt.

Held, that so far as the 1st defendant was concerned the debt was to be scaled down under S. 8 of Madras Act IV of 1938, on the basis of its being a renewal of the original liability under the Explanation to S. 8, but that as regards the second defendant, the Explanation to S. 8 did not apply and that he could claim relief only under S. 9 in the matter of interest under the promissory note of 1933. (*Wadsworth and Patanjali Sastri, JJ.*) GOPALA MALLER *v.* KRISHAN. **54 L.W. 105 = 1941 M.W.N. 927 = (1941) 2 M.L.J. 340.**

——— **S. 8, Expl.**—*Applicability—Period for determining whether debtor is an "agriculturist"—Promissory note by three persons in* 1932 *in renewal of earlier one—Subsequent renewal by two out of three—If falls under explanation to S. 8—Right to claim benefit of Act.*

A promissory note of 1929 executed by *R*, *S* and *T* was discharged by another promissory note of 1932 executed by them. In discharge of this note of 1932, *R* and *S* alone executed the suit promissory note on 29—7—1935. It was not a case of a joint family debt; it was proved that in May, 1937, *R* purchased lands and would hence be an agriculturist as defined by Madras Act IV of 1938. *S* was throughout an agriculturist. It was not known whether *T* was or was not an agriculturist. In an application by *R* and *S* for scaling down the debt,

Held, (1) that the debt of 1932 was apparently due jointly and severally from *R*, *S* and *T*, and it was discharged by another debt due from *R* and *S*, which was sufficient to make the latter debt an inclusion in a fresh document of the former debt; (2) that the subsequent note by *R* and *S* was a renewal of the entire debt binding *R* and *S* by reason of the earlier note; (3) that the purchase by *R* of lands in May, 1937, was sufficient to qualify him to claim the benefit of the Act as an agriculturist.

Held, further, that the relevant period apart from the date of the suit, when a debtor has to be an agriculturist in order to claim the benefit of the Explanation to S. 8 of the Act, would be the period from and after the 1st October, 1937, having regard to the proviso to S. 3 (*ii*) of the Act. (*Wadsworth and Patanjali Sastri, JJ.*) DEVARAYAN CHETTIAR *v.* SUBRAMANIA AYYAR. **54 L.W. 181 = 1941 M.W.N. 1041 = A.I.R. 1941 Mad. 829 = (1941) 2 M.L.J. 257.**

———**S. 8, Expl.**—Applicability—Sale of immovable property and mortgage by vendee to mortgagee of vendor as part of same transaction—Mortgage—If renewal of or inclusion of pre-existing liability. *See* 1940 Dig., Col. 839. SESHANNA *v.* VENKATARAMANA RAO. **A.I.R. 1941 Mad. 60 = (1940) 2 M.L.J. 887.**

———**S. 8, Expl.**—*Applicability—"Same creditor"—Person beneficially entitled in money lent—If creditor—Debt under promissory note by father renewed by mortgage by son—Debtors—If same.*

The definition of "creditor", in S. 3 (*v*) of Madras Act IV of 1938, though it expressly includes his heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. Hence where there is a debt in favour of *A* discharged by a mortgage debt in favour of *B*, it will not be open to the debtor to adduce evidence to show that the money which he owes to *B* is really the money of *A* so as to bring into force Explanation to S. 8 of Madras Act IV of 1938. Where a mortgage is executed by a Hindu son in discharge of preparation debts evidenced by a promissory note executed by his father, the debtors in respect of the two debts are not the same. (*Wadsworth and Patanjali Sastri, JJ.*) NARAYANAMMA *v.* VENKATA CHALAM. **54 L.W. 517 = 1941 M.W.N. 1070 = (1941) 2 M.L.J. 703.**

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———**S. 8, Expl.**—Applicability—"Same creditor"—Renewal or inclusion in fresh document—If to be by identical person—Debt incurred by one member of joint Hindu family—Renewal by fresh document executed by another member—Effect of. *See* 1940 Dig., Col 839. PERIA KARUPPAN CHETTIAR *v.* APPAJI NAIDU. **A.I.R. 1941 Mad. 202 = (1940) 2 M.L.J. 786.**

———**S. 8, Expl.**—Construction—"Renewed or included in a fresh document"—Meaning of—Debt due by *A* discharged on debt due by *B* to same credi or being substituted—If renewal or inclusion. *See* 1940 Dig., Col. 839. NEELAPPA REDDIAR *v.* SOLAIMUTHU UDAYAN. **I.L.R. (1941) Mad 128 = 193 I.C. 171 = 13 R.M 635 = A.I.R. 1941 Mad. 58 = (1940) 2 M.L.J. 517.**

———**S. 8, Expl.**—Mortgage—Purchaser of mortgaged property—Failure to pay—Suit—Compromise decree—Application for scaling down—Basis of scaling down—Renewal—Compromise—If renewal of original debt. *See* 1940 Dig., Col. 840. VENKATAMMAL *v.* RAMASWAMI IYER. **A.I.R. 1941 Mad. 62 = (1940) 2 M.L.J. 685.**

———**S. 8, Expl.**—*Promissory note on* 1-7-1933 *in renewal of earlier one—Payment of interest and portions of principal on* 4-9-1934—*If can be re-opened in suit in* 1937—*Basis of calculation for scaling down.*

On 1-7 1933, the petitioner executed a promissory note for Rs. 391-15-1 in renewal of an earlier note for Rs 255-15-0. On 4-9 1934, the petitioner made a payment of Rs. 26-5-2 towards interest and Rs. 110-2-10 towards the principal of the promissory note of 1-7-1933. A suit was filed on this note on 4 9 1937.

Held, that the appropriations made on 4-9-1937 could not be undone, and on that date the principal of the note was reduced to Rs. 281-12-3, being made up of Rs. 255 15-0, the principal originally advanced and Rs. 25 13-3, interest. Under the Explanation to S. 8 of the Madras Act IV of 1938 the principal of the renewed note would be Rs. 255-15 0, and the interest outstanding on 1-10-1937 would be cancelled. (*Wadsworth, J.*) NARASAREDDI *v.* RANGA REDDI. **53 L.W. 144 = 1941 M.W.N. 267 = A.I.R. 1941 Mad. 550 = (1941) 1 M.L.J. 216.**

———**S. 8, Expl.**—Same creditor—Person beneficially entitled to debt—If creditor—Mortgage in favour of Hindu father in 1926—Promissory note in favour of son of mortgagee in 1932 for interest due on mortgage—Decree in favour of son on promissory note—Creditors, if same—Procedure for scaling down. *See* 1940 Dig., Col. 840. VARADARAJAM PILLAI *v.* KRISHNAMURTHI PILLAI. **I.L.R. (1941) Mad. 248 = 195 I.C. 776 = 14 R.M. 229 = A.I.R. 1941 Mad. 321 = (1940) 2 M.L.J. 664.**

———**S. 8, Expl.**—"Same creditor"—Promissory note in favour of mother—Suit on and decree—Mortgage in favour of sons in discharge of decree—If in favour of same creditor—Right to apply for scaling down on basis of promissory note—Plea that mother was benamidar for sons—If open. *See* 1940 Dig., Col. 840. RAGHUPATHI AIYAR *v.* KRISHNAMACHARIAR. **192 I.C. 838 = 13 R.M. 593 = A.I.R. 1941 Mad 87 = (1940) 2 M.L.J. 756.**

———**S. 8, Expl.**—*Scope—Son estopped from questioning liability under a mortgage after partition by his father which he had attested—Subsequent mortgage by the son of his own property in discharge of father's mortgage debt—If renewal of earlier debt.*

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Although it had been held that a son was estopped from disputing the liability of his property under a mortgage by his father after partition by reason of his attestation of the mortgage, it cannot be said that a fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. There is a complete *novatio* which cannot be treated as a renewal by the same debtor. (*Wadsworth and Patanjali Sastri, JJ.*) SABAPATHI MUDALIAR *v.* RAJARATHNA MUDALIAR. **53 L W. 225 = 1941 M.W.N. 186 (2) = A.I.R. 1941 Mad 495 = (1941) 1 M.L.J. 302.**

——**S. 8 (1) and (4)**—Construction and scope—"Refund"—Meaning of—Appropriations made after 1st October, 1937—If can be reopened. *See* 1940 Dig., Col. 837. SURYANARAYANAMURTHI *v.* VIRAMMA. **A.I.R. 1941 Mad. 226 = (1940) 2 M.L.J 547.**

——**Ss. 8 (1), 19 and 20**—*Dismissal of stay application under S. 20 for default—Effect on right to apply for scaling down decree under S. 19—Amounts realised in execution after 1st October, 1937—Appropriation by creditor—Permissibility.*

S. 20 of Act IV of 1938 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under S. 20 to be dismissed for default he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For instance, the execution may have stopped for some reasons quite apart from the proceedings under the Act. In such a case there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preferring his application to the Court which passed the decree under S. 19. Accordingly when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would not bar the substantive application under S. 19. The period of limitation prescribed under S. 20 begins to run with the grant of a stay and not when there was no grant of stay. (1939) 2 M.L.J. 308 = I.L.R. (1939) Mad. 886, Ref. to and Expl.

Held also, that an amount realised in execution of a decree after 1st October, 1937, could not be appropriated by the decree-holder to interest accruing due before 1st October, 1937, so as to nullify the effect of S. 8 (1) of the Act. (1940) 2 M.L.J. 547, Foll. (*Wadsworth, J.*) SARASWATHI AMMAL *v.* ARABUSA SAHIB. **53 L.W. 227 = 1941 M.W.N. 270 = A.I.R. 1941 Mad. 433 = (1941) 1 M.L.J. 296.**

——**S. 8 (2)**—*Applicability—Appropriation of open payments made prior to 1st October, 1937—Awarding of counter interest on payment made—Effect.*

When on open payments made in 1932, counter-interest was awarded and a fresh promissory note was executed in 1934, after deducting the payment with counter-interest.

Held, (1) that the mere fact that counter-interest was awarded on open payments does not indicate that the payment should be treated as payments towards principal; (2) that when a fresh promissory note was executed after deducting the payments with counter-interest, it must be deemed that the appropriation was made at the time of the fresh promissory note; (3) that the interest outstanding at the time of the fresh promissory note must be deemed to have been satisfied by the payment, the balance if any appropriated towards principal; and (4) that the onus lies heavily on the debtor to prove that the interest was outstanding on 1st October, 1937, to get the benefit of S. 8 of Madras Act IV of 1938. (*Wadsworth and Patanjali Sastri, JJ.*) VENKAYAMMA *v.* RAMAKOTAYYA. **1941 M.W.N. 188 =**

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53 L.W. 240 = A.I.R. 1941 Mad. 479 = (1941) 1 M.L.J. 316.

——**S. 8 (2)**—Payment—Usufructuary mortgage—Mortgagee enjoying produce—If payment by mortgagor to mortgagee. *See* MADRAS AGRICULTURISTS' RELIEF ACT, S. 10 (2) (1). **(1941) 1 M.L.J. 197.**

——**Ss. 8 (3) and 12**—Debt scaled down—Date from which interest is to run. *See* 1940 Dig., Col. 837. SEVUGAN CHETTIAR *v.* RENGANATHA MUDALIAR. **A.I.R. 1941 Mad. 288 = (1940) 2 M.L.J. 870.**

——**Ss. 9 and 13**—*Applicability—Fresh debts or debts in discharge of earlier ones incurred after the commencement of the Act—Whether S. 9 or S. 13 applicable.*

All debts incurred after the commencement of the Madras Agriculturists' Relief Act, whether they be in discharge of prior debts or not will fall only under S. 13 and S. 9 is not applicable to such debts. (*Wadsworth and Patanjali Sastri, JJ.*) THIRUVENGADATHA IYENGAR *v.* SANNAPPAN SERVAI. **54 L.W. 229 = 1941 M.W.N. 800 = A.I.R. 1941 Mad. 799 (2) = (1941) 2 M.L.J. 307.**

——**Ss. 9, 15 and 19**—Applicability—Promissory note for arrears of rent—Suit on—Decree—If one for rent or for debt—Scaling down—Procedure. *See* 1940 Dig., Col. 841. RAMADOSS REDDIAR *v.* MUNUSWAMI REDDIAR. **A.I.R. 1941 Mad. 116 = (1940) 2 M.L.J. 825.**

——**S. 9**—Applicability—Suit on renewed debt—Renewal by agriculturist—Prior debt not due by agriculturist—Right to benefit of S. 9. *See* 1940 Dig., Col. 842. KRISHNASWAMI IYER *v.* NAGALINGA MUDALIAR. **193 I.C. 470 = 13 R.M. 676 = (1940) 2 M L J. 174.**

——**S. 9**—*Scope—Payments made towards interest in excess of amount due as scaled down interest—If can be adjusted in reduction of principal—Right of creditor to retain excess.*

If in scaling down a debt under S. 9 of the Madras Act IV of 1938, it is found that the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal. There is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him. (*Wadsworth and Patanjali Sastri, JJ.*) LAKSHMI VENKAYAMMA *v.* VENKATAPATHIRAJU. **196 I.C 251 = 14 R.M. 270 = 1941 M.W.N. 39 = 53 L.W. 67 = A.I.R. 1941 Mad. 382 = (1941) 1 M.L.J. 25.**

——**S. 9 (1), proviso**—*Construction—Promissory note in 1937 for balance due on mortgage executed after 1-10-1932—Scaling down—Basis of—Original mortgage advance—If can be adopted.*

There is nothing in S. 9 of Madras Act IV of 1938, which justifies the treatment of the principal of a debt as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8 of the Act, which S. 9 does not seem to contemplate except for the specific purposes of reducing debts which originated before 1st October, 1932. In a suit on a promissory note dated 22 9 1937, executed for the balance due under a prior mortgage in favour of the same creditor executed on 19 12 1932, the defendant cannot claim to have the debt scaled down on the basis of the original mortgage advance; the Court cannot import into the first part of the proviso to S. 9 (1) the explanation to S. 8 which treats the original principal as the principal for the purposes of S 8. Where the prior debt was not contracted before 1-10-1932, the last part of the proviso has no application. There can, under

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S. 9, be, therefore, no recalculation of interest on the antecedent debt and re-appropriation of payments towards interest made under the antecedent debt. (*Wadsworth, J.*) SESHAYYA *v.* SWAMIREDDI

1941 M.W.N. 995 = 54 L.W. 551 = (1941) 2 M.L.J 795

——S 9(1) **Proviso**—Scope—Debt renewed several times—Duty of Court to trace back to principal originally advanced—Scaling down—If limited to one renewal only. *See* 1940 Dig., Col. 842. CHIDAMBARAM IYER *v.* MANICKAVASAGAM PILLAI.

192 I.C. 378 = 13 R.M 546 = (1940) 2 M.L.J. 232.

——S. 10 (2)—*Applicability—Usufructuary mortgage in renewal of prior simple mortgage—Clause providing for keeping alive prior mortgage—Mortgagee to be in possession under mortgage in lieu of interest—No rate of interest stipulated—Liability to scaling down.*

A usufructuary mortgage deed in and by which the property is mortgaged under a stipulation that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee, directly comes within S. 10 (2) of the Madras Act IV of 1938, and the debt under such a mortgage cannot be scaled down. The fact that the mortgage was executed in renewal of an earlier simple mortgage deed and that there is a clause in it providing for the keeping alive of the prior mortgage would not entitle the mortgagor in a suit on the usufructuary mortgage to claim the benefit of the Act on the ground that the suit must be deemed to have been laid on the original mortgage as well, when the suit is laid only on the usufructuary mortgage. The clause for the keeping alive of the prior mortgage is intended for the benefit of the mortgagee so that he can use it as a shield against any mortgage which might intervene. (*Venkitaramana Rao and Somayya, JJ*) RAMA AIYAR *v.* MADHAVA RAO. **1941 M W.N. 802 = 54 L.W 301 = A I.R. 1941 Mad 912 = (1941) 2 M.L.J. 376.**

——S. 10 (2) (1)—*Applicability—Mortgage with possession—Mortgagee to enjoy usufruct for two years in lieu of interest—Mortgagor to pay on expiry of two years—In default mortgagee to continue in possession and also entitled to interest at 3 per cent. in addition—If can be scaled down—Enjoyment of produce—If payment by mortgagor.*

S. 10(2)(1) of Madras Act IV of 1938 is not confined to mortgages which are usufructuary mortgages within the terms of S. 58 (*d*) of the Transfer of Property Act. The clause provides a special exemption for any mortgage under which the mortgagee has possession and no rate of interest is specified. It does not apply to a mortgage in which, although the mortgagee is in possession a rate of interest is stipulated, and it makes no difference whether the rate of interest stipulated in the mortgage is one which might be regarded as penal. A mortgage stipulated that the mortgaged properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years the mortgagor shall pay the amount due, and if he failed to do so the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled to three per cent. per annum in addition to the usufruct.

Held, (1) that the mortgage was one under which a rate of interest was stipulated and was therefore not saved by S. 10 (2) (1) of Madras Act IV of 1938 and was liable to be scaled down; (2) that the enjoyment of the produce by the mortgagee could not be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act. (*Wadsworth J*) JAGANNATHA AIYANGAR *v.* SENNIVEERA CHETTIAR.

1941 M.W.N. 271 = A.I.R. 1941 Mad. 487 = (1941) 1 M.L.J. 197.

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——S. 10 (2) (ii)—*Applicability—Endorsement of promissory note in part payment of price of land purchased—Endorser's right to claim benefit of scaling down.*

A promissory note executed by the 1st defendant in favour of the 2nd defendant was subsequently endorsed over to the plaintiff in part payment of the price of immovable property purchased by the 2nd defendant from the endorsee. In a suit on the promissory note by the endorsee, the 2nd defendant (endorser) applied to scale down the debt.

Held, that since, on the date of the endorsement, the 2nd defendant promised to pay the amount of the note to the plaintiff and since at the inception of his liability there was a charge provided under S. 55 (4) (*b*) of the Transfer of Property Act. S. 10 (2) (*ii*) of the Madras Act IV of 1938 excluded the 2nd defendant's liability from the operation of Ss. 8 and 9 of the Act, although the 1st defendant, the maker of the promissory note would be entitled to the benefit of the Act, if otherwise qualified as an agriculturist. (*Wadsworth, J.*) RANGIAH CHETTIAR *v.* SYED KARIM SAHIB.

1941 M.W.N. 801 = 54 L.W. 310 = A.I.R. 1941 Mad 890 = (1941) 2 M.L.J. 453.

——S. 10 (2) (ii)—Applicability—Mortgage by vendee to vendor for sale price—Mortgage of lands purchased and other lands—Agreement to pay interest on pricipal—Debt—If falls under S. 10 (*ii*)—Statutory charge under S. 55 (4) (*b*), T. P. Act—If excluded—"Contract to the contrary." *See* 1940 Dig., Col. 843. LAKSHMANA IYER *v.* RAMASWAMI NAICKER.

A.I.R. 1941 Mad. 119 = (1940) 2 M.L.J. 827.

——S. 10 (2 (ii)—Applicability—Mortgage for unpaid purchase money—Subsequent mortgage for part of debt on other properties—Charge for vendor's lien—If affected—Debt if taken out of S. 10 (2) (ii). *See* 1940 Dig., Col 844. ATHIYAPPA GOUNDAN *v.* RAMANATHAN CHETTIAR **193 I.C 281 = 13 R.M. 640 = (1940) 1 M.L.J. 367.**

——S. 10 (2) (ii)—Applicability—Promissory note by vendee to vendor for unpaid purchase money—Endorsement over to another—Effect—If changes character of liability and take it out of S. 10 (2) (ii)—Debtor's right to have it scaled down. *See* 1940 Dig., Col. 844. VARADARAJA PERUMAL PILLAI *v.* PALANIMUTHU GOUNDAN. **I.L.R. (1941) Mad 132 = 195 I C. 559 = 14 R.M 202 = A.I.R. 1941 Mad. 118 = (1940) 2 M.L.J. 838.**

——S 10 (2) (ii)—Payment of price and execution of sale-deed in favour of *X*—Agreement by *X* before registration to have the land conveyed by the vendor to *Y* direct—*Y* paying cash and executing a promissory note to *X*—Registered sale-deed executed by vendor in favour of *Y*—*Y* executing a mortgage next day in favour of *X* to cover the amount due on the promissory note—Liability under—If excluded by S 10 (2) (ii) of Act IV of 1938. *See* 1940 Dig., Col. 845. NARAYANAYYA *v.* VENKATAYYA. **A.I R. 1941 Mad. 128 = (1940) 2 M L J. 920.**

——Ss. 10 (2) (iii) and 1—*Applicability—Mortgage suit—Vendee of hypotheca impleaded in suit—Decree—Application by vendee to scale down debt—Maintainability—Liability—If exempted.*

Where a vendee of immovable property is a party to a suit on a mortgage of that property and a decree is passed in the suit, it cannot be said that the vendee is not a judgment-debtor; and an application by him for scaling down the debt under S. 19 of the Madras Act IV of 1938 cannot be rejected on that ground. Nor can his application be rejected on the ground that the liability which he seeks to scale down is

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one in respect of which there is a charge under S. 55 (4) (*b*) of the Transfer of Property Act, and that therefore the debt cannot be scaled down by reason of S. 10 (2) (*iii*) of Madras Act IV of 1938. The liability of the vendee to the decree-holder is not the same as the liability to the mortgagor (vendor) in respect of which the vendor's lien subsists. (*Wadsworth and Pataniali Sastri, JJ.*) PALANIVEL GOUNDAN *v.* SUBBAROYA GOUNDAN. **54 L W. 240 = 1941 M.W.N. 804 = A.I.R. 1941 Mad. 889 (1)**

——**S. 10 2) (iii)**—*Interest "payable in respect of the liability"—Meaning—Decree on mortgage in favour of public company—Interest at less than 8 per cent. and default interest at 12½ per cent.—If exempted from Act.*

Where a public company has got a decree on a mortgage providing for interest at something under 8 per cent. with a default rate of 12½ per cent. per annum, and the latter rate has actually been adopted in the decree, the debt is not exempted from the operation of Ss. 8 and 9 of Madras Act IV of 1938. Interest "payable in respect of the liability" in S. 10 (2) (*iii*) of the Act refers to the interest on the basic debt and not the subsequent interest on the decree amount. It is not open to the creditor to base an argument on the theory that the 12½ per cent. is not a rate of interest payable but a penal rate which could not be recovered. (*Wadsworth, J.*) NELLORE PERMANENT FUND, LTD. *v.* SUBBA RAO. **1941 M W.N. 784 = 54 L.W. 239 = A.I.R. 1941 Mad. 888 = (1941) 2 M.L J. 388.**

——**S. 10 (2) (iii)**—*Liability excluded under—Debt due to public company carrying interest at less than 9 per cent. in renewal of earlier debt with interest at higher rate—If can be scaled down.*

Where a debt due to a public company carries interest at not more than 9 per cent. it is clearly excluded from the operation of Ss. 8 and 9 of Madras Act IV of 1938, and therefore Ss. 8 and 9 cannot be called in aid to substitute for that liability an earlier liability which it renewed and which bore a higher rate of interest, and thereby to exclude it from the operation of S. 10 (2) (*iii*) of the Act. The liability excluded from the purview of operation under Ss. 8 and 9 by S. 10 (2) (*iii*) s the present liability under which the debtor is, at the time of his application, indebted. (*Wadsworth, J.*) SUBRAMANIA AIYAR *v.* INDIA EQUITABLE INSURANCE CO., LTD. **54 L.W. 353 = 1941 M.W.N. 887 (1) = (1941) 2 M.L.J. 509.**

——**Ss. 11 and 19**—Decree — Costs—Interest on costs—Liability to be scaled down. *See* 1940 Dig., Col. 846. PALANI GOUNDAN *v.* MUTHUSWAMI GOUNDAN. **194 I.C. 36 = 13 R.M. 734 = A.I.R. 1941 Mad. 52 = (1940) 2 M.L J. 707.**

——**S. 11**—Scope— Costs of execution—Right to recover. *See* 1940 Dig., Col. 846. VENKATAMMAL *v.* RAMASWAMI IYER. **A.I R 1941 Mad. 62 = (1940) 2 M.L J. 685**

——**S. 13**—*Procedure—Debt—Subject-matter of appeal—Application for scaling down—When to be made—Proper procedure on application in appellate Court.*

Where a debt is the subject-matter of an appeal, if an application for scaling it down under Madras Act IV of 1938, is not made in the appellate Court before the judgment is pronounced, the decree must be drawn up in accordance with the terms of the judgment, and no subordinate Court has power to pass an order which will affect the decree. Where, however, an application for scaling down is made before judgment is delivered, the proper course will be to reserve the final order until the application for scaling down is decided. All questions arising in the appeal other than the question of scaling

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down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. But if the application is not made before the judgment is delivered, it will be too late for the judgment-debtor to raise the question. (*Leach, C.J., Wadsworth and Patanjali Sastri, JJ.*) SRIRAMAREDDI *v.* SRIRAMAREDDI. **54 L.W. 627 = 1941 M.W.N 1052 = A.I.R. 1941 Mad. 929 = (1941) 2 M L.J. 855 (F.B.).**

——**S. 15**—Applicability—Alienee of portion of kanom interest—Right to apply—Deposit—If to include Government Revenue. *See* 1940 Dig., Col. 847. ITTEERI NAMBUDIRI *v.* SANKUNNI NAIR. **A.I.R. 1941 Mad. 303 = (1940) 2 M L.J. 820.**

——**S. 15**—Applicability and scope—Application by kanomdar for renewal of kanom under S. 24 of the Malabar Tenancy Act—Liquidation of arrears of rent by deposit under S. 15—If can be effected. *See* 1940 Dig., Col. 847. SOOLAPANI MOOPIL VARIAR *v.* VEETTIL VELOOR. **A.I.R. 1941 Mad. 196.**

——**S. 15**—Applicability— Assignee from original lessee—Arrears of rent due for period before assignment —If "rent payable" by the assignee—Right of latter to apply for wiping out by deposit. *See* 1940 Dig., Col. 847. CHEERU *v.* CHATHU NAMBIAR. **A.I.R. 1941 Mad. 44 = (1940) 2 M.L.J. 451.**

——**S. 15**—*Applicability – Conditions—Land held by non-agriculturist tenant on date of Act—Assignment of land after Act to agriculturist—Application by latter under S. 15—If lies.*

S. 15 (1) of the Madras Agriculturists' Relief Act requires that there should be rent outstanding on the date of the commencement of the Act, which rent must be, as on that date, payable by an agriculturist. In a case where at the commencement of the Act there was no rent payable by an agriculturist in respect of a land, the tenant being a non-agriculturist, the mere fact that the land has been assigned, after the Act came into force, to an agriculturist cannot give the latter the benefit of S. 15 of the Act. (*Wadsworth and Patanjali Sastri JJ.*) PARAMESWARA AIYAR *v.* NARAYANAN NAMBUDRIPAD **53 L.W. 104 = 1941 M.W.N. 186 (1) = A.I.R. 1941 Mad. 432 = (1941) 1 M.L.J. 177.**

——**S. 15** – *Applicability—Co-tenants—One agriculturist and another non-agriculturist—Right of former to benefit of Act.*

There is no reason why an agriculturist tenant should not get the benefit of S. 15 of the Madras Act IV of 1938 by paying the rent for the holding for Faslis 1346 and 1347, merely because there is a co-tenant who is not an agriculturist. (*Wadsworth, J.*) KALLIANI *v.* KANARAN. **1941 M.W.N. 239 (1) = 53 L.W. 361 = A.I.R. 1941 Mad 436.**

——**S. 15**—*Applicability—Existence of tenancy in fasli 1347—If condition precedent.*

Where a tenancy has ceased to exist before the commencement of fasli 1347, S. 15 of the Madras Act IV of 1938 does not apply. and the tenant is not entitled to the benefits under that section. A tenancy in and payment of rent for, fasli 1347 is a condition precedent to obtaining relief in respect of fasli 1345 and the earlier years. (*Leach, C.J., Gentle and Krishnaswami Ayyangar, JJ.*) PECHIYAPPA CHETTIAR *v.* VAZHUKKA CHETTI. **I.L.R. (1941) Mad. 433 = 195 I.C. 351 = 14 R.M. 183 = 53 L.W. 287 = 1941 M.W.N. 241 = A.I.R. 1941 Mad. 366 = (1941) 1 M.L J. 333 (F.B.).**

——**S. 15**—*Applicability—If confined to cases of landlord and tenant under Estates Land Act—Jodi payable by agraharamdar—If "rent."*

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The operation of S. 15 of Madras Act IV of 1938 is not confined to cases arising between landlord and tenant under the Madras Estates Land Act. Where an agraharam within a zemindari was not excluded from the zamindari by the permanent settlement but continued as before the settlement to be held on an under-tenure under the zamindar, the jodi payable by the proprietor of the agraharam to the zamindar is "rent" as defined by Madras Act IV of 1938, and comes within the purview of S. 15 of the Act. The proprietor of the agraharam is a tenant, as he is a person liable to pay the rent (the jodi), and the property in respect of which such rent has accrued is his holding. (*Wadsworth and Patanjali Sastri, JJ.*) NAVANEETHA KRISHNA YACHENDRA BAHADUR *v.* RAMANUJULU CHETTY. **1941 M.W.N. 904 = 54 L.W. 120 = (1941) 2 M.L.J. 159.**

——**S. 15**—*Applicability—Mortgage with possession by jenmi—Lease back by mortgagee to jenmi—Right of jenmi lessee to apply for wiping-off of arrears of rent—Rent under lease—If "interest".*

Where a jenmi mortgages his land with possession and takes the property back at the same time from the mortgagee under a lease undertaking to pay rent to the lessor-mortgagee, the rent payable is not interest so far as Madras Act IV of 1938 is concerned. The lease though contemporaneous with and closely related to the mortgage, must be regarded as a lease and the payment thereunder must be regarded as rent. The mortgagee from the jenmi has, by reason of the mortgage, an interest entitling him to possession of the land and is thus an "intermediary" under the Malabar Tenancy Act, though he transfers that possession to the jenmi himself. The rent payable by the jenmi to the mortgagee-lessor (intermediary) therefore falls within S. 15 of Madras Act IV of 1938, and the lessee-jenmi is therefore entitled to relief under S 15, if he makes the required deposit within the time laid down by the section. (*Wadsworth, J.*) KRISHNA MENON *v.* KUNJANDI. **1941 M.W.N. 799 = 54 L W. 309 = A.I.R. 1941 Mad. 826 = (1941) 2 M.L J. 351.**

——**S. 15**—Applicability—Owner of kudivaram interest purchasing zamin rights in estate paying Rs. 1,200 as peishkush—Usufructuary mortgage—Zamin right—Mortgagor retaining ryoti lands as tenant of mortgagee—Latter recognised as landholder—Mortgagor's right to apply for scaling down. *See* 1940 Dig., Col. 848. RANGASWAMI REDDI *v.* GOPALAKRISHNA REDDI. **195 I.C. 149 = 14 R.M 140 = 1941 M.W.N. 31 = A I.R. 1941 Mad. 200 = (1940) 2 M L.J. 883.**

——**S. 15**—*Applicability — Promissory note for arrears of rent—It can be scaled down as rent.*

Where a landlord takes a promissory note from his tenant for arrears of rent, the character of the liability changes, and it ceases to be rent for the purposes of S. 15 of the Madras Act IV of 1938. The debtor cannot compel the promisee to treat his claim as one for rent, whereas in fact it is nothing of the kind, S. 15 does not apply to such a case. (*Wadsworth, J.*) VENKATESWARA RAO *v.* LAKSHMI KANTHARAO. **1941 M.W N. 454 = 53 L.W. 672 = A.I.R. 1941 Mad 638 = (1941) 1 M.L.J. 633.**

——**S. 15**—*Applicability—Rent due to* melcharthdar *—Liability to be scaled down.*

A *melcharthdar* is neither a jenmi nor an intermediary, and hence rent due to a landlord who is a *melcharthdar* cannot be scaled down. (*Wadsworth, J.*) KALLIANI *v.* KANARAN **1941 M W.N. 239 (1) = 53 L.W. 361 = A.I.R. 1941 Mad. 436.**

——**S. 15**—Arrears of rent for faslis prior to 1345 due from tenant assigned by jenmi to third person—It can be deemed t be discharged by tenant depositing

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rent for faslis 1346 and 1347—Malabar Tenancy Act, S. 3 (*k*) and (*j*)—'Jenmi' or 'Intermediary'—If includes assignee of right to collect rents. *See* 1940 Dig., Col. 849. AHMAD KOYA *v.* APPU. **1941 M.W.N. 33 = 193 I.C. 406 = 13 R.M. 664 = A.I.R. 1941 Mad. 201 = (1940) 2 M.L J. 235.**

——**S. 15**—Kanom *demise—Assignee of part of properties demised—Right to apply under S. 15—"Liable to pay rent."*

An assignee of a part of property demised on *kanom* is liable by privity of estate to pay a proportionate part of the rent or *michawaram* reserved under the demise, so long as he remains assignee; and by virtue of S 41 of the Malabar Tenancy Act, the jenmi is entitled to recover the entire rent reserved under the demise from such assignee. The assignee is therefore entitled to claim the benefit of S. 15 of Madras Act IV of 1938 in respect of arrears of *michawaram* due to the jenmi. The fact that a part of the consideration for the assignment was expressly reserved with the assignee for payment to the jenmi towards the arrears is no bar to his claiming the statutory right to have the arrears wiped out under S. 15. (*Wadsworth and Patanjali Sastri, JJ.*) VASUDEVA NAMBUDIRI *v.* KAYYUMMA. **53 L.W. 151 = 1941 M.W.N. 174 = A.I.R. 1941 Mad 486 = (1941) 1 M L.J. 220.**

——**S. 15 (4)**—*Applicability—Decree for rent by Civil Court—Application under S. 15 (4) to Revenue Court—Competency—Procedure.*

S. 19 only provides for the scaling down a decree for the repayment of a debt which term does not, strictly speaking, include a liability for rent. But a procedure analogous to that laid down in S. 19 should be followed in the case of decrees for rent. It is therefore apparent that when there is a decre of a Civil Court determining the amount of rent payable for the relevant period there is no room for any application to the Revenue Court under S. 15 (4) of the Act. The object of S. 15 (4) is clearly to enable a tenant whose liability for rent has not yet come into Court to ascertain what is the extent of that liability as scaled down and pay it into the Revenue Court in order to prevent an unnecessary suit. Where, however, a decree has been passed by a Civil Court for rent, the proper course for the judgment-debtor is to apply for relief under S. 19 of the Act to the Court which passed the decree. (*Wadsworth, J.*) VENKATA RAJAGOPALA KRISHNA YACHENDRA BAHADUR VARU *v.* VENKATASESHACHARLU. **1941 M.W.N. 997 = 54 L.W 464 = (1941) 2 M.L.J. 655.**

——**S. 17**—*Scope—Suit for arrears of rent for fasli* 1344 *due from non-agriculturist—If saved.*

S. 17 of Madras Act IV of 1938 covers any suit in respect of arrears of rent accrued for fasli 1345 or any prior fasli, and it is not restricted to such a suit filed against an agriculturist. The section therefore saves limitation in respect of a suit for arrears of rent for fasli 1344 due from a non-agriculturist. (*Wadsworth and Patanjali Sastri, JJ.*) NAGORE DURGA *v.* KANNU PILLAI. **1941 M.W.N 913 = 54 L W. 433 = (1941) 2 M.L J. 604.**

——**S. 19**—Appeal—Order under S. 19—Appeal prior to the new rules—Competency. *See* 1940 Dig. Col. 849. PAKKIRI MAHOMED THARAGANAR *v.* SYED SAHIB. **194 I.C. 607 = 14 R.M. 24 = (1940) 1 M.L.J. 422.**

——**Ss. 19, 20 and 21**—*Applicability and scope—Sale by Official Receiver of property subject to mortgage—Scaling down of mortgage debts—Stay of sale—Procedure—Application to Official Receiver to stay sale and application to Insolvency Court to scale down mort-*

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gage debts without impleading Official Receiver—Competency.

S. 20 of the Madras Agriculturists' Relief Act has no application to sales by Official Receivers and cannot be invoked in favour of a person who is not a judgment-debtor seeking to stay the execution of a decree. It is also clear that though S. 21 of the Act does not lay down any procedure for scaling down debts due by an insolvent, the procedure should, as far as may be, be analogous to that prescribed for the reduction of other debts. The Court which passed the decree would have to be moved under S. 19 to reduce the decree and the Court which executes the decree must be moved under S. 20 to stay execution of the decree in so far as the debts of the insolvent are covered by decrees of Courts. It would be within the power of the Insolvency Court to entertain an application under S. 21. for scaling down of those debts of the insolvent which are not covered by decrees or suits in other Courts. But any proceedings under S. 21 should not be taken behind the back of the Official Receiver by the insolvent himself. If the Official Receiver is about to sell properties subject to mortgages which are liable to be scaled down, an application may be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed. It is not open to the insolvent to apply to the Official Receiver to stay the sale, or to apply to the Insolvency Court to have it declared that he is an agriculturist and that his debts should be scaled down without making the Official Receiver a party to the application. (*Wadsworth, J.*) KRISHNA RAO *v.* OFFICIAL RECEIVER, EAST GODAVARI.

54 L.W. 513=1941 M.W.N. 947=(1941) 2 M.L.J. 698.

——**S. 19**—*Applicability—Decree by Court outside Madras Province—If can be scaled down under Act.*

Interest payable under a decree passed by a Court in the Bombay Presidency, but transferred for execution to a Court in the Province of Madras, is not liable to be scaled down under Madras Act IV of 1938, because S. 19 of the Act does not apply to a Court outside the Province of Madras. (*Wadsworth and Patanjali Sastri, JJ.*) SANTHAPPA *v.* ESWARAPPA.

54 L W. 178=1941 M.W.N. 961=A.I.R. 1941 Mad. 810=(1941) 2 M.L.J. 295.

——**S. 19**—*Applicability—Decree in Privy Council appeal—If can be scaled down—If decree of foreign Court.*

It cannot be held that the Privy Council is not a "Court" and that its decision is not a decree properly so called falling within the purview of Madras Act IV of 1938. S. 19 applies to the decree made by the Privy Council in appeal from decisions of Courts in Madras. The Privy Council is not a foreign Court or tribunal so as to make the section inapplicable to a decree passed on an appeal to the Privy Council taken from the province of Madras. The application to scale down such a decree has to be made to the Court of first instance, *i.e.*, a Court of this Province (Madras). (*Wadsworth and Patanjali Sastri, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BHUSHANARAO.

54 L.W. 107=1941 M.W.N. 741=4 F.L.J. (H.C.) 280=A.I.R. 1941 Mad. 817=(1941) 2 M.L.J. 125.

——**S. 19**—Applicability—Decree for rent by Civil Court—Procedure for scaling down — Application to Revenue Court under S. 15 (4)—Propriety. *See* MADRAS AGRICULTURISTS' RELIEF ACT. S. 15 (4).

(1941) 2 M.L.J. 655.

——**S. 19**—*Applicability—Decree in suit by trial Court before Act came into force—Appeal—Appellate decree after Act confirming decree of trial Court—Subsequent application to trial Court for scaling down—Competency.*

S. 19 of the Madras Agriculturists' Relief Act would not apply to a decree passed after the commencement of the Act, whether it be a decree passed by the trial Court in a suit or by an appellate Court in proceedings in appeal of which the affected party has had notice. Whether the decree of the appellate Court is passed in the first instance or in modification or reversal or confirmation of the decree of the original Court, nevertheless it would be a decree passed after the commencement of the Act, and cannot be amended under S. 19 of the Act, although the decree in the suit was passed by the trial Court before the Act came into force. The pendency of an appeal suspends the finality of the decree of the original Court, and before a final decree is passed on appeal, all the relief which a party is entitled to and which would have been given by the original Court had Act IV of 1938 been in existence on the date on which it passed the decree should be urged before the appellate Court is passed. An application under S. 19 of the Act to the original Court is incompetent when the decree of such Court has been confirmed on appeal after the coming into force of the Act. (*Venkataramana Rao and Horwill, JJ.*) VEERAPPA CHETTIAR *v* SIVAGAMI ACHI.

(1941) 2 M.L.J. 1064.

——**S. 19**—*Applicability—Decrees passed after Act—Dismissal of application to scale down decree under appeal—Appeal against dismissal not clubbed with main appeal—Main appeal dismissed* ex parte—*Appeal from dismissal of application—Sustainability of.*

S. 19 of the Madras Act IV of 1938 has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings, and if he does not so urge he must be taken to have waived it. There is no reason to apply a different principle to proceedings in appeal of which the affected party has notice. Accordingly where an application to scale down a decree (against which an appeal is pending) is dismissed, and an appeal against such orders of dismissal is not clubbed with the main appeal which is allowed by the debtor to proceed *ex parte*, then after the disposal of the main appeal substituting the appellate decree for the decree sought to be scaled down, the original decree cannot be scaled down and the appeal against the dismissal of the application for scaling down under S. 19 becomes infructuous and must be dismissed. (*Wadsworth and Patanjali Sastri, JJ.*) RAMASWAMI UDAIYAR *v.* RAMANATHAN CHETTIAR.

53 L.W. 22=1941 M W.N. 51=A.I.R. 1941 Mad. 373=(1941) 1 M.L.J. 6.

—— **S. 19**—*Applicability—Execution sale held before 1st October, 1937—Purchaser by decree-holder—Sale when becomes complete—Sale not confirmed owing to pendency of application to set aside sale—Application to scale down decree—Maintainability.*

In the case of a sale in execution to a decree-holder who has been permitted to bid and set off the sale price, the decree is not satisfied until the sale is confirmed. Where the confirmation of a sale held before 1st October, 1937, is held up owing to the pendency of an application to set it aside under O. 21, R. 90, C. P. Code, the decree still subsists and the judgment-debtor is therefore entitled to ask the Court to scale down the decree under S. 19 of Madras Act IV of 1938. (*Wadsworth and Patanjali Sastri, JJ.*) NATARAJA PILLAI *v.* RANGASWAMI KARAMUNDAR.

54 L.W. 503=1941 M.W.N. 941=(1941) 2 M.L.J. 682.

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——S. 19 — *Applicability — "Judgment-debtor" — Surety for defendant in application to set aside* ex parte *decree—Liability of—Application to scale down decree—Competency—Extent of right available to surety.*

A person executing a surety bond undertaking to satisfy any decree which might be passed against a defendant can be deemed to be a judgment-debtor entitled to scale down the decree which might ultimately be passed, by the procedure laid down in S. 19 of the Madras Act IV of 1938. In an application by the respondents 2 and 3 to set aside an *ex parte* decree passed against them in a suit by the 1st respondent on two promissory notes of 1929 and 1931, the petitioner stood surety and gave a bond on 4—7—1934, by which he undertook to satisfy any decree that might be passed against the 2nd and 3rd respondents. The *ex parte* decree was set aside, and the suit reopened and on 10—9—1934, a compromise decree was passed in favour of the 1st respondent against the respondents 2 and 3, for principal and interest at 12 per cent. and costs. The 1st respondent sought execution against the surety. The surety applied for scaling down the decree under S. 19 of Madras Act IV of 1938.

Held, that the petitioner (surety) was, for the purposes of execution, in the position of a judgment-debtor, he should be given the benefit of the procedure laid down in S. 19 to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act, having regard to the date on which the liability of the surety himself was incurred. The bond and the decree in the case having come into being in 1934, the surety was entitled to the benefit of the 1st part of S. 9 of the Act, as his liability fell under that section. He was not entitled to go behind the decree and have his liability reduced with reference to the original promissory notes by the judgment-debtors. (*Wadsworth and Patanjali Sastri, JJ.*) MUTHYALU *v.* CHINNAYYA. **54 L.W. 699 = (1941) 2 M.L.J. 1010.**

——S. 19—Applicability—Mortgage suit—Vendee of hypotheca impleaded as party—If judgment-debtor under decree in suit—Right to apply for scaling down. *See* MADRAS AGRICULTURISTS' RELIEF ACT, SS. 10 (2) (*iii*) AND 19. **54 L.W. 240**

——Ss. 19 and 20—*Applicability—Partnership—Debt due by—Personal decree against partner who is an agriculturist—Right of latter to relief.*

A debt incurred by a partnership is really a debt incurred by the parners for which each of them is liable. And, if a partner who is, by a decree of Court, made personally liable for the debt of the firm, is an agriculturist, he is entitled to apply under Ss. 19 and 20 of Madras Act IV of 1938 for scaling down the debt. (*Wadsworth and Patanjali Sastri, JJ.*) PITCHAYYA *v.* SUBBAYYA. **53 L.W. 497 = 1941 M.W.N. 570 = A.I.R. 1941 Mad. 611 = (1941) 1 M.L.J. 609.**

——S. 19—Applicability—Puisne mortgagee impleaded in suit on first mortgage—Right to apply—Sub-mortgage by puisne mortgagee to non agriculturist—Effect on claim to benefit of Act. *See* 1940 Dig. Col. 849 RAMIER *v.* SRINIVASIAH. **I.L.R. (1941) Mad. 336 = 195 I.C. 702 = 14 R.M. 218 = A.I.R. 1941 Mad. 204 = (1940) 2 M.L.J. 872.**

——S 19—Application under, to appellate Court—If original matter—C. P. Code (V of 1908), O. 7, R. 10—Applicability *See* 1940 Dig., Col. 850. SATYANARAYANA *v.* PEDDI NAIDU. **A.I.R. 1941 Mad. 362 = (1940) 2 M.L.J. 940.**

——S 19—Applicability—Suit dismissed before Act—Appeal—Reversal and decree after Act—Application under S. 19—Competency. *See* 1940 Dig. Col. 850.

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KANNABHIRAN PILLAI *v* GOVINDASWAMI PILLAI. **194 I.C. 757 = 14 R.M. 54 = (1940) 2 M.L.J. 473.**

——Ss. 19 and 20—*Co-judgment-debtors—Application by one—If all others should be joined.*

There is nothing in S. 19 or S. 20 of Madras Act IV of 1920 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor. (*Wadsworth and Patanjali Sastri, JJ.*) NAGASUNDARAM PILLAI *v.* MATHURBOOTHAM AIYAR. **53 L.W. 158 = 1941 M.W.N. 204 (1) = A.I.R. 1941 Mad. 556 = (1941) 1 M.L.J. 218.**

——S. 19—Construction and scope—Debt ripening into decree after Act—If debt liable to be scaled down under Act. *See* 1940 Dig., Col. 850. KANAKARAJU *v.* ATCHUTHARAMANARAJU. **192 I.C. 400 = 13 R.M. 552 (1).**

——Ss. 19 and 20—Death of judgment-debtor just before expiry of the sixty days time allowed under S. 20 for applying for scaling down—Legal representative—If entitled to file a fresh application for stay under S. 20—Procedure. *See* 1940 Dig., Col. 850. SUNDARA REDDIAR *v.* ALAGAPPA CHETTIAR. **194 I.C. 134 = 13 R.M. 747 = A.I.R. 1941 Mad. 100 (2) = (1940) 2 M.L.J. 466.**

——S. 19—*Final decree in mortgage suit before 1-10-1937—Private sale of part of hypotheca—Vendee paying part of sale price to decree-holder—Application by mortgagor to scale down—Competency—Vendee not agriculturist—Effect of.*

After a final decree in a suit on a mortgage some of the mortgaged items of property were sold privately on 9-10-1937 and the vendee was directed to pay the amount to the mortgagee He paid a portion, retaining the balance for future payment. The debtor applied for entering up satisfaction on the ground that more than twice the amount of the principal and the costs had been paid. The creditor applied to have the purchaser impleaded as a party to the final decree and opposed the debtor's application on the ground that it should not enure to the benefit of the purchaser who was not an agriculturist.

Held, (1) that the purchaser could not be impleaded as he had no separate rights to agitate in the execution of the decree; (2) that he was not a party to the decree and the scaling down could not be restricted to the judgment-debtor agriculturist's interest in the property in his possession inasmuch as that would result in the splitting up of the decree against the only party to the decree; (3) that there was no decree against two persons, one an agriculturist and the other a non-agriculturist, but the decree was only against one person, the mortgagor. (*Wadsworth and Patanjali Sastri, JJ.*) SATYANARAYANAMURTHY *v.* GANGISETTI **53 L.W. 162 = 1941 M.W.N. 284 = A.I.R. 1941 Mad. 497 = (1941) 1 M.L.J. 223.**

——S. 19—Judgment debtor alone entitled to scaling down—Purchaser of equity of redemption from Official Receiver in the insolvency of the judgment-debtor—Whether judgment-debtor. *See* 1940 Dig., Col. 851. GANAPATHI BHATTA *v.* A.M.L. D'SOUZA. **13 R.M. 595 = 191 I.C. 744 = (1940) 2 M.L.J. 317.**

——S. 19—Jurisdiction—Suit challenging decree of another Court—Decree in—Appeal from—Application to appellate Court to scale down decree attacked—Competency. *See* 1940 Dig., Col. 851. VALLABHACHARYULU *v* RANGACHARYULU. **A.I.R. 1941 Mad. 76 = (1940) 2 M.L.J. 416.**

——S. 19—Jurisdiction — Trial Court — Power to scale down decree passed by appellate Court. *See* 1940 Dig., Col. 851. PERIASWAMI CHETTIAR *v.* RAMA-

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SWAMI GOUNDAN. **I.L.R. (1941) Mad 53 = 195 I.C. 697 = 14 R.M. 219 = A.I.R 1941 Mad. 113 = (1940) 2 M.L.J 513.**

——**S. 19**—Mortgage decree—Purchaser of equity of redemption at sale in execution of money decree—Right to apply for scaling down mortgage decree *See* 1940 Dig., Col. 851. PALANI GOUNDAN *v.* PERIA GOUNDAN. **A.I.R. 1941 Mad. 158 = (1940) 2 M.L.J. 887.**

——**S. 19**—Order under—Revision—Provision of right of appeal against such orders by the new rules—If retrospective—Effect on competency of pending revision petitions. *See* 1940 Dig., Col. 852. CHIDAMBARAM CHETTIAR *v.* MUTHUKUMARASWAMI CHETTIAR. **192 I.C 896 = 13 R.M. 607 = (1940) 1 M.L.J. 817.**

——**S. 19**—Procedure—Liability created for first time by appellate decree—Application for scaling down—Procedure—Forum for making application—Trial Court or appellate Court. *See* 1940 Dig., Col. 852. KANNABHIRAN PILLAI *v.* GOVINDASWAMI PILLAI. **194 I.C. 757 = 14 R.M. 54 = (1940) 2 M.L.J. 473.**

——**Ss. 19 and 23**—Sale in execution of mortgage decree—Application by judgment-debtor—Qualification for benefits under—Necessity to give notice to puisne mortgagee. *See* 1940 Dig., Col. 852. KUMARASWAMI REDDIAR *v.* MUTHUGOPAL NAICKER. **A.I.R. 1941 Mad. 205 = (1940) 2 M.L.J. 943.**

——**S. 19, Proviso**—Applicability — Compromise decree for principal, interest and costs—No separate allocation of costs—Costs if can be separately taxed—Costs of execution—If can be directed to be paid first. *See* MADRAS AGRICULTURISTS' RELIEF ACT, SS. 8, 9 AND 19, PROVISO. **(1941) 2 M.L.J. 658.**

——**S. 19, Proviso**—Decree for costs in favour of respondent in appeal before Privy Council—Adjustment of decree by appropriation of payments already made under S. 19—Claim by respondent for payment towards costs out of deposit by appellant under O. 45, R. 7, C.P. Code. *See* C. P. CODE, O. 45, R. 7. **(1941) 2 M.L.J. 125.**

——**S. 19, Proviso**—*Decree on mortgage—Payment under—Re-appropriation towards costs—Principles.*

On the basis of a mortgage executed in August 1925, for Rs. 7,500, a decree was passed for the principal amount and Rs. 3,311-14-0 interest, Rs. 336-8-4 subsequent interest, and Rs. 1,515-8-0 as taxed costs. In 1935, the judgment-debtor mortgaged one of the items of the mortgaged properties with the leave of the Court and deposited a sum of Rs. 8,500, which he raised by mortgage, in Court towards the decree. In 1936, a further sum of Rs. 500 was paid towards the decree and part satisfaction was entered to the extent of Rs. 9,000. From the order of assessment to income-tax made on the decree holder in 1936, it was found that the decree-holder had appropriated in his books Rs. 5,000 out of Rs. 8,500 towards the principal and Rs. 3,500 towards interest. The sum of Rs. 500 was not definitely appropriated either to the principal or to the interest, but it was definitely appropriated to the decree.

Held, (1) that the sum of Rs. 500 could not be treated as unappropriated; (2) that in the absence of evidence of the judgment-debtor to the contrary, the sum of Rs. 8,500 could not be treated as not definitely appropriated by the act of the creditor, and the creditor's appropriation must therefore stand except for purposes of re-appropriation under the proviso to S. 19 of Madras Act IV of 1938; (3) that it was equitable that the amount appropriated towards the principal and the amount appropriated towards interest should contribute rateably in making up the amount required for re appropriation towards costs. (*Wadsworth and Patanjali Sastri, JJ.*)

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SREENIVASACHARIAR *v.* KRISHNAYYA CHETTI. **53 L.W. 721 = 1941 M.W.N. 625 = A.I.R. 1941 Mad. 697 = (1941) 1 M.L.J 833.**

——**S. 20**—Applicability—Execution sale and confirmation—Application for stay of delivery pending application under Ss. 19 and 23—Maintainability. *See* 1940 Dig., Col. 852 LAKSHMINARASIMHA RAO *v.* MUNEYYA. **191 I.C. 359 = 13 R.M. 511 = (1940) 2 M.L.J. 234.**

——**S. 21**—*Insolvency of mortgagor and declaration of dividend in the insolvency—Purchasers of equity of redemption—Right to have mortgage decree scaled down.*

Where a mortgagor has been adjudged insolvent and a dividend has been declared in the insolvency, the purchasers of the equity of redemption who are agriculturists are entitled to have the mortgage decree scaled down under Act IV of 1938. (1940) 2 M.L.J. 291, Appr. (*King and Patanjali Sastri, JJ.*) SUBBARAYADU *v.* SOMAYYA. **53 L.W. 229 = 1941 M.W.N. 191 (1) = A.I.R. 1941 Mad. 491 = (1941) 1 M.L.J. 304.**

——**S. 21**—*Scope—Application by insolvent—Parties—Official Receiver—Necessity for impleading.*

S. 21 of Madras Act IV of 1938 in its plain terms seems to contemplate an application by the person who would have been an agriculturist but for his adjudication as an insolvent. To such an application the Official Receiver in whom the estate vests should be impleaded as a party. (*Wadsworth, J.*) JAGANNATHA AIYANGAR *v.* SENNIVEERA CHETTIAR. **1941 M.W.N. 271 = A.I.R. 1941 Mad. 487 = (1941) 1 M.L.J. 197.**

——**S. 21**—Scope of—Claim to restitution against Hindu father—Insolvency of father—Application by son for scaling down—If barred. *See* MADRAS AGRICULTURISTS' RELIEF ACT, S. 3 (*iii*). **53 L.W. 69.**

——**Ss. 22 to 25**—Applicability—Sale in execution before Act—Application to set aside under O. 21, R. 89, C. P. Code—Deposit on date when Act in force—Withdrawal by decree-holder in full satisfaction—Subsequent application for scaling down—Competency. *See* 1940 Dig., Col. 853. THIRAVIA NADAR *v.* CHELLIAH NADAR. **A.I.R. 1941 Mad. 74 (2) = (1940) 2 M.L.J. 417.**

——**S. 23**—*Applicability — Agriculturist parting with interest long before sale.*

It is clear that the words "property in which an agriculturist had an interest has been sold," must refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. (*Wadsworth, J.*) RAMAYYA *v.* KOTAYYA. **54 L.W. 561 (1) = 1941 M.W.N. 879 (2) = (1941) 2 M.L.J. 557.**

——**S. 23**—*Applicability—Decree for arrears of rent—Sale held in execution—If wipes off arrears of rent.*

The mere holding of a sale in execution of a decree for arrears of rent will not wipe off the arrears of rent so as to exclude the operation of S. 23 of the Madras Act IV of 1938. The arrears will remain outstanding until the proceeds of the sale in deposit in Court or with the Collector are paid to the landlord. (*Wadsworth and Patanjali Sastri, JJ.*) VENKATARATNAM *v.* SURYA RAO **1941 M.W.N. 96 = 53 L.W. 86 = A.I.R. 1941 Mad. 500 = (1941) 1 M.L.J 156.**

——**S. 23**—*Applicability—Decree of Foreign Court—Execution sale of properties in British India—Liability to be set aside.*

A judgment-debtor under a decree of a Court of a Native State is not entitled in respect of such decree to the benefits of S. 23 of Madras Act IV of 1938, as the

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Act has no application to foreign decrees or foreign Courts. Hence a sale of properties in British India in execution of such a decree cannot be set aside under S. 23 of the Act. (*Wadsworth, J.*) PARAMESWARA MENON *v.* NARAYANA MENON.

1941 M.W.N. 879 (1)=54 L.W. 422=(1941) 2 M.L.J 580.

——**S. 23**— Applicability — "Judgment debtor"—Donee of part of mortgaged property from mortgagor impleaded in suit on mortgage—Sale of all properties in one lot—Right of donee to apply to set aside sale—C. P. Code, S 2 (10) *See* 1940 Dig., Col. 854. PARVATHI AMMA *v.* SUBRAMANIA PATTAR.

192 I C. 107=13 R.M. 535=(1940) 2 M L.J. 749.

——**S 23**—*Applicibility—Mortgage decree for sale—Mortgagor parting with equity of redemption even before preliminary decree—Right to apply to set aside sale in execution.*

S. 23 of Madras Act IV of 1938 contemplates the existence of an interest owned by an agriculturist at the time of the sale. Where pending a suit on a simple mortgage the mortgagor sells his equity of redemption to another person, and subsequently a decree is passed, it is not open to the mortgagor to claim to have the sale in execution of the final decree set aside under S. 23 of the Act, because he has no such interest in the property as would entitle him to apply under S. 23. (*Wadsworth and Patanjali Sastri, JJ.*) NAGARAJAN *v.* KRISHNA AYYAR. **54 L.W. 184=1941 M.W.N. 975=(1941) 2 M.L.J. 298.**

——**S 23**—*Application—Sale in execution of decree for rent under Madras Estates Land Act—If can be set aside*

S. 23 of the Madras Act IV of 1938 is not inapplicable to sales in execution of decrees for rent under the Madras Estates Land Act. In terms the section applies to sales in execution of any decree whereby immovable property in which an agriculturist has an interest has been sold on or after 1st October, 1937, and if the application is made within 90 days of the commencement of the Act, the Court is obliged, if satisfied that the applicant is an agriculturist entitled to the benefits of the Act, to set aside the sale after giving notice to the persons interested and hearing them. The absence in S. 23 of a *non-obstante* provision regarding what is contained in the Estates Land Act, the absence of any necessity for confirmation of a sale under the Estates Land Act, the absence of provisions in S. 23 of the Madras Act IV of 1938 regarding the setting aside of sales under the summary provisions contained in Ss. 112 to 118 of the Estates Land Act, and the non-mention of Estates Land Act in S. 23 are not an indication that S. 23 would have no application to sales for arrears of rent in the ordinary Civil Courts under the procedure laid down by the C. P. Code. The words "any decree" in S 23 are very wide and would include a decree for rents under the Estates Land Act. (*Wadsworth and Patanjali Sastri, JJ.*) VENKATARATNAM *v.* SURYA RAO.

1941 M W.N 96=53 L.W. 86=A.I.R. (1940) Mad. 500=(1941) 1 M L.J. 156.

——**S. 23**—Construction—"Notwithstanding the sale has been confirmed"—Effect of. *See* 1940 Dig., Col. 854. SUBBA NAICKER *v.* SAVARIMUTHU PILLAI.

A.I R. 1941 Mad 73 (2)=(1940) 2 M.L.J. 709.

——**S. 23**—*Construction—Sale confirmed and satisfaction of decree entered up before Act—Application to set aside sale—Competency.*

Where before the commencement of Act IV of 1938, properties of the judgment-debtor had been sold away, the sale confirmed and satisfaction of the decree entered up, there is no longer a judgment-debtor, because the decree itself is wiped out before the commencement of Act IV of 1938, and after that no application under S. 23 is competent by a person who had previously been a judgment debtor. (*Burn, J.*) GOPALA MENON *v.* MEENAKSHI AMMA. **53 L.W. 57=1941 M.W.N. 89=A.I.R. 1941 Mad. 402=(1941) 1 M.L J. 106.**

MADRAS AGRIC. RELIEF ACT (1938), S. 28.

——**S. 23**—*Not applicable to sales held after the Act came into force.*

S. 23 of Madras Act IV of 1938 has no application to sales held after the Act came into force. (*Wadsworth and Patanjali Sastri, JJ.*) SESHAYYA *v.* VENKATARAMAYYA. **54 L.W. 228=1941 M.W.N. 971=(1941) 2 M.L.J. 309.**

——**Ss. 23 and 24**—*Profits on land after purchase at sale in execution and before setting aside under S. 23—Liability of purchaser to account to judgment debtor.*

It does not appear to have been the intention of the Legislature to deprive the purchaser of the profits which his purchase has earned in the interval between the original execution of the decree and the cancellation of the sale on an application under S. 23 of the Madras Agriculturists' Relief Act. S. 24 is altogether silent on the subject of interest and on the subject of profits. The Act is an expropriatory measure, and the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act, or by necessary implication therefrom. There is no express provision that the judgment-debtor should be entitled to the profits on the land the sale of which is set aside, and no such provision can be read into the Act by necessary implication from its terms. (*Wadsworth and Pantanjali Sastri, JJ.*) CHINNA KONDAYYA *v.* RAMALINGA REDDI. **(1941) 2 M.L.J. 1060.**

——**S. 23**—Sale held in execution of decree before 1st October, 1937—If can be reopened and scaled down. *See* 1940 Dig., Col. 854. BASAVAYYA *v.* MANIKYALA RAO. **A.I.R 1941 Mad. 37=(1940) 2 M.L.J. 340.**

——**S. 27**—Certificate by Local Board—If conclusive. *See* 1940 Dig., Col. 854. KAMAKSHI CHETTI *v.* ALAGANAN CHETTIAR. **A.I.R. 1941 Mad 73 (1)=(1940) 2 M.L J. 468 (1).**

——**S. 28 and R. 7**—*Scope—If* ultra vires.

R. 7 of the rules enacted by the Provincial Government under Madras Act IV of 1938, which makes it clear that the term "assessed to property tax" in Proviso C to S. 3 (*ii*) of the Act would not cover the case of a person in whose name an assessment has been made when he was not in fact the owner of the property during the relevant period is not *ultra vires*. There is nothing repugnant to the apparent intention of Proviso C in this rule, nor can it be said that the rule gives to the proviso a meaning which is not its probable meaning. The use of the word "owner" in the last sentence of the Proviso C, gives considerable support to the view that the Legislature intended to disqualify from a claim to be an agriculturist only a person from whom tax had been demanded by virtue of ownership. It is within the powers of the Provincial Government to make a rule, such as R. 7, which merely removes an ambiguity in a clause of the statute, and is not beyond the powers of the Government under S. 28 (*Wadsworth and Patanjali Sastri, JJ.*) ISWARIAH *v.* KANAPPA CHETTY.

I.L.R. (1941) Mad. 840=1941 M W N 400=53 L W. 518=A.I.R. 1941 Mad. 704=(1941) M.L.J. 605.

——**S. 28**—*Rules—R. 8—Scope—If* ultra vires—*Order on application under S. 19—Appeal—Matter—If relates to execution of decree.*

MADRAS AGRIC. RELIEF ACT (1938), S. 28.

An appeal does not lie as of right but must be conferred by express enactment. R. 8 of the Rules promulgated under S. 28 of Madras Act IV of 1938 providing for appeals is *ultra vires*. Proceedings under S. 19 of the Act for scaling down decrees are not proceedings in execution and no appeal will therefore lie under S. 47, C.P. Code. The pendency of execution proceedings does not make an application under S. 19 a matter relating to the execution of the decree in any sense. (*Leach, C.J., Gentle and Krishnaswami Aiyangar, JJ.*) NAGAPPA CHETTIAR *v.* ANNAPOORNI ACHI.

I L R. (1941) Mad. 261 = 53 L W. 79 = 1941 M.W.N 131 = A.I.R. 1941 Mad. 235 = (1941) 1 M.L.J. 164 (F.B.).

——**S. 28, Rules, R. 9**—Appeal under—Court-fee payable. *See* COURT-FEES ACT, SCH. II, ART. 11.

(1941) 1 M.L.J. 721.

MADRAS BOARD OF REVENUE (STANDING) ORDERS, O. 15 (18)—*Communal land—Wrong grant by tahsildar—Jurisdiction of Collector to interfere—Civil Courts—Jurisdiction of.*

Communal land or land required for communal purposes cannot be granted on *darkhast*. Where a tahsildar grants such land or grants mistakenly believing that it is not required for communal purposes, the Collector can interfere in revision and cancel the assignments. Civil Courts have no jurisdiction in such matters and cannot interfere where the orders of the revenue officers are within the scope of their authority. (*Chandrasekhara Ayyar, J.*) VARADIAH CHETTY *v.* PROVINCE OF MADRAS. **54 L W. 404 = (1941) 2 M.L J. 564.**

——**Order No 18**—Tree patta—Incidents of—If document of title—Right to resume trees from original grantee and to grant them to another. *See* 1940 Dig., Col. 877. SECRETARY OF STATE *v.* HUSSANI SAHIB.

191 I.C. 631 = 13 R.M. 502 = (1940) 2 M.L.J 13.

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 7 (2)—Powers of Magistrate under—Acquittal—Legality. *See* 1940 Dig., Col. 855. PUBLIC PROSECUTOR *v.* CHELLIAH TEVAN **192 I.C. 289 = 13 R.M. 554 (1) = 42 Cr.L.J. 269 = A.I.R. 1941 Mad. 61 = (1940) 2 M L J. 418.**

MADRAS CHILDREN ACT (IV OF 1920), S. 22—*Child or young person—Material time to consider whether offender is young person—Time of offence or time of conviction.*

In considering whether an offender is a child or a young person under S. 22 of the Madras Children Act, the point of time that is material is the time at which the sentence is to be pronounced, *i.e.*, the time of the conviction and not the time of the offence. (*Burn and Mockett, JJ.*) PUBLIC PROSECUTOR *v.* VENKATASUBRAMANYAM. **I.L.R. (1941) Mad. 428 = 192 I.C. 579 = 42 Cr.L.J. 311 = 13 R.M 585 = 52 L.W. 949 = 1941 M W.N. 58 = A.I.R. 1941 Mad. 358 = (1941) 1 M.L.J. 34.**

——**S. 26 (1)**—*Sentence of fine on young offender—Father directed to pay fine without giving opportunity of showing cause—Legality—Proper course.*

A young person accused of an offence under S. 326, I. P. Code, pleaded guilty to the charge and was sentenced to pay a fine of Rs. 50. His father who was present in obedience to a notice under S. 21 (1) of the Madras Children Act was directed to pay the fine under S. 26 (1) but he was not given any opportunity of showing that he had not conduced to the commission of the offence by neglecting to exercise due care on his son. It did not also appear that the offence was due to any neglect of the father.

Held, that the order under S. 26 (1) should be set aside, and the proper course was to commit the accused to the custody of the father on his executing a bond to be responsible for the good behaviour of the accused, his son. (*Lakshmana Rao J.*) HUSSAIN KHAN, *In re*. **53 L W. 154 = 194 I C 98 = 13 R.M. 755 = 42 Cr.L.J. 516 = 1941 M.W.N. 369 = A.I.R. 1941 Mad. 429 = (1941) 1 M.L.J. 219.**

MADRAS CITY MUNICIPAL ACT (IV OF 1919, as amended in 1936), S. 101 (b)—*Applicability—Conditions—"Choultry".*

In order to claim exemption under S. 101 (*b*) of the Madras City Municipal Act as amended in 1936, the first condition to be satisfied is that the buildings in question are choultries. The buildings must, in other words, afford accommodation as a resting place for travellers—unless this is so, S. 101 (*b*) will not apply even though the rent derived from the buildings is used exclusively for charitable purposes. (*Somayya, J.*) DEIVASIGAMANI PONNAMBALA DESIKAR *v.* CORPORATION OF MADRAS. **54 L.W. 720 = 1941 M.W.N. 825 = A.I.R. 1941 Mad. 908 = (1941) 2 M.L.J. 544.**

——**S. 287**—Scope—Power of Commissioner to renew licence for carrying on business in particular premises. *See* 1940 Dig., Col. 855. ABDUL KAREEM SAHIB *v.* COMMISSIONER, CORPORATION OF MADRAS.

193 I.C. 551 = 13 R.M. 683 = A.I R. 1941 Mad. 19 = (1940) 2 M.L.J. 597.

——**S. 357 (1) (a)**—Applicability—Failure to comply with notice under S. 218 (1)—Particulars of work to be carried out and time within which work is to be carried out not specified in notice—Effect—Conviction—Sustainability. *See* 1940 Dig., Col. 855. GOPALACHARI *v.* CORPORATION OF MADRAS. **13 R.M. 488 = 42 Cr L J. 61 = (1940) 2 M.L.J. 88.**

MADRAS CITY POLICE ACT (III OF 1888), S. 37 (3)—*Applicability—Gaming—What amounts to.*

P.W. 1, the Sub-Inspector of Police, received information that the 1st accused was receiving bets on horse races and sent P.W 2 with a slip containing names of horses and a sum of 4 annas. P.W.2 handed the slip and cash to accused 1, who retained the cash and passed the slip to his clerk the 2nd accused. The latter wrote something over the slips and gave them to the 1st accused who returned one slip to P.W. 2. P.W. 1 rushed to the place and some betting slips and cash were found on the 1st accused. The 2nd accused had a pencil with him.

Held, that the 1st accused was guilty and liable to conviction under S. 37 (3) of the Madras City Police Act, but that the 2nd accused was not guilty as he was not found gaming. (*Lakshmana Rao, J.*) CROWN PROSECUTOR *v.* ABDUL WAHAB.

1941 M.W.N. 669 (1) = 54 L.W. 236 = A.I.R. 1941 Mad. 767 (1).

——**S. 47**—*Common gaming house—Money found on persons convicted of gaming—Forfeiture—Rule as to.*

Where persons have been found guilty of running a common gaming house and of gaming within the house, the general principle to be adopted by the Magistrate in dealing with the money found on the persons concerned under S. 47 of the City Police Act is to consider whether the money is likely to have been used in connection with the gaming. If he finds in the affirmative, he should order its forfeiture; if not he should refrain from doing so. It is a question of fact in each case whether money found on the person of the accused convicted under the Act was used for gaming. In an average case when there is no evidence one way or the other, the rule may be adopted of forfeiting such money as may be found on the floor and no more. But where there is evidence pointing one way or the other, the Magistrate is bound to take that evidence into consideration and not

MADRAS CITY POLICE ACT (1888), S. 75.

to rely entirely on the rough rule of forfeiting the money found on the floor only. (*Horwill, J.*) REX *v.* JAGGOPAL PRASAD. **196 I C. 775 = 54 L.W. 274 = A I R. 1941 Mad. 889 (2) = (1941) 2 M.L.J. 397.**

——S 75—Conviction under—Order under S. 106, Cr. P Code—Legality. *See* CR. P. CODE, S. 106. **1941 M.W.N. 221 (2).**

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922), S. 9—Valuation under—Basis of—Duty of Court—Values fixed in other suits—Relevancy of. *See* 1940 Dig., Col. 856. RAHMAT BI SAHEBA *v.* KRISHNA DOSS LALA. **194 I.C. 788 = 14 R.M. 76.**

——S. 11—Death of lessee or assignment by him—Notice to all the heirs or to assignee—If essential—Notice addressed to and served on only one joint tenant—Sufficiency. *See* 1940 Dig., Col 856. RAHMAT BI SAHEBA *v.* KRISHNA DOSS LALA. **194 I.C. 788 = 14 R.M. 76.**

——S 12—*Applicability—Right to benefit of act—Conditions—Sub-tenant under tenancy created before Act—Tenant evicted and lease granted to various lessees from time to tim—Sub-tenant becoming sub-tenant of each succeeding tenant—Right to benefit of Act.*

On 5—1—1916, a lessee, *K*, went into possession of certain properties under a registered lease deed which gave him a lease of the premises for five years. This was renewed for a period of three years on 5—1—1921 on the same terms. In a partition suit in 1924, receivers were appointed in respect of the properties, and they ejected *K* and leased the properties to another. On 27—8—1929, the properties were leased to another and on 1—11—1931, they were again leased to another. In 1917, *K*, the then lessee, sublet a portion of the properties to the respondents who erected a shed on the property for storing firewood. On each occasion when a fresh lease was granted, the respondents accepted the then lessee as their landlord and paid him rent. In a suit for ejectment in 1934, the respondents claimed the benefit of S. 12 of the Madras City Tenants' Protection Act.

Held, that the respondents could not be said to be holding under a tenancy created before 1922 when the Act came into force, but were in possession only under a tenancy created after the Act came into force. A sub-lessee could have no greater rights than his landlord and when his landlord's lease terminated, any sub-lease created by him ceased to exist. *K's* lease having terminated in 1925, and there having been a new sub lease under each of the subsequent leases, the respondents must be deemed to be in possession under a sub tenancy which commenced on 1—11—1931. (*Leach, C.J. and Happell, J.*) VISWANATHA SASTRI *v.* MURUGAPPA CHETTI. **1941 M W.N. 537 = 54 L.W. 66 = A.I.R. 1941 Mad. 682 = (1941) 2 M L.J. 115.**

MADRAS CIVIL RULES OF PRACTICE, R. 183—Debt attached in execution of decree—Sale of—If void—Setting aside—Limitation. *See* 1940 Dig., Col 857. BRAHMANANDAM *v.* SARVESWARA RAO. **A.I.R. 1941 Mad. 276 = (1940) 2 M.L.J. 503.**

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), S. 25—Membership—Date of ceasing—Resignation of membership—When takes effect—Acceptance by Society—Necessity—Receipt of letter of resignation by society—Sufficiency. *See* 1940 Dig., Col 857. GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY. **194 I.C. 769 = 14 R M. 67 = (1940) 2 M.L.J. 241.**

——S. 48—*Applicability—Sale at instance of Co-operative Society in execution of decree—Claim to property—Rejection by sale officer—Suit to set aside order*

MAD. DEBT CONCILIATION ACT (1936), S. 4.

—Leave of Registrar— Necessity— R. 22 (17) (a) to (c)—Scope.

S. 48 of the Madras Co-operative Societies Act only contemplates cases where proceedings have to be initiated against a society and not to cases where a society was itself a party to an order in proceedings instituted by virtue of the Co operative Societies Act. Where in execution of a decree a Co-operative Society brings certain properties to sale, and a claim to the properties preferred under R. 22 (17) (*a*) of Rules under the Act is dismissed by the sale officer, the claimant is entitled to file a suit to set aside the order rejecting his claim petition, without the leave of the Registrar of Co operative Societies. Cases which are expressly provided in the Act are specifically saved by S. 48 from the condition as to leave. Sub-Rr (*a*) to (*c*) of R. 22 (17) take effect as if enacted in the Act by virtue of S. 65 (4), and as the rule specifically provides for a suit to set aside the claim order within 6 months, the prohibition under S. 48 cannot apply to such a suit. (*Venkataramana Rao, J.*) RAMAYYA *v.* BOLLANKA CO-OPERATIVE CREDIT SOCIETY. **54 L.W. 176 = 1941 M.W.N. 862 = A.I.R. 1941 Mad. 739 = (1941) 2 M.L.J. 72.**

——S. 48—Scope—Liquidator appointed for Co-operative Society—Suit against society—Maintainability without leave of Registrar. *See* 1940 Dig., Col. 857. GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY **194 I.C. 769 = 14 R.M. 67 = (1940) 2 M.L.J. 241.**

——S. 51 and R. 15—Award—Assignment—Execution in Civil Court by assignee—C. P. Code, O. 21, R. 16—Applicability. *See* 1940 Dig., Col. 858. MUNUSAMI CHETTI *v.* CHENCHU NAIDU. **193 I.C. 634 = 14 R M. 706 = (1940) 2 M.L.J. 216.**

——S 51 and R. 15 (7) (c)—Award—Execution by Court—Limitation—Article applicable—Limitation Act, Arts. 181 and 182. *See* 1940 Dig., Col. 858. SUBBA RAO *v.* CALICUT CO OPERATIVE URBAN BANK, LTD. **191 I C. 226 = 13 R.M. 492 = (1940) 1 M.L.J. 268.**

—— S. 65—Rules—R. 22 (17) (*a*) to (*e*)—Scope and effect—Suit to set aside claim order—Leave of Registrar—Necessity. *See* MADRAS CO OPERATIVE SOCIETIES ACT, S. 48. **(1941) 2 M.L.J. 72.**

MADRAS COURT OF WARDS ACT (I OF 1902), S. 49—Notice under—Frame and contents of—Suit on behalf of temples situate in village—Notice mentioning names of temples and villages in which they are situate—Sufficiency—Non-mention of names and addresses of managers—If invalidates notice. *See* 1940 Dig., Col 858. NAGAPPA CHETTIAR *v* ZAMINDAR OF SIVAGANGA. **194 I.C. 786 = 14 R M. 80 = (1940) 1 M.L.J. 442.**

MADRAS CRIMINAL RULES OF PRACTICE, R. 82—*Advocate accused of crime along with others—Right to appear as counsel for co-accused.*

An advocate who is accused with others of a criminal offence cannot appear at the trial as counsel for his co-accused. R. 82 of the Madras Criminal Rules of Practice does not authorise a co-accused to appear as counsel in the case. (*Leach, C.J and Gentle, J.*) SUBRAMANYA SARMA, *In re.* **196 I.C. 624 = 54 L W. 133 = 1941 M W.N. 683 = A.I.R. 1941 Mad. 808 = (1941) 2 M.L.J. 156.**

MADRAS DEBT CONCILIATION ACT (XI OF 1936), Ss. 4 and 25—Applicability to execution proceedings—Decree on basis of mortgage—If falls within purview of the Act—Execution—Stay of. *See* 1940 Dig., Col. 859. NARAYANASWAMI CHETTI *v.* VENKATA REDDI. **192 I.C. 315 = 13 R.M. 539 = (1940) 2 M.L.J. 324.**

MAD. DEBT CONCILIATION ACT (1936), S. 4.

——**S. 4 (1)**—Insolvent debtor—Application by, to Debt Conciliation Board—Jurisdiction of Board to entertain. *See* 1940 Dig., Col. 859. DASARADHARAMA REDDI *v.* SYED RAHIMTULI A HUSSANI.

193 I.C. 567=13 R.M. 700=(1940) 1 M.L.J. 270.

——**Ss. 7 and 17**—*Applicability and scope—Application in order—Board proceeding under S. 8—Jurisdiction to dismiss application thereafter under S. 7 on the expiry of 12 months—Duty of procedure to act under S. 17.*

S. 17 of the Debt Conciliation Act leaves no option to the Board. If before the expiration of the twelve months no settlement has been arrived at, the debtor's petition must be dismissed. There is no power in the Board to extend the proceedings beyond twelve months. The Board cannot evade its statutory duty under S. 17 by rejecting the application under S. 7 of the Act. Once the Board takes an application on file and finds no formal defects which would enable it to dismiss the application under S. 7, it must proceed under S. 8, and thereafter it has no jurisdiction to go back and dismiss the petition under S. 7, so as to enable the debtor to file another petition. The Board's duty is to dismiss the petition under S. 17 on the expiry of the twelve months, though that would preclude a fresh application. The Board has no power to extend the period by having recourse to S. 7 when it has to proceed under S. 17. The omission to give the Board power to extend its proceedings beyond 12 months is a defect which cannot be remedied by the Courts, but which could be remedied only by the Legislature. (*Leach, C.J. and Chandrasekhara Aiyar, J.*) SUBBARAYA CHETTIAR *v.* DEBT CONCILIATION BOARD.

1941 M.W.N. 893=54 L.W. 423=(1941) 2 M.L.J. 581

——**Ss. 10 and 23**—*Jurisdiction of Board—Creditor filing statement of claim—Order declaring debt discharged for absence of creditor and failure to produce accounts—Legality—Writ of* certiorari—*Issue of—If justified.*

After a statement of claim has been filed by a creditor before the Board under S. 10 (1) of the Debt Conciliation Act, the Board has no longer jurisdiction to declare the debt as discharged under S. 10 (2). Where, after filing such a statement the Board declares the debt discharged on the ground of the creditor's absence at the adjourned hearing and failure to produce account books, the order is unlawful and liable to be quashed by a writ of *certiorari*. It is only when there is another suitable remedy open to the aggrieved party that the Court will not issue a writ of *certiorari*. The provision for review under S. 23 of the Debt Conciliation Act cannot be regarded as a suitable or other remedy so as to disentitle the aggrieved creditor to the issue of a *writ*. Where a Debt Conciliation Board has acted in abuse of its powers, the aggrieved person should not be compelled to apply for review. (*Leach C.J. and Krishnaswami Ayyangar, J.*) KAMALINGAM CHETTIAR *v.* DEBT CONCILIATION BOARD, DHARMAPURI.

I.L.R. (1941) Mad. 288=53 L.W 71=1941 M.W.N. 167=A.I.R. 1941 Mad. 385=(1941) 1 M.L.J. 108.

——**S. 10 (1) and (2)**—*Scope—Creditor filing statement and taking time to produce accounts—Failure to appear and to produce accounts on date fixed—Order cancelling debt—Legality.*

A creditor, when filing his statement of debt giving particulars under S. 10 (1) of the Debt Conciliation Act, stated that his account books were filed, in Court in a partition suit in which he was a defendant and took time for production of the account books. On the adjourned date, he was still unable to produce the account books and he did not appear. The Conciliation Board thereupon passed an order discharging the debt under S. 10 (2) of the Act. There was no dispute between the creditor and the debtor as regards the amount due.

Held, that the creditor having substantially complied with the provisions of S. 10 (1) of the Act, the order under S. 10 (2) was illegal and without jurisdiction the failure of the creditor to produce his account books or to appear before the Board on the adjourned date gave no warrant to the Board to pass this order of cancellation. (*Leach, C.J. and Somayya, J.*) SUBBA RAO *v.* SATYANARAYANAMURTHI.

54 L.W. 143=1941 M.W.N. 903=A.I.R. 1941 Mad. 750=(1941) 2 M.L.J. 170.

——**Ss. 10 (2), 14 and 18**—*Duties and powers of Board—Objection raised to maintainability of petition and to inclusion of false debts—Board not deciding same and proceeding to settlement without preparing scheaule of assets and liabilities—Order under Ss.* 10 (2), 14 *and* 18—*Sustainability*

In a case where the jurisdiction of the Debt Conciliation Board to entertain a debtor's petition is challenged on the ground that the petitioner was not a "debtor" under the Debt Conciliation Act, and objections are raised stating that the debtor has fraudulently and collusively included false and bogus debts, it is the obvious duty of the Board to inquire into these objections and give its finding. Without a finding on these questions the Board would have no jurisdiction to proceed further. Where the Board does not decide these questions, or enquire into the genuineness of the debts challenged as false debts and does not prepare a schedule of assets and liabilities which it is its duty to do under the Act, the orders of the Board discharging certain debts for failure of the creditors to file statements, and allowing settlement of certain debts, and granting certificate under S. 18 of the Act are all without jurisdiction and must be quashed, as they cannot be sustained.

Per *Chief Justice*—It is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because the creditor has not filed a statement confirming the particulars set out in the debtor's application; though he may be precluded from disputing the debtor's figures, there can be no justification at all for depriving him of what the debtor has acknowledged to be due to him. Abuse of the powers under S. 10 (2) and arbitrary nature of the orders pointed out. (*Leach, C.J. and Somayya, J.*) VEERARAGHAVA RAO *v.* DEBT CONCILIATION BOARD, BEZWADA.

A.I.R. 1941 Mad. 873=(1941) 2 M.L.J. 366

——**S. 10 (2)**—*Scope—Creditor requesting Debt Conciliation Board to summon deed as evidence of debt—Refusal and order discharging debt—Legality.*

In a petition by a debtor for conciliation of his debts, the creditor who was the only creditor requested the Debt Conciliation Board to summon a mortgage deed in the possession of his brother, who had filed a partition suit against him, as evidence of his debt. The Board did not comply with this request and declared the debt to be discharged,

Held, that it was the duty of the Board to summon the document and the Board was wrong in declaring the debt, admitted by the debtor himself to be due, discharged on the ground that the creditor did not furnish a proper statement under S. 10 (2) of the Debt Conciliation Act. The order was of a most arbitrary character and unjust and must therefore be quashed. (*Leach, C.J.*

MAD. DEBT CONCILIATION ACT (1936), S. 14.

and Happell, J.) VENKATASWAMI *v.* PEDDA MADDULETI 54 L.W 103 = 1941 M.W N. 952 = A.I.R. 1941 Mad. 736 = (1941) 2 M.L.J. 155.

——**Ss. 14 and 18**—*Decrees obtained by non-consenting creditors before settlement—Right to execute against all the assets of the creditor—Certificate under S. 18—Effect.*

Though the agreement under S. 14 (1) definitely prescribes what assets of the debtor shall be available for the creditors consenting to the conciliation, that is not enough to constitute a charge which is to be binding upon all the world and in particular upon the non consenting creditors who have already obtained decrees. S. 18 deliberately excludes from its effect decrees obtained before the settlement by the Board. The Act imposes no obstacle against execution of such decrees against all the assets of the debtor including those earmarked by the settlement under S. 14 (1) for the benefit of those creditors who agreed to the settlement. (*King, J.*) MUNI REDDY *v.* MUNI REDDY.

I.L.R. (1941) Mad 846 = 53 L.W. 461 = 1941 M.W.N. 315 = A.I.R. 1941 Mad. 434 = (1941) 1 M.L.J. 499.

——**Ss. 17 and 18**—Petition for conciliation of debts—Liability to eventual dismissal under S. 17—Effect on jurisdiction of Board to certify under S. 18 that a fair and reasonable offer has been refused. *See* 1940 Dig. Col. 859. MUTHU GOUNDAN *v.* PERIA GOUNDAN.

I.L.R. (1941) Mad 78 = 1941 M.W.N. 28 = 193 I.C. 416 = 13 R.M. 663 = A.I.R. 1941 Mad. 353 = (1940) 2 M.L.J. 937.

——**S. 17**—Scope—Duty of Board under—Power to extend proceedings beyond 12 months by proceeding under S. 7. *See* MADRAS DEBT CONCILIATION ACT. SS. 7 AND 17. (1941) 2 M.L.J. 581.

——**S. 23**—Scope—Order declaring debt discharged passed without jurisdiction—Writ of *certiorari*—Right to issue of—Remedy by way of review—If a bar. *See* MADRAS DEBT CONCILIATION ACT, SS. 10 AND 23. (1941) 1 M.L.J. 108.

——**S. 25**—Application under C. P. Code, O. 21, R. 90 by judgment debtor to set aside sale—If a "proceeding in respect of the debt" which can be stayed under S. 25 of Madras Act XI of 1936. *See* 1940 Dig., Col. 860. SURYA RAO *v.* BULLEMMA. 191 I.C 733 = 13 R.M. 509 = (1940) 2 M.L.J. 333

——**S. 25**—Duty of Court to grant unconditional stay. *See* 1940 Dig., Col. 860. SUNDARALINGAM *v.* VENKATARAMANAYYA. 192 I.C 409 = 13 R.M. 548 = (1940) 2 M.L.J. 322.

——**S. 25**—*Scope—Dismissal of application under S. 9 after eight months of its presentation—Liberty to file fresh application granted by Board—Second application beyond 12 months of original application—Stay of execution—If can be granted.*

An application to the Debt Conciliation Board for conciliation of the applicant's debts was allowed to remain pending for eight months and was then dismissed, the Board granting him in its order of dismissal liberty to apply again. The applicant filed a fresh application and applied also for stay of execution, but the Court refused to grant stay. More than twelve months had elapsed from the date when the first application was made.

Held, (1) that the dismissal was under S. 9 of the Debt Conciliation Act and not under S. 7, and hence the permission granted by the Board in dismissing the application was one which it had no jurisdiction to grant; (2) the second application could not therefore be regarded as a restoration or a continuation of the first but was a new application; (3) that even if the two

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applications are to be treated as one, since more than 12 months, as laid down in S. 17 of the Act, had elapsed, the Board would have no jurisdiction to extend the consideration of the application over a period of twelve months, and hence the order refusing stay was correct. (*King, J.*) RAMANATHAN CHETTIAR *v.* SUBRAMANIAN CHETTIAR. 54 L.W. 138 = 1941 M.W.N. 1015 = A.I.R. 1941 Mad. 747 = (1941) 2 M.L.J. 123.

——**S. 25**—Stay of execution in respect of same debt—If can be granted more than once—Application for conciliation—If can be made more than once. *See* 1940 Dig., Col. 860. NATESA AIYAR *v.* SINGARAVELU PILLAI. A.I.R. 1941 Mad. 350 = (1940) 2 M.L.J. 923.

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 81 and 83 (1) (a)—Construction—Power-house of Devasthanam—When exempt from property tax—Power-house used for supplying electricity to shops and hotels and yielding profits—Effect. *See* 1940 Dig., Col. 861. MUNICIPAL COUNCIL, PALNI *v.* SRI DANDAYUTHAPANI DEVASTHANAM.

I.L.R (1941) Mad. 322 = 13 R.M. 606 = 193 I.C. 34 = A.I.R. 1941 Mad. 185 = (1940) 2 M.L.J. 897.

——**Ss. 81 (3) and 354 (2)**—*Scope—Vacant sites owned by Railway Company—Taxation—Basis—Rules not framed by Local Government—Tax levied on basis of value fixed by committee appointed with consent of assessee—Legality—Suit for refund—Maintainability.*

The appellant, a railway company, owned vacant sites within the Municipality, and these lands were sought to be assessed to general property tax on the strength of a Government notification which declared the company liable to tax. Under the instructions of the Local Government and at the instance of the appellant company, a committee was convened and the committee fixed the capital value and the annual value of the lands. The municipal chairman who was the executive authority empowered to levy the tax adopted the value fixed by the committee and levied the tax on the annual value so arrived at. The company having paid the tax filed a suit for a refund on the ground that the tax had been illegally levied.

Held, (1) that the committee were satisfied that resort to the capital value method was the appropriate method in the case, and the rating authority could not therefore be said to have acted *ultra vires* its powers; (2) that the omission of the rule-making authority to frame rules could not take away the right of the Municipal Council to levy tax at the rate mentioned in the notification under S. 81 (3) of the District Municipalities Act; (3) that though the committee which fixed the capital value had no legal status under the act to make any assessment, since the appellant company asked for a committee, it could not object to the tax levied on the basis of the value fixed by the committee as being illegal; (4) that the provisions of the Act had in substance and in effect been complied with and therefore S. 354 (2) of the District Municipalities Act barred the suit. (*Pandrang Rao and Somayya, JJ.*) M. & S. M. RY. CO. *v.* MUNICIPAL COUNCIL, BEZWADA.

I.L.R. (1941) Mad. 897 = 1941 M.W.N. 545 = 53 L.W. 616 = A.I.R 1941 Mad. 641 = (1941) 2 M.L.J 189.

——**S. 82, Cl. (2)**—*Cost of constructing compound walls—If can be taken into consideration in fixing the annual value of the premises for taxation*

Having regard to the purpose and intendment of the Madras District Municipalities Act and of the proviso to Cl. (2) of S. 82, compound walls form part of the

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building and the cost of constructing the compound walls should also be taken into consideration in fixing the annual value of the premises for purposes of assessment. (*Somayya, J.*) TIRUMALAI TIRUPATHI DEVASTHANAMS *v.* TIRUPATI MUNICIPAL COUNCIL.
54 L.W. 754 = (1941) 2 M.L.J. 1093.

——**S. 83**—*Applicability—Building used by lessee for a school—Owner's right to claim exemption from property tax.*

The word "used" in S. 83 of the District Municipalities Act means "used" by the person who is primarily liable for the tax or in other words the owner. Where a building has been leased by the owner to another, and that another is using it as a school (for educational purposes), the owner cannot claim exemption from liability to property tax under S. 83. (*Krishnaswami Ayyangar, J.*) SURYANARAYANA MURTHI *v.* MUNICIPAL COUNCIL, COCANADA. 1941 M.W.N. 772 = 54 L.W. 392 (2) = A.I.R. 1941 Mad. 877 = (1941) 2 M.L.J. 338.

——**Ss. 93 (1) and 94 A**—Transacting or carrying on business—Meaning of—Person selling goods in a place—If carries on business there. *See* 1940 Dig., Col. 862. MUNICIPAL COUNCIL, ADONI *v.* BABU NAIDU.
194 I.C. 722 = 14 R.M. 44 = (1940) 1 M.L.J. 437.

——**S. 93 (1) (a) (i) and (ii) and (b)**—*Applicability and construction—Government servant holding appointment within Municipality for part of half-year but residing outside—Liability to tax—Extent and basis of calculation.*

Petitioner was the District and Sessions Judge of Trichinopoly and the total period of his duty as District and Sessions Judge during a half-year was 3 months and 2 days. During this period he worked inside the Municipality of Trichinopoly, but resided outside the Municipality. He paid the profession-tax which would be due from him on the income earned by the exercise of his profession during the period of 3 months and 2 days. The Municipality, however, claimed that he was liable not only on the pay of his appointment during the period for which he held an appointment within the Municipality but also on his professional income for the rest of the half-year when he was absent from Trichinopoly.

Held that the petitioner was taxable only under S. 93 (1) (*a*) (*i*) of the Madras District Municipalities Act, by virtue of his having held an appointment within the Municipality, that appointment within the Municipality was the sole source of income in respect of which tax was leviable, and in calculating his income for the half year, only the income from the taxable source should be taken into consideration. (*Wadsworth, J.*) AUSTEN BYERS *v.* MUNICIPAL COUNCIL, TRICHINOPOLY. 1941 M.W.N. 402 = 53 L.W. 533 = A.I.R. 1941 Mad. 636 = (1941) 1 M.L.J. 620.

——**S. 145**—*Construction and scope—Public latrine constituting nuisance to private person—If authorised under Act.*

Where the erection of a public latrine by a Municipality is found to constitute a nuisance to a private person near the locality, it cannot be taken to be authorised by S. 145 of the Madras District Municipalities Act, so as to disentitle the aggrieved party from suing for an injunction against the Municipality. (*Venkataramana Rao, J.*) MADURA MUNICIPALITY *v.* NATARAJA PILLAI. 53 L.W. 656 = 1941 M.W.N. 502 = A.I.R. 1941 Mad. 650 = (1941) 1 M.L.J. 768.

——**Ss. 167 and 183**—*Building licence—Sanction to construct house in accordance with plan—Provision that street alignment of 6 feet should be observed—*

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Addition of pial to building—Effect—Power of Municipality to order demolition.

Where a licence granted by a Municipality for putting up a building according to the plan submitted to the Municipality by the owner provides that the street alignment of 6 feet under S. 167 of the District Municipalities Act should be strictly observed, if the owner after constructing the building according to the plan adds a pial offending S. 167, the Municipality can order demolition of the pial. A pial is part of a building and it is therefore in breach of the licence to build a pial. S. 183 of the Act does not deal with pials which do not overhang a street; it deals with verandahs in the nature of balconies which overhang a street. (*Horwill J.*) PUDIKUTTY UNNEERI *v.* MUNICIPAL COUNCIL, CALICUT. 196 I.C. 261 = 14 R.M. 271 = 53 L.W. 712 = 1941 M.W.N. 443 = A.I.R. 1941 Mad. 657 = (1941) 1 M.L.J. 624.

——**S. 163**—*Applicability.*

S. 168 of the Madras District Municipalities Act applies to a person who is reconstructing his house and who because of an order of the Municipality has to keep his house out of the street alignment. (*Horwill, J.*). PUDIKUTTY UNNEERI *v.* MUNICIPAL COUNCIL, CALICUT. 196 I.C. 261 = 14 R.M. 271 = 53 L.W. 712 = 1941 M.W.N. 443 = A.I.R. 1941 Mad. 657 = (1941) 1 M.L.J. 624.

——**S. 183**—Applicability—Pial of house. *See* MADRAS DISTRICT MUNICIPALITIES ACT, SS. 167 AND 183. (1941) 1 M.L.J. 624.

——**S. 267-A**—*Scope and effect—Owner of private market—Right to prevent Municipality from opening new market.*

The owner of a private market in a Municipality is not entitled to prevent the Municipality from opening a new market. S. 267-A of the Madras District Municipalities Act does not impliedly give such a right. All that that section says is that it is open to the Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the Municipality to acquire his right and not to open a new market. There is no such thing as a market franchise or a right to hold a market conferred by grant from the Crown in Madras. The English common law rule that the owner of a private market can prevent another market being opened within a radius of 62 miles, is an artificial rule and is not countenanced even in England as a sound one. It is not a rule based on any equity or good conscience which would compel Courts in India to adopt it. (*Venkataramana Rao, J.*) HAMEDIA MADRASA SCHOOL *v.* MUNICIPAL COUNCIL, TIRUVARUR. 1941 M.W.N. 792 = 54 L.W. 728 = A.I.R. 1941 Mad. 834 (1) = (1941) 2 M.L.J. 347.

——**S. 306 (28)**—*Construction and scope—Bye law authorising levy of licence fees for advertisements—If ultra vires.*

The intention of S. 306, Cl. 28 of the District Municipalities Act, is to empower the Municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, but the section does not confer expressly or impliedly any power on a Municipality to levy licence fees in respect of advertisements. A bye-law framed by a Municipality authorising the levy of licence fees for advertisements is therefore *ultra vires*, and the contravention of such a bye-law is not an offence for which the offender can be convicted. (*Mockett, J.*) M. S. AYYAR & CO. *v.* SRINIVASULU NAIDU.
196 I.C. 761 = 1941 M.W.N. 681 = 54 L.W. 93 = A.I.R. 1941 Mad. 749 = (1941) 2 M.L.J. 145

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——**S. 354** (2)—Scope—Bar of suit—**Tax** levied on vacant lands owned by railway company on basis of capital value—Value fixed by committee appointed at the instance of railway company—Legality—Suit for refund—Bar of. *See* MADRAS DISTRICT MUNICIPALITIES ACT, SS. 81 (3) AND 354 (2). **53 L.W. 616.**

MADRAS ELECTORAL RULES, R. 48—*Claim for return of deposit by unsuccessful candidate for election to a seat in the Legislative Council—Forfeiture of deposit and rejection of claim by Returning Officer affirmed by Local Government—Suit in Civil Court for recovery of amount—Maintainability.*

An unsuccessful candidate for election to a seat in the Legislative Council held on 10th March, 1930, applied for the refund of his deposit to the Returning Officer who passed an order declaring that the deposit was forfeited to the Government. The petition to the Local Government against the order was rejected and the candidate filed a suit in the Civil Court for the recovery of the amount deposited by him. On the question of the jurisdiction of the Civil Court to entertain the suit,

Held, that the decision of the Government must for the purposes of the case be taken to be the decision of the Governor under R. 48 of the Electoral Rules which says that the question shall be referred for the decision of the Governor whose decision shall be final. The Governor, the only competent tribunal, having decided the case against the candidate a suit does not lie in the Civil Court to recover the deposit. The Civil Court would have jurisdiction only if the proper tribunal had declined jurisdiction and the aggrieved party was bereft of his statutory and constitutional remedy. (1938) 2 M. L.J. 745, Affir.; 47 Mad. 585; 45 M.L.J. 23 and 47 Mad. 325; 46 M L.J 60, Rel. (*Leach, C.J. and Happell, J.*) PANCHAPAKESA AIYAR *v.* SECRETARY OF STATE.

I.L.R. (1941) Mad. 481 = 53 L.W. 297 = 1941 M.W.N. 217 = 4 F.L.J. (H.C.) 72 = A.I.R. 1941 Mad. 412 = (1941) 1 M.L.J. 310.

MADRAS ESTATES LAND ACT (I OF 1908), Ss. 3 (5), 77-A and 112—*Proceedings initiated by one co-sharer without joining others—Validity.*

The term 'landholder' in Ss. 77-A and 112 of the Madras Estates Land Act must have the same meaning as under S. 3 (5) and in the case of a divided family it is not open to the elder brother to represent his minor brother and act as his guardian without being appointed as such under the Guardians and Wards Act and it is not competent for one co-sharer to initiate proceedings to exercise the power of sale under Ss. 111 and 112 without joining the other co-sharer. Under S. 3 (5) the Collector can recognise one person as a landholder if there is more than one landholder, only if there is a dispute between the landholders and not wherethe dispute is raised only by a ryot. Need for amendment of S. 3 (5) in the interests of the landholders and ryots pointed out. (*Venkataramana Rao, J.*) ETHIRAJA MUDALIAR *v.* MURUGESA MUDALIAR.

(1941) 2 M.L.J. 1088.

——**(as amended by Act XVIII of 1936), S. 6 (1), Expl. 2**—Scope and effect of—Decree for eviction in 1934 unexecuted—Execution after coming into force of amending Act—Plea that owing to acquisition of occupancy rights eviction cannot be effected—If open—Executing Court—Powers of. *See* 1940 Dig, Col. 863 CHINNA GOUNDAN *v.* KALYANASUNDARAM AIYAR.

A.I.R. 1941 Mad. 126 = (1940) 2 M.L.J. 881.

——**S. 6** (6)—*Scope and effect of—Ijardar—Right of to bring ryot's holding to sale for arrears of rent and purchase it himself.*

The right of occupancy referred to in S. 6 (6) is the right of permanent occupancy and anything short of this may be purchased by the ijardar. The right of permanent occupancy is not the only right of occupancy contemplated by the Act. Ss. 6 and 8 of the Act read in conjunction with S. 46 of the Act also show that a person can be in lawful possession of ryoti land for purposes of agriculture without having a permanent right of occupation. Consequently, S. 6 (6) does not operate as a bar to the ijardar purchasing at the auction the holding of his ryot put up for sale by him for arrears of rent. The omission of the word "permanent" in S. 6 (6) makes no difference. If after his purchase he lets in a tenant during the period of the ijara the tenant will automatically acquire a permanent right of occupancy. If he does not let in a tenant the ijardar will be left on the expiration of his lease merely with the right to possession of a non-occupancy ryot. (*Leach, C.J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI.

I.L.R. (1941) Mad. 785 = 196 I.C. 406 = 14 R.M. 293 = 1941 M.W.N. 655 = A.I.R. 1941 Mad. 539 = (1941) 2 M.L.J. 79 (F.B.).

——**S. 25**—*Agreement by ryot to pay a premium—Ryot let into possession—Landlord, if can recover the premium afterwards.*

Where a ryot has agreed to pay a premium and has been let into possession before making the payment, the landholder cannot recover the amount from him afterwards. The ryot may pay the premium if he chooses but the liability cannot be enforced against him, for there is no liability after entry. (*Leach, C.J. and Patanjali Sastri, J.*) RAJA OF VIZIANAGARAM *v.* NARAYANA RAJU.

53 L.W. 265 = 1941 M.W.N. 189 = A.I.R. 1941 Mad. 411 = (1941) 1 M.L.J. 314.

—— **S. 31**—*Apportionment of compensation—Windfall resulting in heavy rise in value of land—Right of melvaramdar to benefit of increase.*

When there has been a windfall and the land has risen in value enormously owing to the location of a university and a harbour near it, there is no reason why part of the benefit of this rise in value should not go to the melvaramdar. As much as one-third of the compensation paid for the entire land can be apportioned as the share of the melvaramdar. (*Pandrang Row and Somayya, JJ.*) NARAYANA GAJAPATI RAJU BAHADUR GARU *v.* ANNAPURNAMMA GARU.

I.L.R. (1941) Mad. 753 = 1941 M.W.N. 346 = 53 L.W. 463 = A.I.R. 1941 Mad. 660 = (1941) 1 M.L.J. 527.

——**S. 52** (3)—*Scope*—Patta *for one year—Holder remaining as* pattadar *after expiration of period—Suit to eject trespasser after one year—Landlord not made party at inception but impleaded in second appeal—Effect of—Decree for possession with landlord's assent—Validity—Registration Act, S. 17.*

Where a landholder granted a *patta* to a person for one year in respect of land forming part of an estate, and the land being in the possession of trespassers on the date of the *patta*, the tenant instituted a suit to recover possession from the trespassers after the expiry of the one year covered by the *patta* without making the landholder a party, but the landholder was added as a party in second appeal more than 12 years from the date of the trespass and signified his consent to the tenant getting possession.

Held, (1) that the patta, though only for one year, continued in force until a new *patta* and *muchilika* were exchanged by reason of the provisions of S. 52 (3) of the Madras Estates Land Act and the tenant (*pattadar*) could therefore sue to eject the trespasser even after the expiry of one year; (2) that the *patta* did not require

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registration under S. 17 of the Registration Act and the fact that S. 52 of the Estates Land Act permitted the holder of the *patta* for a year to remain in occupation of the land after the expiration of the period, until the issue of a fresh *patta*, did not turn the document into a lease for more than a year within the meaning of S. 17 of the Registration Act; (3) that since the landholder had signified his assent to the tenant's getting possession, a decree for possession could be passed in favour of the tenant, though the landholder was not a party to the suit at its inception; (4) that the date on which the landholder was made a party to the suit was immaterial as no relief was asked for against him. (*Leach, C.J. and Happell, J.*) BANGARIGADU *v.* ATCHUTARAMAYYA 1941 M.W.N. 248=53 L.W. 303= A.I.R. 1941 Mad. 572=(1941) 1 M.L.J. 384.

——S. 56—*Scope—Joint holding—Pattas not tendered to all ryots—Suit for acceptance of pattas—Maintainability.*

The right to enforce acceptance of patta arises to a landlord only after the patta has been tendered to the ryot and, if the holding is joint to the several ryots who hold the same jointly. One of the joint pattadars cannot be held to be the agent of the others for acceptance of pattas. When pattas are not tendered to all the ryots in possession of a joint holding, a suit under S. 56 of the Madras Estates Land Act. is not maintainable. (*Abdur Rahman, J.*) SYED GHOUSE SAHIB *v.* MAHOMED KHAN SAHIB. 53 L.W. 509=1941 M.W.N. 436= A.I.R. 1941 Mad. 567=(1941) 1 M.L.J. 550.

——S. 74—*Decision of Collector—Second appeal—Maintainability—Decision of Collector and of Distrit Court on appeal—If decree—C. P. Code. S.* 100.

A decision by the Collector under S. 75 of the Madras Estates Land Act disallowing objections preferred under S. 74 of the Act to the effect that rent was payable in money and not in kind, is not a decree, and is subject only to one appeal, namely before the District Court. The decision of the Collector is in the nature of an order only, and the appeal against such order must be regarded to be a continuation of the proceedings before the Collector and the decision by the District Court on appeal cannot be characterised as a decree. The provisions of S. 100, C. P. Code, cannot apply and no second appeal is competent against the decision of the District Judge. (*Abdur Rahman, J.*) PANTHANAM *v.* MAHOMED ABDUL RAHIMAN MARAKAYAR. 54 L.W. 382= 1941 M.W.N. 855=(1941) 2 M.L.J. 529.

——S. 112—*Applicability—Defaulter—Transferee from registered pattadar—Issue of patta to him bearing name of transferor—Acceptance of patta by transferee—Effect—Failure to pay rent—If can be proceeded against as "defaulter."*

The expression "defaulter" in S. 112 of the Madras Estates Land Act denotes not only the person who is the registered pattadar or the heir of the registered pattadar or the person whom the landholder has become bound to recognise as the ryot by reason of the provisions of S. 146, but also includes a person who has been accepted by the landholder as his ryot and has defaulted in the payment of his rent. The landholder may recognise a transferee of a registered pattadar without any formality and if he does the transferee becomes a ryot within the meaning of the Act. But before action can be taken under S. 112, S. 53 requires that the landholder shall have issued a *patta*, to the transferee, not necessarily bearing his name, but if a patta which is intended to be the transferee's patta though bearing the name of the transferor is accepted by the transferee all the provisions of the Act apply to the relationship between the landholder and the transferee. (*Leach, C.J., King and Patanjali Sastri, JJ.*) LAKSHMANA AYYAR *v.* AIYASAMI CHETTIAR I.L.R. (1941) Mad. 356= 192 I.C. 469=13 R.M. 558=1941 M.W.N. 35= 52 L.W. 976=A.I.R. 1941 Mad. 149= (1941) 1 M.L.J. 1 (F.B.).

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——Ss. 112 and 53—*Transferee—Recognition—Effect of—If "Defaulter."*

A transferee can be recognized as a ryot without any formality and if he is so recognized he becomes a defaulter within the meaning of S. 112, irrespective of whether a patta was issued to him or not. But in view of the provisions of S. 53, S. 112 cannot be invoked by the landholder unless he has in fact issued a patta to the transferee. (*Leach, C.J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI. I.L.R. (1941) Mad. 785= 196 I.C. 406=14 R.M. 293=1941 M.W.N. 655= A.I.R. 1941 Mad 539=(1941) 2 M.L.J. 79 (F.B.).

——Ss. 112 and 189—*Jurisdiction—Question whether sale was nugatory by reason of acceptance of arrears of rent after sale—Civil suit—Maintainability.*

In the case of a sale of an occupancy holding for arrears of rent the question whether the sale was rendered nugatory by the acceptance of the arrears of rent after the sale can be decided by the Civil Court. (*Leach, C.J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI. I.L.R. (1941) Mad. 785=196 I.C. 406= 14 R.M. 293=1941 M.W.N. 655= A.I.R. 1941 Mad. 539=(1941) 2 M.L.J. 79 (F.B.).

——Ss. 112 and 189—*Pattadar—Mortgagee of—Suit by in Civil Court to set aside sale and for declaration that sale does not affect his position as mortgagee—Competency.*

Where in the case of a mortgage of his interest by a pattadar notice under S. 112 is merely served on the mortgagee and neither the pattadar nor his sub-tenants are given any intimation of the intention to sell for default in payment of the rents due, the omission to serve pattadar entitles the mortgagee to have the sale set aside by a suit in a Civil Court and also entitles him to a declaration that the sale does not affect his position as mortgagee. (*Leach, C J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI. I.L.R. (1941) Mad. 785= 196 I.C. 406=14 R.M. 293=1941 M.W.N. 655= A.I.R. 1941 Mad. 539=(1941) 2 M.L.J. 79 (F.B.).

——S. 124—Scope—Landlord purchasing at revenue sale—Remedy for possession—Omission to proceed under S. 124—Effect—Subsequent suit for mesne profits between date of sale and date of delivery after getting possession without suit—If lies. *See* MADRAS ESTATES LAND ACT, SS. 163 AND 163-A.

(1941) 2 M.L.J. 781.

——(as amended in 1934). S. 125—*Scope—If retrospective—Sale in execution of rent decree—Effect on charge in respect of arrears and interest accrued due after decree at time of sale.*

The amendment of S. 125 of the Madras Estates Land Act by Act VIII of 1934 has no retrospective effect, it only clarifies the existing law; under S. 125 as it stood before the amendment, read in the light of S. 127, the sale of a holding in execution of a decree for rent must be deemed to put an end to landlord's charge over that holding in respect of the arrears and interest thereon which have accrued due since the decree at the time of the sale. (*Wadsworth, J.*) APPANNA SASTRI *v.* SOBHANADRI APPA RAO. 1941 M.W.N. 860= 54 L.W. 416=(1941) 2 M.L.J. 947.

——S. 127—*Notice—Form and mode of service of—Personal notice to defaulter—If necessary.*

MAD. ESTATES LAND ACT (1908), S. 151.

There is no necessity under S. 117 of the Madras Estates Land Act to give personal notice of a sale in execution of a rent decree to the defaulter. The kind of notice contemplated is by beat of drum in the village and by an affixture in a conspicuous part of a place in the village. (*Wadsworth, J.*) APPANNA SASTRI *v.* SOBHANADRI APPA RAO. **1941 M W.N. 860 = 54 L.W. 416 = (1941) 2 M L.J. 947.**

——**S. 151**—*Construction—Action under section——Grounds for—Building compound wall to prevent trespass of cattle—Digging land and laying foundations for erecting structure—Effect of.*

The Courts have nothing to do with the policy of rural reconstruction in construing a statutory provision like S. 151 of the Madras Estates Land Act. The object of S. 151, is that the value of the land as agricultural land should be strictly maintained and any attempt made by the tenant to divert the land for non agricultural purposes should be prohibited. He can only make such improvements as are necessary for the beneficial enjoyment of the holding. He cannot be allowed to take the law into his own hands and plead, nor should the Court take the view that it is enough that the landlord is given compensation. The erection of a compound wall to the holding to prevent cattle, etc., from trespassing into it is valid, and would be an improvement within the meaning of S 3 (4) (*d*) of the Estates Land Act, because it is necessary for the convenient enjoyment of the holding by preventing the trespass of cattle into the fields; the erection of a compound wall cannot be made a ground of complaint by the landlord for maintaining an action under S. 151 of the Act The fact that the tenant digs up the land and lays foundations for constructing a super tructure cannot also necessarily be made a ground for action under S. 151. The tenant may put up a structure on a reasonable portion of the holding to be used as a farm house or for the purpose of storing crops raised on the holding but not for the purpose of storing grain purchased elsewhere from others or for using the same for any business carried on by him. (*Venkataramana Rao, J.*) NARAYANA GAJAPATI RAJU BAHADUR *v.* JAGAYYA.

1941 M.W.N 344 = 53 L.W. 476 = A.I.R. 1941 Mad. 600 = (1941) 1 M.L.J. 523.

——**Ss. 163 and 164 A**—*Applicability and scope—Landlord purchasing holding at revenue sale—Remedies open for rent and damages—Landlord obtaining possession without suit—Subsequent suit for mesne profits between date of sale and date of possession against occupant—Maintainability—S.* 124.

S 163 of the Madras Estates Land Act provides the ordinary machinery whereby a landlord can recover rent and damages for unauthorised occupation of ryoti land. The section, though not very explicit, is intended to cover the usual case in which a person cultivates ryoti land on the implied understanding that he will, when asked to do so, pay the rent for it. If, however, the landlord does not desire that the occupant should continue in occupation of his land, he may treat him as a trespasser, in which case a machinery is provided under S. 163-A whereby a suit may be filed, and the landlord may claim mesne profits and also damages which are to be assessed on the basis given in S. 163. S. 163 A is not intended to provide a machinery for collecting mesne profits from unauthorised occupants except as an incident of their eviction by suit. Where the landlord has bought in the property at a revenue sale, he can get delivery without suit by proceedings under S. 124. If he refrains from taking these proceedings it is a reasonable inference that he is prepared to accept any damages which can be claimed under S. 163 from the actual occupant during the interval between the sale and the delivery. It is very doubtful whether landlord can abstain from taking action either under S. 124 or S. 163 and then file a suit under S. 163-A, after possession has been surrendered. Still less is it clear that the landlord, having got possession without a suit, can bring a separate suit merely for mesne profits. The underlying idea is that a person who has unauthorisedly occupied ryoti land and has not been evicted by a suit shall be liable to pay such sum as can be claimed under S. 163. There being a special remedy provided by the Act whereby the landlord can recover compensation for unauthorised occupation of ryoti land in cases where a suit for eviction is unnecessary, it is not possible to claim in the ordinary Civil Courts a different remedy with an enhanced period of limitation for the same wrong. (*Wadsworth, J.*) MAHARAJAH OF PITHAPURAM *v.* MANGAMMA. **(1941) 2 M.L.J. 781.**

MAD. ESTATES LAND ACT (1908), S. 181.

——**Ss. 181 and 187 (1) (c)**—*Scope and effect of—Private lands in estate—Sale by landholder reserving melwaram to himself—Effect—Vendee agreeing to pay fixed rent and interest on arrears of rent—If creates ryoti tenure—Construction of deed.*

Per Chief Justice and Venkataramana Rao, J.—Where a landholder possesses private land within an "estate" and sells the *kudivaram* right in those lands, retaining the *melwaram*, he must be deemed to have converted the lands into *ryoti* lands, and additional terms in the deed of sale would not alter the nature of the transaction. Such terms would stand, provided they are not inconsistent with what the statute states should apply to *ryoti* tenure. To the extent that the additional terms are inconsistent with a *ryoti* tenure, they should be regarded as void. A "*Khat*" or counterpart of a lease embodying the terms of a contract between the appellants, who were the *mokhasadars* of a village, and the first respondent which after reciting that the appellants had agreed to sell to the 1st respondent the *kudivaram* right in their *kambattam* or homefarm lands, provided: "You have hereby sold to us all the rights possessed by you in the said lands excepting the *melwaram* rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise disputes either with us or with our heirs;" the deed further stipulated for the payment of a fixed rent, for the payment of interest at 10 annas per cent. per mensem as arrears of rent, and another clause stipulated that the *cist* payable to the landholder should be a first charge on the land. Finally it was provided that the appellants should be entitled to the trees on the land on that date but that those grown after that date should belong to the respondent, etc.

Held (by the *Chief Justice and Venkataramana Row, J.*), that the appellants could have sold the lands in suit to the respondent absolutely or they could have leased them at any rent they might have agreed upon without separating the *kudivaram* right from the *melwaram* right, but as they chose to separate the *kudivaram* right from the *melwaram* right and grant a permanent right of occupancy on the payment of rent relating to the *melwaram* right, they should be deemed to have converted the lands into *ryoti* lands.

Per *Krishnaswami Aiyangar, J.*— The clauses relating to the fixity of rent and payment of interest on arrears specifically agreed to and undoubtedly intended to be operative, created incidents which were not only foreign to *ryoti* tenure under the Madras Estates Land Act, but materially opposed to it. It was not for the Court to evaluate the terms of a deed for the purpose of accept-

MAD. ESTATES LAND ACT (1908), S. 187.

ing some and rejecting others. On the contrary every rule of law and every rule of equity would seem to prohibit its doing so. It was not for a Court to infer a tenure by taking into account some only of the terms of a contract ignoring others, when it was possible and it was permissible to give effect to all the terms by treating it as a special contract and one not entered into for the purpose of impressing a *ryoti* tenure on the land comprised in the '*Khat*". The conveyance of that species of right known as the *kudivaram* interest would not amount to the creation of a *ryoti* tenure in the lands conveyed. (*Leach, C. J., Venkataramana Rao and Krishnaswami Aiyangar, JJ.*) KONDAYYA RAO *v.* NAGANNA. **I.L.R. (1941) Mad. 720 = 194 I C. 470 = 13 R.M. 776 = 53 L.W. 248 = 1941 M.W N 191 (2) = A I.R. 1941 Mad. 367 = (1941) 1 M.L.J. 336 (F.B.).**

——**S 187**—Scope and object—Occupancy tenant taking mortgage from landlord—Undertaking to deliver possession at end of period—Effect—If estopped from denying landlord's right to possession. *See* 1940 Dig., Col. 865. RAMUDU *v.* SANYASI NAIDU.

A.I.R. 1941 Mad. 97 = (1940) 2 M L.J. 668

——**Ss. 189 and 213**—Scope—Claim based on S. 69, Contract Act—Claim for relief against alleged defaulter—Jurisdiction of Civil Court—If barred. *See* MADRAS ESTATES LAND ACT, S. 213. **1941 M.W.N. 739.**

——**S. 189 (1) and (3)**—*Scope of—Failure to sue in Revenue Court to contest sale of holding—Effect of on pleas raised in civil suit.*

A suit to contest the right of a holding can only be brought in a Revenue Court. S. 189 (3) does not detract from absolute prohibition contained in S. 189 (1). It only means that where a matter has been decided in a Revenue Court and the decision there is one of the factors in a civil suit, the finding of the Revenue Court cannot be questioned and must be taken as conclusive on the particular point at issue in the civil suit. Consequently, where notice has been duly served upon a defaulting ryot he must file a suit in a Revenue Court within 30 days; otherwise he will be precluded from challenging the sale on any of the grounds which could be urged in a suit under S. 112 of the Act. (*Leach. C.J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI.

I.L.R. (1941) Mad. 785 = 196 I.C. 406 = 14 R.M. 293 = 1941 M.W.N. 655 = A.I R. 1941 Mad 539 = (1941) 2 M.L.J. 79 (F.B.)

——**S. 192**—Scope and effect—Sale by Revenue Court in execution of rent decree—C. P. Code, S. 66—Applicability. *See* C. P. CODE, S. 66.

(1941) 2 M.L.J. 717.

——**S. 212 (d) and (e)**—*Applicability — Raiyat evicted under decree of Civil Court—Trespass on land—Conviction under S.* 212 (d) *and* (e)—*Sustainability—Penal Code, S.* 447.

A raiyat having failed to pay the arrears of rent, the land was purchased in Court auction by the landholder who took delivery. The raiyat, however, continued to occupy the land; the landholder thereupon sued to eject him, got a decree and obtained delivery of possession through the Civil Court. In spite of this the raiyat trespassed into the land notwithstanding the objection of the landholder, refused to vacate and ploughed the land and raised crops.

Held, that the facts justified a conviction under S. 447, I.P. Code, but not a conviction under S. 212 (*d*) and (*e*) of the Madras Estates Land Act in the absence of an eviction under S. 163 A of the Madras Estates Land Act. (*Lakshmana Rao, J.*) PONNAMBALA THEVAR *v.* RAMASWAMI IYER. **1941 M.W.N. 666 = A.I.R. 1941 Mad. 803 (1).**

MAD. ESTATES LAND ACT (1908), S. 216.

——**S. 213**—*Applicability—Suit by person other than tenant or registered pattadar—"Any person aggrieved."*

S. 213 of the Madras Estates Land Act is not inapplicable to a suit for damages brought by a person who is not a tenant suing his landlord. Such a suit would lie not merely at the instance of the registered pattadar or other person actually impleaded as defaulter in the original proceedings but would also apply to a suit brought at the instance of any other person coming within the category of those who under S. 131 have a right to set aside the sale on deposit of the amount due. The words "any person aggrieved" in S. 213 would cover any person who had any interest in the land in question and would include a mortgagee of the kudiwaram interest. (*Wadsworth, J.*) SATTIRAJU *v.* VENKATARATNAM. **1941 M.W.N. 739 = 54 L.W. 505 = (1941) 2 M.L.J 646.**

——**S. 213**—*Scope—Sale of holding for decree for amount not due to zamindar—Suit to recover money paid to set aside such sale—Claim against zamindar and against tenants who were bound to pay alleged dues—Jurisdiction of Civil Courts.*

A suit for compensation for a payment which the plaintiff was obliged to make owing to the tortious act of the defendant under colour of the procedure laid down in the Madras Estates Land Act and for relief on the ground of fraud under colour of the Act falls under S. 213, Madras Estates Land Act and lies only in a Revenue Court, and the Civil Courts have clearly no jurisdiction to entertain such a suit in view of Ss. 213 and 189 of the Act. Petitioner held a decree on a mortgage binding lands in an estate, the kudiwaram interest in which was owned by defendants 3, 4 and 5. Defendant No. 1 was the zamindar, who in 1929 obtained an *ex parte* decree against 3 to 5 for watercess alleged to be due on their land within an inam. Under that decree a sale was held and a portion of the land was purchased by defendant No. 2. The petitioner came to know of this and got the sale set aside by paying the amount due under the *ex parte* decree on 17—1—1930. On 17—1- 1933, he brought a suit in the Civil Court alleging a fraudulent conspiracy between the 1st defendant and defendants 3, 4 and 5, whereby a decree was obtained for an amount not due and the land was sold to the 2nd defendant, a friend of the parties. He therefore claimed the right to get back from the 1st defendant and defendants 3 to 5, the amount which he was obliged to pay to get the sale set aside. He also claimed that the claim of the 1st defendant was based on fraud, that the amounts if really due to 1st defendant was due from defendants 3 to 5, and that as they defaulted and were responsible for the sale, they were bound in law to make good the said amount paid by him with interest.

Held, (1) that in so far as the plaint sought relief against the defendants 1, 3, 4 and 5 on the ground of fraud under colour of the Estates Land Act, the Civil Court clearly had no jurisdiction in view of the terms of Ss. 213 and 189 of the Act; (2) that the alternative prayer, based under S. 39 of the Contract Act, against defendants 3 to 5, was one which the Civil Court alone could entertain and which the Revenue Court could not entertain. (*Wadsworth, J.*) SATTIRAJU *v.* VENKATARATNAM. **1941 M.W.N. 739 = 54 L.W. 505 = (1941) 2 M.L.J. 646.**

——**Ss. 216 and 338**—Applicability and scope of—Building commenced and completed before receipt of licence—Notice under S 338 to pull down—Failure to accept notice—Demolition of building by Municipality—Legality of—Maxim *generalia specialibus non derogant*

MADRAS FOREST ACT (1882), S. 26.

—Application of. *See* 1940 Dig., Col. 862. MAYANDI CHETTIAR *v.* MADURA MUNICIPALITY.
I.L.R. (1941) Mad. 406 = 195 I.C. 301 = 14 R.M. 169 = 1941 M W.N. 46 = A.I.R. 1941 Mad. 259 = (1940) 2 M L J. 1032.

MADRAS FOREST ACT (V OF 1882), Ss. 26 and 63—*Timber Transit Rules* (1939), *R.* 1 (d)—*Construction—Wood or fuel in bandy loads—If exempted.*

R. 1 (*d*) of the Timber Transit Rules under the Madras Forest Act cannot be interpreted so as to apply the exemption in the rules to fuel or wood in bandy loads. The exemption in the rules applies only to small wood for fuel and bamboos which are in head-loads or less quantities. (*Lakshmana Rao, J.*) NACHI NAICKER *v.* EMPEROR. **1941 M.W.N. 665 = A.I.R. 1941 Mad. 809.**

——**S. 43**—*Construction—Confiscation under—If imperative.*

The words "shall be liable to confiscation" in S. 43 of the Madras Forest Act cannot be construed as being identical with "shall be confiscated." The section does not make confiscation imperative on the Court, and to hold that the Court has no option but to confiscate is opposed to the language of S. 43. (*Lakshmana Rao, J.*) ARDHANARI IYER *v.* EMPEROR.
1941 M.W.N. 671 (1) = A.I.R. 1941 Mad. 835.

——**S. 56**—*Presumption under—Application of.*

The presumption under S. 56 of the Forest Act is expressly restricted to proceedings taken under that Act or in consequence of anything done under that Act. (*Lakshmana Rao, J.*) RAMI REDDY *v.* EMPEROR.
197 I.C. 214 = 1941 M.W.N. 845.

MADRAS GAMING ACT (III OF 1930), S. 3—"*Common gaming house.*"

A house in which wagering or betting on horse races takes place is a common gaming house. (*Horwill, J.*) PERIYA YELUMALAI CHETTI, *In re.* **196 I.C. 778 = 54 L.W. 210 = 1941 M.W.N. 761 = A.I.R. 1941 Mad. 814 = (1941) 2 M L J. 353.**

MADRAS GENERAL SALES TAX ACT (IX OF 1939)—*Scope—If* ultra vires—*Tax on first sales of goods produced in province—Power of Provincial Legislature to authorise levy—Government of India Act, S.* 100 *and Sch. VII, List I* (45) *and List II* (48).

The Provincial Legislature can levy a tax on the sale by a person who obtains the goods from the manufacturer or producer and so on when the goods pass from hand to hand, but it has no power to tax a sale by the manufacturer or producer himself as this would mean an imposition of excise duty and the assumption of a power vested only in the centre. Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into the latter entry a power to tax all sales subsequent to the sale by the manufacturer or producer, that is when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the province. Notwithstanding that the tax imposed by the Madras General Sales Tax Act is based on turnover, it is in fact a tax on sales and in so far as it imposes a tax on first sales of goods manufactured or produced within the province it is *ultra vires* the Provincial Legislature. (*Leach, C.J. and Chandrasekhara Ayyar, J.*) PROVINCE OF MADRAS *v.* PAIDANNA AND SONS. **I.L.R. (1941) Mad. 874 = 4 F.L.J. (H.C.) 332 = 54 L.W. 452 = 1941 M.W.N. 887 (2) = A.I.R. 1941 Mad 913 = (1941) 2 M L.J. 607.**

——**S. 15 (a)**—*Applicability—Ignorance of rules under Act—If saves liability—Failure to submit return—If to be "wilful".*

MAD. HERED. VILL. OFF. ACT (1895), S. 13.

In order to constitute an offence under S. 15 (*a*) of the General Sales Tax Act, it is not necessary that the failure to submit a return should be "wilful". It is not correct to hold that the word "wilfully" governs the second as well as the 1st part of the sub-section. Nor can it be held that S. 15 does not apply where the accused does not know what the rules under the Act are. Every person is supposed to know that the law is, and if he fails to act in accordance with the law, then he has to suffer the consequences. (*Horwill, J.*) SWAMINATHA AIYAR, *In re.* **(1941) 2 M.L.J. 1045.**

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), Ss. 3 and 5—*Burden of proof—Plea that lands are protected—Sustainability in Patna on the ground that Madras Government recognised lands as protected—Party conceding in trial and appeal that lands are protected—It can go back in second appeal.*

The fact that the Government of Madras regarded certain inam lands as falling within the purview of the Madras Hereditary Village Offices Act is not binding on the Courts in Patna. But where a party concedes at the trial and in the appeal that the inam lands in question were protected under the Act, it is not open to him in second appeal to resile from his admission and to contend that it was not established that the lands in question were protected under the Act. (*Harries, C.J. and Mahomed Noor, J.*) ANTARJYAMI NAIK *v.* B. S. RATH **194 I.C. 797 = 14 R P. 69 = 7 B.R. 862 = A.I.R. 1941 Pat. 216.**

——**S. 5**—*Scope and effect of—Service inam lands—Growing crops or—Attachability in execution of decree against holder.*

Growing crops on service inam lands cannot be attached in execution of a decree against the holder of the inam lands. The fact that the holder of the inam lands has, long since the grant, ceased to be useful is no ground for depriving him of the protection given to this property by the law. The Court cannot go into the question as to how much of the profits of the inam lands would be necessary to maintain the holder thereof (*Harries, C.J. and Mahomed Noor, J.*) ANTARJYAMI NAIK *v.* B. S. RATH **194 I.C. 797 = 14 R.P 69 = 7 B.R. 862 = A.I.R. 1941 Pat 216.**

——**S. 5**—*Scope—Assignment of standing crops on main land—If prohibited.*

A sale or assignment of the standing crops (the landlord's rajabhogam) is not void as being prohibited by S. 5 of the Madras Act III of 1895. It is not open to a cultivating tenant of the holder of the service inam to plead that an assignment of the crops is invalid especially when the holder supports the assignment. (*Dhavle, J.*) PUNYA RAULO *v.* KHETRA GANDA. **7 Cut L.T. 58.**

——**Ss. 13 and 21**—*Jurisdiction of Civil Court—Suit by claimant to office by right of succession—Defendant alleged to be appointed in violation of S.* 10 (2)—*Suit in Civil Court to declare defendant's appointment invalid—Maintainability.*

Where the plaintiff claims a right of succession under the Madras Hereditary Village Offices Act, and alleges that the defendant was appointed by the Revenue authorities in violation of his own right, his remedy is to sue under S. 13 of the Act in the Revenue Court for recovery of his office from the person alleged to have been wrongfully appointed. S. 21 of the Act bars the Civil Court from entertaining such a suit. The plaintiff, by merely confining his relief as one for a declaration of the invalidity of the defendant's appointment, cannot be permitted to agitate the matter before a Civil Court. The granting of a mere declaratory decree is discretionary, and the Civil Court will refuse to grant it where

MAD. HERED. VILL. OFF. ACT (1895), S. 13.

the remedy asked for is unnecessary and where the relief really needed is to be sought in the Revenue Court. (*Somayya, J.*) NARASIMHA RAO *v.* VENKATA RAMANA RAO. **54 L.W. 321 = 1941 M.W.N. 983 = A.I.R. 1941 Mad. 857 = (1941) 2 M.L.J. 439.**

——**Ss. 13 and 14 (1)**—*Scope and effect—Suit for recovery of lands attached to office of village blacksmith —Mesne profits for more than 3 years—Power to award —Plaintiff's minority—If ground for extension of limitation.*

In a suit by ex-minors for recovery of lands forming the emoluments of the office of blacksmith in a village, the Collector is not competent to award to the successful plaintiffs mesne profits for more than three years before suit. The fact that the plaintiffs were minors makes no difference, because custom allows the office of the village blacksmith to devolve upon a minor, and the proviso to S. 14 (1) would not therefore be available to the plaintiffs who were never disqualified from holding the office. (*Leach, C.J. and Somayya, J.*) KRISHNA REDDY *v.* SATYAM. **1941 M.W.N. 620 = 53 L.W. 736 = A.I.R 1941 Mad. 693 = (1941) 2 M.L.J. 91.**

——**S. 21**—*Applicability and scope—If controlled by S. 13—Assignment of rajabhogam by holder of office— Suit by assignee against tenant of holder—Jurisdiction of Civil Court.*

Ss. 13 and 21 of the Madras Hereditary Village Offices Act must be read together, and notwithstanding the apparent generality of the language of S. 21, it must be held that the section takes away the jurisdiction of Civil Courts only in those cases in which jurisdiction is conferred on Revenue Courts by S. 13 of the Act. A suit by an assignee of the rajabhogam of the paddy grown on lands forming the emoluments of the village blacksmith, against the tenant of the holder of the office who has transferred the rajabhogam to the plaintiff is not a suit by a person claiming as a holder of a village office, and the bar of S. 21 read with S. 13 does not apply so as to take away the Civil Court's jurisdiction. (*Dhavle, J.*) PUNYA RAULO *v.* KHETRA GANDA. **7 Cut.L.T. 58.**

——**S. 21**—Scope—Inam declared to belong to two sharers—Suit for partition of inam lands between the two —If barred. *See* 1940 Dig., Col. 866. SATYANARAYANA-MURTHY *v.* VENKAMMA. **A.I.R. 1941 Mad. 365 = (1940) 1 M.L.J. 708.**

——**S. 21**—*Scope—Suit to declare that claimant to village office is not the adopted son of prior holder— Jurisdiction of Civil Court.*

A suit for a declaration that the person put forward as the successor to a hereditary village office was not the adopted son of the previous holder of that office is not barred by S. 21 of the Madras Hereditary Village Offices Act and is cognizable by a Civil Court. The jurisdiction of a Civil Court is excluded by S. 21 only in those cases where a suit is cognizable by the Collector under S. 13 of the Act. The suit contemplated by S. 13 is only a suit for the recovery of a village office and the proviso to S. 13 (1) cannot be relied upon for the purpose of enlarging the scope of S. 13(1). (*Venkataramana Rao, J.*) KAMESWAR RAO *v.* JAGANNATHA SASTRI. **1941 M.W.N. 52 = 53 L.W. 203 = A.I.R. 1941 Mad. 405 = (1941) 1 M.L.J. 12.**

——**S 23**—*Scope—Dismissal of village officer under S. 27—Remedy—Separate suit—Maintainability.*

A village officer is given under S. 7 of the Madras Act III of 1895, a right to have a charge framed to have witnesses examined in his presence by the Collector and to cross-examine them before he can be dismissed. If any of these rights is infringed, his only remedy is a

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right of appeal to the Collector and a further appeal to the Board of Revenue whose order will be final; there is no right of a separate suit. (*Somayya, J.*) RAMI NAIDU *v.* SECRETARY OF STATE FOR INDIA. **54 L.W. 405 = 1941 M.W.N. 883 = (1941) 2 M.L.J. 577.**

MADRAS HIGH COURT RULES (ORIGINAL SIDE)—Practice—English rules of practice— Applicability. *See* 1940 Dig., Col. 866. MANICKA MUDALIAR *v.* ANDALAMMAL. **193 I.C. 801 = 13 R.M. 714 = (1940) 1 M.L.J. 356.**

——**O. 23**—Official Referee—Powers and functions of—Questions of substantive rights—If may be referred —English Rules of Practice—Applicability. *See* 1940 Dig, Col. 867. MANICKA MUDALIAR *v.* ANDALAMMAL. **193 I.C. 801 = 13 R.M. 714 = (1940) 1 M.L.J. 356.**

——**O 45, Rr. 1 and 9**—Applicability and scope— Questions as to whether proceedings amount to a "suit for land" and whether a party has renounced his legacy—If can be decided summarily—Proper procedure. *See* 1940 Dig., Col 867. RAJAN *v.* PANKAJAMMAL. **I.L.R. (1941) Mad. 226 = 195 I.C. 767 = 14 R.M. 227 = A.I.R. 1941 Mad. 194 = (1941) 1 M.L.J. 186.**

——**O. 45, R. 1 (d)**—*Applicability—Order under —Conditions for making of.*

An originating summons may be taken out under O. 45, R. 1 (*d*) of the Original Side Rules of the Madras High Court for an order directing payment into Court only of moneys actually in the hands of executors, administrators or trustees, and not of moneys which ought to be in their hands. Before an order under the rule can be passed, it must be admitted by the executors, administrators or trustees that they have the money actually in their hands. (*Leach, C.J. and Chandrasekhara Ayyar, J.*) VENUGOPALA MUDALIAR *v.* EMBARU NAIDU. **1941 M.W.N. 795 = 54 L.W. 267 = A.I.R. 1941 Mad. 851 = (1941) 2 M.L.J. 378.**

MADRAS HIGH COURT RULES (ORIGINAL SIDE) FEE RULES, Appendix II, No. 35—"Final judgment"—Judgment directing issue of probate after declaring will genuine—Appeal—Court-fee payable— Probate proceedings—Question of title. *See* 1940 Dig., Col. 867. MARAGADHAMMAL *v.* YASODHAMMAL. **I.L.R. (1941) Mad. 49 = 195 I.C. 206 = 14 R.M. 150 = A.I.R. 1941 Mad. 111. (1940) 2 M.L.J. 587.**

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), S. 9 (5)—*Excepted temple—Succession by hereditary right—What is—C.P. Code, S. 115 —Lower Court misdirecting itself—Interference.*

A temple was governed by a scheme under which none but the lineal descendants of a particular person between the ages of 25 and 50 and permanently residing within 50 miles of the temple could be a trustee of the temple and that no two members of the joint family should at the same time be trustees and that of the five trustees three should belong to one branch and two to another branch of the descendants of the person named. Trustees were to hold office for 5 years and were to be elected by the whole body of the adult lineal descendants of that person. The scheme while recognising the right of that person's descendants to appoint trustees from out of their number prescribed a mode of succession to the office which was essentially elective and not hereditary. In a proceeding under S. 84 (2) of the Hindu Religious Endowments Act in which the question was as to whether the temple was excepted or not, the District Judge overlooked the fact that the actual trusteeship did not reside in the general body of the descendants of the person

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named but that they should constitute the electoral body and only such descendants were qualified for election, and did not take into consideration the mode of succession to the trusteeship during the period immediately preceding the application to the Board and declared that the temple was an excepted temple under S. 9 (5) of the Madras Hindu Religious Endowments Act.

Held, (1) that the District Judge had wholly misdirected himself regarding the basis for the decision of the matter before him and acted illegally in the exercise of his jurisdiction so as to justify interference by the High Court under S. 115, C. P. Code; (2) that though the power of election under the scheme and the qualification for election were hereditary, the succession was not hereditary; (3) that the temple in question was not a temple the succession to the trusteeship whereof was hereditary, having regard to the provisions of the scheme; and (4) that the temple should therefore be declared a non-excepted temple. (*Wadsworth and Patanjali Sastri, JJ.*) T. V. BASHYAKAR *v.* MADRAS H. R. E. BOARD. **I.L.R. (1941) Mad. 559 = 1941 M.W.N. 281 = 53 L.W. 170 = A.I.R. 1941 Mad. 510 = (1941) 1 M.L.J. 250**

——**S. 9 (5) and (6)**—*Scope—Cl.* (6) *if to be read into Cl.* (5)—*Temple trustee succeeding by nomination by predecessor—If temple "excepted"*

The definition of a "hereditary trustee" in S. 9 (6) of the Madras Hindu Religious Endowments Act enumerates four methods of devolution which qualify a trustee to be known as a hereditary trustee. Of these four methods of devolution only the first and the last have been specified as qualifying a temple to be considered an excepted temple under S. 9 (5) of the Act. On the general rule *expressio unius exclusio alterius* it is impossible to resist the inference that when the legislature in the definition of an excepted temple specified only two of the four types of devolution which are recognised in the definition of a hereditary trustee they intended to exclude the other two types of devolution. It follows therefore that a temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage does not come within the definition of an excepted temple. The definition of a hereditary trustee in Cl. (6) of S. 9 cannot be read into the definition of an excepted temple in Cl. (5) of S. 9. (*Wadsworth and Patanjali Sastri, JJ.*) T. V. BASHYAKAR *v.* MADRAS H. R. E. BOARD. **I.L.R. (1941) Mad. 559 = 1941 M.W.N. 281 = 53 L.W. 170 = A.I.R. 1941 Mad. 510 = (1941) 1 M.L.J. 250.**

——**S. 44-B (d) (1)**—Construction—Right of appeal—If confined to order of resumption—Power to pass order of resumption in appeal. *See* 1940 Dig., Col. 869. KALLALAGAR DEVASTHANAM, MADURA *v.* DISTRICT COLLECTOR, MADURA. **I.L.R. (1941) Mad. 36 = 194 I.C. 830 = 14 R.M. 100 = (1940) 1 M.L.J. 891.**

——**Ss. 63 and 65**—Board refusing to frame scheme—Power of Court to frame scheme. *See* 1940 Dig., Col. 869. PICHU AYYANGAR *v.* RAMANUJA JEER SWAMIGAL. **194 I.C. 809 = 14 R.M. 84 = (1940) 1 M.L.J. 882.**

——**S. 63**—Scope—Scheme settled by Board in respect of excepted temple—Jurisdiction of Board—Suit to set aside—Trustee stating in course of enquiry that he has no objection to dittam being settled—Effect of—If estoppel in bar of suit on behalf of temple *See* 1940 Dig., Col. 869. BALAVENKATARAMA CHETTIAR *v.* H. R. E. BOARD. **A.I.R. 1941 Mad. 79 = (1940) 2 M.L.J. 615.**

——**S. 73**—Scope—Excepted temple—Scheme—Jurisdiction of Court—Suit for removal of trustee and appointment of new trustee—Compromise

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providing for administration—Decree in terms of—Legality—Absence of objection to jurisdiction—Objection in appeal—If barred. *See* 1940 Dig., Col. 870. VENKATASUBBA RAO *v.* SIVARAMAYYA. **A.I.R. 1941 Mad. 287 = (1940) 2 M.L.J. 858.**

——**S. 76**—Applicability—Compulsory renewal of kanom under Malabar Tenancy Act—If affected by S. 70. *See* MALABAR TENANCY ACT, S. 17. **(1941) 2 M.L.J. 424.**

——**S. 84 (2)**—*Appeal—Competency—Revision.*

There is no right of appeal against an order of the Court under S. 84 (2) of the Madras Hindu Religious Endowments Act; but the order is open to revision by the High Court under S. 115, C. P. Code. (*Wadsworth and Patanjali Sastri, JJ.*) T. V. BASHYAKAR *v.* MADRAS H. R. E. BOARD **I.L.R. (1941) Mad. 559 = 1941 M.W.N. 281 = 53 L.W. 170 = A.I.R. 1941 Mad 510 = (1941) 1 M.L.J. 250.**

——**Ch. VI**—*Applicability—Temple managed under scheme settled by Court under S. 92, C.P. Code—Powers of Board.*

There is nothing in S. 65-A or in any other section in Ch. VI-A of the Madras Hindu Religious Endowments Act which exempts a temple in respect of which a scheme has been settled by the Court under S. 92, C. P. Code, from the operation of Ch. VI-A of the Act. Ch. VI-A must therefore be held to apply to a temple which is managed under such a scheme. But in exercising its powers under the Chapter, the Board must act judicially after a full and proper inquiry, and as the provisions of Ch. VI-A, with regard to appeal, are illusory, the need for care is all the greater. (*Leach C.J. and Krishnaswami Aiyangar, J.*) DEIVASIKAMANI PONNAMBALA DESIKAR *v.* BOARD OF COMMISSIONERS FOR H. R. E., MADRAS. **I.L.R. (1941) Mad. 807 = 4 F.L.J. (H.C.) 321 = 54 L.W. 147 = 1941 M.W.N. 720 = A.I.R. 1941 Mad. 878 = (1941) 2 M.L.J. 175.**

——**Ch. VI**—Notification of temple under Order of Board arbitrary and illegal—Power of High Court to quash by writ of *certiorari*. *See* GOVERNMENT OF INDIA ACT (1935), S. 306. **(1941) 2 M.L.J. 175.**

MADRAS IMPARTIBLE ESTATES ACT (II OF 1904), S. 4—*Applicability—Trespasser in possession of zamindari—Alienation by—Validity—If confined only to alienor's lifetime.*

Where a person in possession of a zamindari as a trespasser who has no title to the property, alienates the zamindari to another, such an alienation is not governed by the Madras Impartible Estates Act. S. 4 of the Act which provides that an alienation by the holder would be valid only for his own life cannot apply to an alienation by a trespasser. (*Harries, C.J. and Meredith, J.*) PADMAKUMARI *v.* NANDA PADHANO. **195 I.C. 203 = 11 R.P. 91 = 7 B.R. 881 = 22 Pat.L.T. 514 = 7 Cut.L.T. 14 = 1941 P.W.N. 33 = A.I.R. 1941 Pat. 219.**

MADRAS LAND ENCROACHMENT ACT (III OF 1905), S. 6—*Scope—Grant of site by Government—Cancellation—Subsequent assignment by Government to another—Suit by latter for possession from first grantee in Civil Court—If barred*

Where the grant of a site by the Government on patta on certain conditions was cancelled because of the failure of the grantee to comply with the conditions, and a subsequent assignee of the site from Government sued the first grantee for possession in a Civil Court.

Held, that S. 6 of the Land Encroachment Act gave a summary remedy to the Collector but did not take away the right of the Government to proceed in a civil suit or the right of an assignee from Government to

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proceed against the prior grantee in a Civil Court. (*Abdur Rahman, J.*) KRISHNAMACHARIAR *v.* LAKSHMI AMMAL. 54 L.W. 394= 1941 M.W.N. 951=(1941) 2 M.L.J. 507.

——**S. 9**—*Sale for recovery of penal assessment—If prevails over prior encumbrances.*

S. 9 of the Madras Land Encroachment Act equates the penal assessment levied under it to land revenue and provides that it may be recovered as a land revenue. A sale of the defaulter's property held for recovery of the penal assessment passes the property free of all encumbrances and it prevails over prior encumbrances. S. 42 of the Madras Revenue Recovery Act applies to such a sale. (*Somayya, J.*) SECRETARY OF STATE *v.* JODKRAJ DHUPAJEE. 54 L.W. 702= (1941) 2 M.L.J. 993.

MADRAS LOCAL BOARDS ACT (XIV OF 1920), S. 19 and R. 1—*Scope and effect—Declaration—If final as to factum of election—Power of Court to adjudicate as to whether election was held or not.*

There is no provision making a declaration by the Local Government under S. 19 of the Madras Local Boards Act read with R. 1 of the Rules final in regard to the *factum* of an election, and the Civil Court is entitled to entertain a claim in respect of an election and to adjudicate on the question whether the election was in fact held or not. (*Abdur Rahman, J.*) RAMAMURTHY *v.* VENKATANARAYANA. 53 L.W. 195= 1941 M.W.N. 294=A.I.R. 1941 Mad. 506= (1941) 1 M.L.J. 190.

——**S. 55 (2) (b)**—"Undischarged insolvent"—Annulment of adjudication under S. 43, Provincial Insolvency Act—Effect of on debtor—If disqualification for election—Provincial Insolvency Act, S. 73. *See* 1940 Dig, Col 871. CHINNIYA PILLAI *v.* SUBBA RATNAM PILLAI. 193 I C. 147=13 R.M. 632= A.I.R. 1941 Mad. 22=(1940) 2 M.L.J. 590.

——**S. 78**—*Tank in zamindari—Owner letting right to fish in tank—Liability to land cess.*

Where a Zamindar, lets the right to catch fish in a tank in his zamindari, he can be called upon to pay land-cess under S. 78 of the Madras Local Boards Act. There can be no doubt that land which holds a tank in which there are fish has a rental value because the right to catch fish can be let. If the owner of the tank merely sells the right to catch for a period without any right in the purchaser to use for this purpose the bed of the fishery, the purchaser cannot be deemed to be in occupation of the land which holds the fishery, and the owner being in beneficial occupation of the land forming the bed of his tank, land-cess is leviable on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land. (*Leach, C.J. and Happell, J.*) ZAMINDAR OF NUZVID *v.* SECRETARY OF STATE. I.L.R. (1941) Mad. 747=53 L.W 328= 1941 M W.N. 234= A.I.R. 1941 Mad. 414=(1941) 1 M.L.J. 479.

——**Ss. 88 and 89**—*Cess paid by Zamindar—Suit in Revenue Court for recovery from under-tenure holders—Claim for six years—Sustainability.*

A landholder who wishes to recover cess need not sue in the Revenue Court, but if he does so he is restricted to what that Court can give him. Where a zamindar sues his under-tenure-holders in the Revenue Court to recover from them what he has been compelled to pay as cess under the Madras Local Boards Act in respect of six faslis, he can only get a decree for cess for three years which is all that is allowed by the Madras Estates Land Act under which he sues in the Revenue Court, although if he sues in the Civil Court he can recover for 6 years. There is no difference in principle when distraint is

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levied or property is sold summarily and when a suit is brought under S. 77 of the Estates Land Act. (*Leach, C. J. and Happell, J.*) VENKATASURYANARAYANA *v.* TIRUPATAYYA. 53 L.W 640= 1941 M.W N. 477=A.I.R. 1941 Mad 615= (1941) 1 M L J. 779.

——**S. 159**—*Applicability—If depends on encroachment being objectionable—Powers of President of Local Board—Failure to obey president's order for removal of encroachment—Offence.*

The application of S. 159 of the Madras Local Boards Act, which empowers the president of the Local Board to require the owner or occupier of any premises to remove an encroachment, does not depend upon the extent to which such encroachment is objectionable. The president has a right to have the encroachment removed; and if the person who encroaches of the land of the panchayat refuses to obey the president's order, he makes himself liable to a fine by a criminal court under S. 207 (1) of the Act. The fact that the president of the Board and the person making the encroachment are of opposite factions in the panchayat is irrelevant. The powers of the president are none the less because he dislikes the person making the encroachment. (*Horwill, J.*) PRESIDENT, PANCHAYAT BOARD, MANGALAGIRI *v.* KOTAYYA. (1941) 2 M.L.J. 1034.

——**S. 164 (1)**—*Applicability—Lease under S. 160 (3)*—*Expiry of lease—Lessee continuing and refusing to obey notice to quit—Offence—Notice issued under S. 159 (1) and not under S. 164 (2)—It saves lessee from liability.*

A lessee from a Local Board under S. 160 (3) of the Madras Local Boards Act, of a road side site, on which he constructed a small shed, did not quit the land at the end of the period of the lease, and a notice was therefore sent to him, purporting to be one under S. 159 (1), requiring him to remove the shed within a fortnight and threatening, in default, proceedings under the Act. He ignored the notice and thereupon a prosecution was launched for an offence punishable under S. 159 (1) read with S. 207 (1) (*a*) and (*c*) of the Madras Local Boards Act.

Held, that though notice should have gone to the lessee under S. 164 (2) and not under S. 159 (1) of the Madras Local Boards Act, and though the notice sent to him did not purport to be a notice under S. 164 (2) but one under S. 159 (1), that did not make any material difference as the notice made it very clear what was required of him; and by disobeying the lawful notice sent to him, even though it was labelled S. 159 (1) and not S. 164 (2), the lessee committed an offence and was liable to a penalty under S. 164 (1) of the Act. (*Horwill, J.*) MURTHUZA SAHIB, *In re*. (1941) 2 M.L.J. 1042.

——**S. 164 (2)**—Requisition under—Failure to comply—Prosecution—Duty of Magistrate to decide legality of requisition—Acquittal on ground of Local Board's failure to prove title and possession of land in Civil Court—Legality. *See* 1940 Dig., Col. 872. GOPALASWAMY RAO *v.* CHINNA PONNUSWAMY CHETTY. 191 I C. 55=13 R M 483= 42 Cr.L.J. 79=(1940) 1 M.L J. 598.

——**S. 193 (3)**—Scope—Refusal to renew licence—If *ultra vires*. *See* 1940 Dig., Col. 873. CHOWDAPPA CHETTI *v.* PANCHAYAT BOARD, KARIMANGALAM. A I.R 1941 Mad. 24=(1940 2 M.L J. 1.

——**S. 194 (3)**—Compliance—Mere application for permission to instal rice mill—Sufficiency—Installation without obtaining permission—Offence. *See* 1940 Dig., Col. 873. RAHIM SAHIB, *In re*. A.I.R. 1941 Mad. 71 (1).

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——Ss. 197, 203 and Sch. VII—*Storing and selling firewood within Panchayat Board—Failure to take out licence—Offence.*

Sch. VII of the Madras Local Boards Act does not require that a license should be taken out for storing firewood ; a person who stores and sells firewood within the limits of a Panchayat Board, without taking out a licence, therefore, commits no offence and cannot be convicted under S. 197 read with S. 207 and Sch. VII of the Act.

Quaere.—Whether a person can sell firewood without a licence. (*Horwill, J.*) VENKATARAGHAVA AIYAR *In re.* **196 I C. 754 = 1941 M.W.N. 788 = A.I.R 1941 Mad. 828 = (1941) 2 M.L.J. 348.**

——S. 199—*Surcharge Rules, Rr. 5 and 6—Scope—Powers of auditor and powers of Civil Court—Jurisdiction to go into merits of surcharge order.*

In two criminal cases in which subordinates of a Union Panchayat Board were concerned, the president acting under his emergency powers conferred on him by S. 22 of the Local Boards Act made payments to advocates in anticipation of the Board's sanction in excess of the scale which the Board itself could sanction. The Panchayat Board to which the payments were reported duly ratified them. Objection being taken by the auditor because of the failure to obtain the Government's sanction as required by the rules, an application was made to the Government to sanction these payments, but it was rejected ; the auditor therefore surcharged the president. The District Judge set aside the surcharge orders on the ground that the members of the Board who ratified the president's action were equally responsible and that it was inequitable to place the whole burden on the president alone.

Held, in revision, (1) that the surcharge order made by the auditor on the president was not illegal, because R. 5 of the Surcharge Rules clearly permitted the auditor to surcharge either the person who made the payment or the person who authorised the payment to be made; (2) that there was no limitation put by R. 6 of the Surcharge Rules upon the powers of the Civil Court, in dealing with an application to set aside a surcharge order, and the Civil Court had jurisdiction in a proper case to remit a surcharge which, though legally recoverable, should equitably have been placed upon persons other than the person surcharged; the Civil Court's jurisdiction was not limited to merely ascertaining whether a surcharge was in accordance with law or not without any power to go into the merits of the surcharge ; (3) that though the District Judge should have upheld the surcharge on the president to the extent of his proportionate share as a member of the Panchayat Board, it was not desirable to interfere with the decision in revision (*Wadsworth, J.*) EXAMINER OF LOCAL FUND ACCOUNTS *v.* RAMASWAMI CHETTIAR.

1941 M W.N. 782 = 54 L W. 243 = A.I.R. 1941 Mad. 891 (2) = (1941) 2 M L.J. 403

——S. 199 (2) (o), Rules, R. 6—*Scope—If* ultra vires.

Section 199 (2) (*o*) confers full authority on the Local Government to make rules governing the powers of auditors to surcharge, and therefore authority to provide a remedy for the unlawful exercise of the auditor's powers; and hence R. 6 cannot be said to be *ultra vires* the Local Government. (*Leach, C.J., Wardsworth and Somayya, JJ.*) SECRETARY OF STATE *v.* JAGANNADHAM. **I L.R. (1941) Mad. 850 = 196 I C. 353 = 14 R.M. 289 = 1941 M.W.N. 644 = 54 L.W 7 = A I.R. 1941 Mad. 530 = (1941) 2 M.L.J. 47 (F B.).**

——S. 199 (2) (o), Rules, R. 6—*Scope of—Suit in respect of improper surcharge—Maintainability.*

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Rule 6 clearly impliedly excludes the right to file a suit in respect of an improper surcharge imposed thereunder. The power to surcharge arises not under the common law but under the statutory rules and hence the remedy provided by the rules in case of an improper surcharge alone is open and a civil suit in respect of it is barred. (*Leach, C. J., Wadsworth and Somayya, JJ.*) SECRETARY OF STATE *v.* JAGANNADHAM.

I.L.R. (1941) Mad. 850 = 196 I.C. 353 = 14 R.M. 289 = 1941 M.W.N. 644 = 54 L.W 7 = A.I.R. 1941 Mad. 530 = (1941) 2 M L J. 47 (F B.).

——S. 207—*Applicability—Prosecution for non-compliance with notice under S. 123—Offence found as made out—Acquittal on ground that result of objection petition was not communicated to accused—Sustainability.*

The accused was prosecuted on the complaint of the President of a Panchayat Board under Ss. 123 and 207 of the Madras Local Boards Act, for storing manure in a pit causing danger to the health and offensive to the neighbourhood and failure to remove the manure and to close the pit in compliance with the notice lawfully issued to him under the Act. The accused in answer to the notice issued to him presented an objection petition contending that the pit was not insanitary and criticising the administration of the Panchayat. This was presented beyond time, but the Panchayat Board considered the same and decided that the manure pit was insanitary and sanctioned his prosecution. The Magistrate held that the pit was insanitary, but he acquitted the accused on the ground that the result of the objection petition filed by him was not proved to have been ever communicated to him.

Held, in revision, that the magistrate having found in effect that the accused was guilty under S. 207 of the Local Boards Act, the order of acquittal on the ground of non communication of the result of the objection petition was unsustainable and must be set aside. (*Lakshmana Rao, J.*) PRESIDENT, PAKKAM PANCHAYAT BOARD *v.* MUNUSWAMY REDDI.

196 I.C. 168 = 42 Cr L.J. 832 = 1941 M.W.N. 378 = A I.R. 1941 Mad 614 = (1941) 1 M.L.J. 720.

——S. 223—Limitation—Installation of rice mill without permission—Prosecution within twelve months—If barred. *See* 1940 Dig., Col. 873. RAHIM SAHIB, *In re.* **A.I.R. 1941 Mad. 71 (1).**

——S. 225—*Scope—Death caused by fall of tree on cart passing along road—Suit for damages for negligence under Fatal Accidents Act—Limitation—Suit after 6 months—Bar of—Liability of public bodies.*

The 1st plaintiff's wife, and two small sons aged 3 years and 1 year, were killed as the result of a fall of a tree standing on a District Board road on the cart on which they were travelling. The first plaintiff and his remaining three minor children sued the District Board for damages under the Fatal Accidents Act on account of the accident, which the plaintiff alleged was caused by the negligence of the defendant. The suit was filed exactly one year after the accident, which was the period of limitation under the Fatal Accidents Act.

Held, that since it was alleged that the defendant wrongfully neglected to cut down the tree which was a menace to persons passing along the road, it followed that in the words of S. 225 (1) of the Madras Local Boards Act there was a default on the part of the defendant in the execution of the Act, and the suit fell under S. 225 ; and not having been brought within 6 months as required by S. 225 (2), was barred by limitation. The mere fact that the plaintiffs had a cause of action under the Fatal Accidents Act would not save the bar of limitation under S. 225 of the Local Boards Act.

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Held, further, that the only damages for which the defendant could be liable were those arising out of any financial or pecuniary loss which the plaintiffs suffered on account of the death of the first plaintiff's wife and children.

Quaere.—Whether local bodies in India should be exempt from liability for such acts of negligence in the maintenance of their roads as cause loss or injury to persons using them. (*Pandrang Row and Horwill, JJ.*) SUBRAMANYAM *v.* PRESIDENT, DISTRICT BOARD, NARASAPUR. **1941 M W.N 450 = A.I.R. 1941 Mad. 733.**

——**S. 225**—*Scope—Suit for refund of house tax or profession tax illegally collected—Limitation.*

A suit for refund of house tax or profession tax collected on the ground that the levy was illegal does not fall within the scope of S. 225 of the Madras Local Boards Act, and is not barred by limitation though filed more than six months after the assessment. (*Burn, J.*) PANCHAYAT BOARD, RAZOLE *v.* AMICHAND DUNGARMAL. **1941 M W.N. 634 = 54 L.W. 140 = A.I.R. 1941 Mad. 686 = (1941) 1 M.L J. 824.**

——**S. 228 (2)**—*Scope and effect—Compliance with provisions of Act—Burden of proof—Assessee submitting returns and producing income-tax demand notices—President of Board not considering same but making own classification—Effect of.*

The respondents who were residents within a Union Panchayat were assessed to profession tax on a classification made by the President of the Panchayat Board which was not in accordance with the returns made by them. On notices being served on them to submit returns of income, the respondents duly submitted the returns as required by R. 11-A, sub-R. (1) of Sch. IV of the Madras Local Boards Act. Some of the respondents also submitted income-tax demand notices. There was no evidence that the President was satisfied that the returns were incorrect or incomplete. The respondents having paid the taxes sued for refund of the amounts paid on the ground that the assessment had been made arbitrarily, unjustly and incorrectly.

Held, that the suits were not barred under S. 228 (2) of the Madras Local Boards Act; the burden was on the Panchayat Board to show that the provisions of the Act with regard to assessment had been in substance and effect complied with, and merely because the President did not accept the returns and made his own assignments of classes to the respondents for the purpose of profession-tax, it could not be deemed that he was satisfied that the returns were incorrect or incomplete. Further in cases where income-tax notices were submitted they ought to be accepted as conclusive for the purpose of classification under the Explanation to R. 11 A.

Held, further, that the failure on the part of the Board to take notice of the account books produced with the appeal did not by itself amount to sufficient non-compliance with the provisions of the Act. (*Burn, J.*) PANCHAYAT BOARD, RAZOLE *v.* AMICHAND DUNGARMAL. **1941 M.W.N. 634 = 54 L.W. 140 = A.I.R. 1941 Mad. 686 = (1941) 1 M L.J. 824.**

——**S. 229**—*Applicability—"Molest"—Meaning—Person served with notice of demand by Bill Collector of Panchayat Board—Abuse by of unnamed person for giving information leading to exaggerated assessment—Offence.*

The word "molest" carries with it some suggestion of interference or restraint or obstruction. Where a person who is served with a demand notice by the bill collector of a Panchayat Board abuses not the bill collector but some unnamed person inimically disposed towards him who had given information leading to an exaggerated assessment, he cannot be convicted under S. 229 of the Madras Local Boards Act. S. 229 does not make all molestation punishable but only molestation of a person in the performance of his duty. It does not make punishable a molestation *during* the course of the performance of the duty, but *in* the performance of the duty. The abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. (*Horwill. J.*) SEHU MAHOMED MARIKAYAR, *In re.* **196 I.C. 765 = 54 L.W. 231 = 1941 M W.N. 785 = A.I.R. 1941 Mad 834 (2) = (1941) 2 M.L.J. 356.**

MAD. MALABAR TEN. ACT (1930) S. 20.

——**Sch. IV, R. 24**—*Enhancement of tax—Notice—If condition precedent.*

R. 24 of Sch. IV to the Madras Local Boards Act does not require any notice before the tax is enhanced. (*Lakshmana Rao, J.*) YEGNANARAYANIAH *v.* EMPEROR. **1941 M.W N. 672 = 54 L.W. 391 (1) = A.I.R. 1941 Mad. 800 = (1941) 2 M.L.J. 256.**

MADRAS MALABAR TENANCY ACT (XIV OF 1930), S. 17—*Construction—Renewal of kanom—If to be on same terms as previous kanom.*

S. 17 of the Malabar Tenancy Act cannot be interpreted as meaning that a landlord is only bound to grant a renewal but not on the same terms. The word "same" in S. 17 connotes a kanom on the same terms as the previous kanom. If the landlord declines to grant a renewal of the Kanom on payment of the proper renewal fee, the tenant can seek the aid of the Court. The Court can determine what the proper renewal fee payable under S. 17 (*a*) is and on deposit of such renewal fee, the Court would execute the renewal deed. The Court should grant a renewal of the kanom only on the same terms as the previous kanom. (*King and Venkataramana Rao, JJ.*) UKKALI *v.* SIVARAMAKRISHNA PATTAR. **1941 M.W.N. 80 = 53 L.W. 198 = A.I.R. 1941 Mad. 408 = (1941) 1 M.L.J. 113.**

——**S. 17**—*Scope—If affected by S. 47, Madras Hindu Religious Endowments Act—Properties owned by public temple—Right of kanomdar to call upon trustees for renewal—If subject to sanction by Board.*

S. 76 of the Madras Hindu Religious Endowments Act applies to voluntary transfers by the trustees or persons in charge of public religious institutions. The bar enacted in S. 76 cannot apply to the case of a compulsory renewal of a kanom under S. 19 and Ss. 22 to 25 of the Malabar Tenancy Act. The right of a kanomdar to call upon his immediate landlord for a renewal conferred by S. 17 of the Malabar Tenancy Act is not affected by the fact that the properties belong to a public temple. (*Somayya, J.*) MANNENGATH ITTICHIRI *v.* APPU MENON. **54 L.W. 244 = (1941) 2 M L.J. 424.**

——**S. 20**—*Construction and scope—Contract before Act—Provision for eviction of tenant on ground not specified in S. 20—Enforceability.*

The language employed by S. 20 of the Malabar Tenancy Act is plain and peremptory, and prohibits a suit for eviction being instituted except on one or more of the several grounds specified in that section. There are no words in it showing an intention on the part of the legislature to save contracts entered into before or after the Act. Consequently a contract between the landlord and the tenant entered into before the Act and conferring a right of eviction on grounds other than those enumerated in S. 20 cannot be enforced at the instance of the landlord. (*Leach, C. J. and Krishnaswami Aiyangar, J.*) CHANDU *v.* SANKARAN. **53 L.W. 506 = 1941 M.W N. 440 = A.I.R. 1941 Mad. 558 = (1941) 1 M.L.J. 573.**

MAD. MALABAR TEN ACT (1930), S. 14.

——S. 14 (5)—*Construction—Strict construction—"Requires"—If to be construed as "desires"—Test.*

In construing S. 14 of the Malabar Tenancy Act, it must be borne in mind that the object of the Act was to confer a right of permanent occupancy on the tenant, and the exceptions contained in the section must therefore be strictly construed; the landlord who relies on a particular ground must satisfy the Court beyond reasonable doubt that that ground exists. Under Cl. (5) of the section which has been inserted in the interests of the landlord, a mere desire on his part, even if *bona fide*, to have the land for his own cultivation is not enough; the Court in each case must consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of his family or tarwad. The real test is the need of the landlord. The word "requires" in the clause cannot be interpreted as meaning desires. (*Venkataramana Rao, J.*) RAMAN NAYAR *v.* KESAVAN EMBRANDIRI. **1941 M.W.N 698 = A.I.R 1941 Mad. 816 = (1941) 2 M.L.J. 456 (F N).** overruled in **(1941) 2 M.L J 455.**

——S. 20 (5)—*Construction—"Requires"—Meaning of.*

The words "the landlord requires the holding *bona fide* for his own cultivation, etc." in S 20 (5) of the Malabar Tenancy Act mean that the landlord should have a genuine intention to cultivate the land and not that he should show a real need to do so. (*Leach C.J. and Chandrasekhara Ayyar, J.*) NARIKKAL CHATHAN *v.* KESAVAN NAMBOODRI. **1941 M.W.N 851 = 54 L W 339 = (1941) 2 M.L.J. 455.**

——S. 26—Applicability—Renewal of part of holding by intermediary in favour of tenant in actual possession—Permissibility and effect of. *See* 1940 Dig., Col 874. P.V. POKKER *v.* A. KUNHEETHUTHI. **I.L.R. (1941) Mad 152 = 195 I C. 124 = 14 R M. 129 = A.I.R. 1941 Mad 186 = (1940) 2 M.L.J. 603.**

MADRAS MARUMAKKATHAYAM ACT (XXII OF 1933), Ss 38 and 43—Relative scope—Application under S. 43 for registration of tarwad as impartible—Subsequent suit for partition by member under S. 38—Effect—Order of registration—Legality—*Lis pendens*—Applicability. *See* 1940 Dig., Col. 875. MADHAVI AMMA *v.* NAGAPPAN NAYAR. **193 I.C. 869 = 13 R.M 728 = A.I.R. 1941 Mad. 182 = (1940) 2 M.L.J. 791.**

—— S. 48—*Applicability — Property acquired in name of woman by husband—Wife dying before Act—Effect—Absence of legalised marriage under S. 4 (1) (b) (1)—Stirpital division—If available.*

The language of S. 48 of the Marumakkathayam Act cannot apply to property purchased by a husband in the name of his "wife" and daughter, when the "wife" dies before the date of the Act with the result that the conjugal union between her and the husband who purchased the property is not subsisting on the date of the Act, and the union of the two can never have been regarded as a legalised marriage under S. 4 (1) (*b*) (1) of the Act. S. 48 cannot apply to the acquisition of such property and the mode of division by *stirpes* laid down in the proviso to S. 48 is not available. (*Pandrang Row and King, JJ.*) KRISHNAN *v.* THALA. **1941 M.W N 305 = 53 L.W. 452 = A.I.R. 1941 Mad. 605 = (1941) 1 M.L.J. 508.**

——S. 48—*Scope—If retrospective in operation.*

There is nothing in the language of S. 48 of the Marumakkathayam Act which by necessary implication shows that the section must be read retrospectively. It is in accordance with principles of natural justice that, when a new enactment effects a change in the law, that change shall date only from the time the Act comes into force. There is no reason whatever to regard S 48 as being on any score restrospective. (*Pandrang Row and King, JJ.*) KRISHNAN *v.* THALA. **53 L.W. 452 = 1941 M.W.N. 305 = A.I.R. 1941 Mad. 605 = (1941) 1 M.L.J. 508.**

MAD. PROHIBITION ACT (1937), S. 4.

MADRAS MOTOR VEHICLES TAXATION ACT (III OF 1931), S. 2—"Motor Vehicle"—Steam rollers of the Madras Corporation used for making, repairing and maintaining roads—Liability to tax. *See* 1940 Dig., Col. 875. CORPORATION OF MADRAS *v.* SECRETARY OF STATE. **194 I.C. 821 = 14 R.M. 97 = (1940) 1 M.L J. 576.**

——S. 7—Motor Vehicles Rules, Rr. 4 (30) and 138—Charge of using car as goods vehicle—Conviction—Essentials for. *See* 1940 Dig., Col. 875. BELLI GOWDER *v.* EMPEROR. **192 I.C. 326 = 13 R.M. 557 (1) = 42 Cr.L.J. 280.**

MADRAS NAMBUDRI ACT (XXI OF 1933), S. 3—Insolvency of member of illom—Right of Official Assignee to sell interest of such member in illom. *See* 1940 Dig., Col. 876. NARAYANAN NAMBUDRIPAD *In re.* **192 I.C 195 = 13 R.M 640 (2) = A.I.R. 1941 Mad 23 = (1940) 2 M.L.J. 747.**

MADRAS PREVENTION OF ADULTERATION ACT (III OF 1918, S. 5 (1) (b)—Applicability—Hotel keeper—Storing of adulterated ghee for sale—Offence—Servant of hotel-keeper—Liability to conviction. *See* 1940 Dig., Col. 876. ANANTHANARAYANA IYER, *In re.* **192 I.C. 817 = 13 R.M. 628 = 42 Cr.L J. 330 = A.I R. 1941 Mad. 320.**

——S. 5 (1) (b)—Essentials of offence—Hotel keeper storing adulterated ghee for preparation of edibles in his hotel—Offence. *See* 1940 Dig., Col 876. SUBRAMANYA AYYAR *v.* EMPEROR. **42 Cr L J. 31.**

——S. 16 (5)—*Scope—Sample already analysed by Government analyst—If to be sent again to him by Magistrate*

Where a sample has in fact been analysed by the Government analyst, it is not incumbent on the Magistrate to send it again to the Government analyst under S. 16 (5) of the Madras Act III of 1918. (*Lakshmana Rao, J.*) RAMASAMI KONAR *v.* EMPEROR. **1941 M W N. 844 (1).**

——S. 20. Rr. 27 and 29—*Scope—Selling milk containing 14% of water—Offence—Purity of milk—If material.*

The accused was selling milk which was found to contain 14 per cent. of water. She was charged under Ss. 27 and 29 of the rules framed under S. 20 of the Madras Prevention of Adulteration Act. The Magistrate acquitted her on the ground that the milk was not otherwise adulterated and did not fall below the standard of purity prescribed for cow's milk in the rules.

Held, that the accused was guilty under Rr. 27 and 29, and since the purity of the milk was immaterial, her acquittal was unsustainable and must be set aside. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR, MADRAS *v.* SOORAMMA. **195 I.C. 713 = 14 R M. 244 = 42 Cr L.J. 795 = 1941 M W N. 379 = A.I.R 1941 Mad. 617 - (1941) 1 M.L J 716.**

MADRAS PROHIBITION ACT (X OF 1937) S. 4 (1) (a)—*Scope—If* ultra vires—*Possession of arrack in contravention of S. 4 (1) (a)—Offence—Government of India Act* (1935), *Sch. VII, List I, Cl. 19 and List II, Cl. 31—Scope*

The petitioner was convicted under S. 1 (*a*) of the Madras Prohibition Act of being in unlawful possession of a quantity of arrack. In revision against the conviction

MAD. PROHIBITION ACT (937), S. 4.

the petitioner contended that in prohibiting the possession of intoxicating liquor the Madras Prohibition Act was *ultra vires* the Provincial Legislature and therefore the conviction must be quashed.

Held, that under Cl. 31 of the Provincial Legislative List in the seventh schedule to the Government of India Act, the Provincial Legislature had full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors, while Cl. 19 of the Federal List gave the Central Legislature power to legislate with regard to import and export across frontiers. S 4 (1) (*a*) of the Prohibition Act prohibited *inter alia* the possession of intoxicating liquors. Since in the present case, which was merely concerned with the possession of arrack produced in the Madras Presidency there was no question of any import or export, the conviction was lawful as the Provincial Legislature had power to prohibit the possession of arrack. (*Leach, C.J. and Somayya, J.*) SYED GAFFAR SAHIB, *In re*. **I.L.R. (1941) Mad. 701 = 195 I.C. 115 = 14 R.M. 130 = 4 F.L.J. (H C.) 97 = 42 Cr.L.J. 672 = 1941 M.W.N. 449 = 53 L.W. 615 = A I R 1941 Mad. 621 = (1941) 1 M.L.J. 715.**

——**S. 4 (1) (a)**—*Scope*—Ultra vires—*Government of India Act, S. 107—Scope.*

S. 4 (1) (*a*) of the Madras Prohibition Act is completely *ultra vires* so far as the possession of ganja or any other dangerous drug is concerned. The Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, in view of S. 107 of the Government of India Act. (*Leach C. J. Mockett and Krishnaswami Ayyangar, JJ.*) ADILAKSHMI AMMAL *v.* EMPEROR.

I.L.R. (1941) Mad. 687 = 196 I.C. 23 = 14 R.M. 245 = 42 Cr.L.J. 793 = 54 L W. 17 = 4 F.L.J. (H.C.) 171 = 1941 M.W.N. 525 = A.I.R. 1941 Mad. 533 = (1941) 2 M.L.J. 41 (F.B.).

MADRAS REVENUE RECOVERY ACT (II OF 1864)—*Procedure—Sale after death of defaulter—Heirs not substituted in registry—Failure to serve notice on them or to fix fresh date—Effect on sale.*

The Madras Revenue Recovery Act contemplates the continued existence of the defaulter till the date of the sale, and if, before such date, the defaulter dies, the sale would be infructuous and would pass no title to the purchaser Where, therefore, a registered ryotwari pattadar dies before the date fixed for sale for recovery of the arrears of revenue due by him, the proper course for the revenue authorities would be to register the heirs of the deceased as owners in the revenue registers, serve notices on them and fix a fresh date for sale, or to start the whole procedure *de novo* by issuing a fresh demand and taking further steps as provided in the Act. A sale after the defaulter's death without following such a course is consequently invalid. (*Venkataramana Rao, J.*) THIRUVENGADAM PILLAI *v.* KOOLAI.

54 L.W. 684 = (1941) 2 M.L.J. 1002.

——**S. 38 (3)**—*Jurisdiction of Collector—Setting aside of sale—Conditions—Suit in Civil Court to cancel order of Collector setting aside sale—Maintainability—Grounds for.*

All that is necessary under S. 38 (3) of the Revenue Recovery Act before setting aside a sale is that the Collector should have reason to think that the sale ought to be set aside, so that, if the Collector gives any substantial reasons why a sale should be set aside, his order is good. It is not necessary that he should find that there was a material irregularity; it is not also necessary that he should find that that the price was unduly low.

MAD. SUR. & BOUND. ACT (1897), S. 14.

Still is it necessary that the Collector should come to the conclusion that the lowness of the price was a direct result of some material irregularity. Where there is ample evidence before the Collector to justify the setting aside of a sale held under S. 38 (1) of the Revenue Recovery Act, it cannot be held that the Civil Court can set aside that sale merely because the applicant for setting aside the sale fails to adduce the same evidence before the Civil Court. Where the executive authority acts in some illegal or improper or arbitrary manner, then and only then can a Civil Court interfere with the order passed. (*Horwill, J.*) NARAYANAN CHETTIAR *v.* SECRETARY OF STATE FOR INDIA.

1941 M.W N 318 = 53 L.W. 457 = A.I.R. 1941 Mad. 561 = (1941) 1 M.L.J. 543.

——**S. 42**—Applicability—Sale under Land Encroachment Act—Effect on prior encumbrances. *See* MADRAS LAND ENCROACHMENT ACT, S. 9.

(1941) 2 M.L.J. 993.

——**S. 59**—*Limitation—Period of six months—Starting point of limitation—Sale confirmed by Deputy Collector—Application to Collector to set aside sale—Order declining to interfere—Suit within six months of Collector's order—If in time.*

When an application is preferred to the Collector under Cl. 3 (3) of Madras Regulation VII of 1828 to set aside a revenue sale which has been confirmed by the Deputy Collector under S. 38 of the Madras Revenue Recovery Act the period of six months prescribed by S. 59 of the Act for a suit in the Civil Court by the aggrieved party for redress has to be computed not from the date of confirmation of sale by the Deputy Collector but from the date when the Collector passes a final order on the application made to him Until the Collector has decided the application, refusing to interfere, it cannot be said that the sale is finally confirmed. (*Leach, C.J., Gentle and Somayya, JJ.*) VENKATANARASIMHACHARYULU *v.* SECRETARY OF STATE.

54 L.W. 647 = 1941 M W.N. 1050 = A.I R. 1941 Mad. 933 = (1941) 2 M L J. 904 (F B.).

——**S** 58—Scope—Jurisdiction of Civil Court to grant declaration as to area of land or assessment. *See* 1940 Dig., Col. 877. YEGNESWARA SASTRI *v* SECRETARY OF STATE. **191 I.C 14 = 13 R.M. 531 = (1940) 1 M L.J. 704.**

——**S. 59**—Order of Collector setting aside sale under S. 38 (3)—Suit to cancel—Maintainability—Grounds for. *See* MADRAS REVENUE RECOVERY ACT, S. 38 (3).

(1941) 1 M L.J. 543.

MADRAS SALT ACT (IV OF 1889), S. 74 (d)—*Offence—Transport of contraband salt in motor lorry—Owner, driver and cleaner—Liability to conviction—Evidence of knowledge of salt being contraband—Necessity.*

Where the owner, driver and cleaner of a motor lorry in which contraband salt is transported are charged with an offence under S. 74 (*d*) of the Madras Salt Act, there must be evidence to show that they knew or had reason to believe that the salt was contraband. In the absence of such evidence they cannot be convicted of the offence under S. 74 (*d*). (*Lakshmana Rao, J.*) VENKATACHALAM *v.* EMPEROR.

1941 M.W.N. 1040.

MADRAS SURVEY AND BOUNDARIES ACT (IV OF 1897), Ss. 11, 12 and 13—Decision of Survey officer—Effect of—Adverse possession of unsuccessful party—If interrupted. *See* ADVERSE POSSESSION—INTERRUPTION. **7 Cut L.T. 38.**

——**S. 14**—Suit under—Parties—Government—If necessary or proper party. *See* 1940 Dig., Col 878. SECRETARY OF STATE FOR INDIA *v.* VENKATA

MAD TOWN NUISANCES ACT (1889), S. 3.

NARASIMHARAO. **193 I.C. 37 = 13 R.M. 609 = (1940) 1 M.L.J. 690**

MADRAS TOWN NUISANCES ACT (III OF 1889), S. 3 (12)—*Sentence—Convictions under S. 3 (12) and S. 352, I. P. Code, on same facts—Separate sentences—Legality—General Clauses Act, S. 26.*

A person who is found guilty and convicted under S. 352, I. P. Code and S. 3 (12) of the Madras Town Nuisances Act, on the same facts, cannot be punished twice over; only one sentence can be passed against him. (*Lakshmana Rao, J.*) BALARAMA MUDALI *v.* EMPEROR. **1941 M.W.N. 765 (1).**

MADRAS VILLAGE COURTS ACT (I OF 1889), S. 8—*Duty of District Judge—Notice to show cause to Village Munsif before making requisition to Collector for removal of Village Munsif—Omission to give—Effect on order of removal.*

Under S. 8 of the Madras Village Courts Act, once the Collector receives a requisition from the District Judge calling upon him to act under the section the Collector's power is only in regard to the punishment, namely, whether he should suspend the Village Munsif or remove him. But when a report is made to the District Judge by a District Munsif under S. 74 of the Act, the District Judge must act according to natural justice, and must give notice to the Village Munsif to show cause before he makes a requisition to the Collector to dismiss the Village Munsif. An order passed without notice being given to show cause is illegal and cannot be sustained. (*Venkataramana Rao and Horwill, JJ.*) RANGA RAO *v.* COLLECTOR OF TRICHINOPOLY.

54 L.W. 271 = 1941 M.W.N. 1020 = A.I.R 1941 Mad. 863 = (1941) 2 M L J. 428.

——**S. 32**—Scope—Suit in Panchayat Court—Adjournment for evidence—Absence of plaintiff—Procedure—Disposal on the merits—Legality—Remedy—Application for setting aside and for restoration of suit before succeeding Court—Order setting aside dismissal and restoring suit—Order of Munsif quashing same—If justified. *See* 1940 Dig., Col. 879. KUTINHA *v.* NATHAL PINTO BAI. **A.I.R. 1941 Mad. 272 = (1940) 2 M.L.J. 780.**

——**S. 73**—Limitation—Time taken to apply for and obtain copy of decree—If can be excluded for purposes of revision application to District Munsif. *See* LIMITATION ACT, S. 12 (2). **(1941) 1 M.L.J. 540.**

——**S 73**—Material irregularity—Decree by Village Court on lesser degree of proof—If justifies interference by District Munsif. *See* 1940 Dig., Col. 879. KESAVAN NAYAR *v* VELU. **191 I.C. 557 = 13 R M. 522 = (1940) 2 M.L.J. 238.**

MAHOMEDAN LAW.

Administration.
Co-heirs.
Divorce. *See* MUSLIM DISSOLUTION OF MARRIAGES ACT.
Dower.
Gift.
Guardianship.
Maintenance.
Marriage.
Mosque.
Mujawar.
Mutawalli. *See* MAHOMEDAN LAW—WAKF.
Pre-emption.
Succession.
Wakf.
Will.

——*Administration—Assets of deceased—Sufficient for funeral expenses only—Liability to attachment for debts of deceased*

MAHOMEDAN LAW—Dower.

Where the only available assets of the deceased are just sufficient only for his funeral expenses, that could not be attached in satisfaction of a previous decree against the deceased, for whoever spends for the funeral expenses has a right to claim the amount from whoever is in possession of the assets. (*Davies.*) ASGHARI BEGUM *v* CHOGA LAL. **1941 A.M.L J. 6.**

——*Co heirs—Debts due by deceased—Heirs in joint possession of property—Form of decree.*

A decree was obtained against all the heirs of a deceased Mahomedan for debts due by the deceased. The estate was not distributed among the heirs and they were in joint possession of the estate.

Held that there should be a decree against the heirs which would enable the decree-holder to execute against the property as a whole without interfering with the extent of liability of heirs *inter se*. (*McNair, J.*) MAMRAJ MANIRAM *v.* MUHAMMAD HASHIM.

194 I.C. 727 = 14 R.C 10 = A.I.R. 1941 Cal. 245.

——*Co-heirs—Possession of property—Nature of.*

The co-heirs of a deceased Mahomedan, who have succeeded to his property in specific shares under their personal law, hold it as co-owners until there has been a partition by metes and bounds and possession of one is the possession of all. (*Tek Chand, Abdul Rashid and Sale, JJ.*) MOHAMMAD SOHAIL *v.* GHULAM RASUL.

I.L.R. (1941) Lah. 308 = 194 I.C. 125 = 13 R.L. 511 = 43 P.L.R. 238 = A.I.R. 1941 Lah. 152 (F.B.).

——Divorce. *See* MUSLIM DISSOLUTION OF MARRIAGES ACT (VIII OF 1939).

——Dower debt—Nature of—Proper remedy of widow's creditor. *See* 1940 Dig., Col. 880. SAIBANBI *v.* MAHOMEDALLI. **I.L.R. (1941) Nag 164 = 192 I.C. 286 = 13 R.N. 233 = A.I.R. 1941 Nag. 8.**

——Dower—Deferred—Nature of wife's interest. *See* PROVINCIAL INSOLVENCY ACT, S. 9 (1) (*b*). **1941 N L J. 181.**

——Dower—Lien—Wife's right to retain husband's property—When arises. *See* 1940 Dig., Col. 880. ASIA KHATUN *v.* AMARENDRA NATH BASU.

191 I.C. 783 = 13 R.C. 283.

——*Dower—Prompt dower—Consummation of marriage—Effect on wife's right to dower.*

Under Mahomedan Law consummation of marriage has not the effect of making the prompt dower as deferred and the wife has an absolute right to bring an action for the recovery of prompt dower even after consummation, whenever she chooses to do so. (*Bajpai and Dar, JJ.*) MOHAMMAD TAQI AHMAD KHAN *v* FARMOODI BEGAM. **I.L.R. (1941) All. 326 = 195 I.C 353 = 14 R.A 28 = 1941 A.W.R. (H.C.) 75 = 1941 O.A. (Supp.) 135 = 1941 A.L.W. 183 = 1941 A.L.J. 118 = 1941 O W N. 283 = A.I.R. 1941 All 181.**

——*Dower—Prompt dower—Portion not fixed by any agreement—Demand, if a condition precedent to suit for dower—Form and nature of demand.*

When the prompt dower of a Mahomedan wife is an ascertained sum under a contract or under a custom it may be possible to hold under the terms of the contract as a matter of construction that the demand for payment of dower was a part of the contract and an integral part of the cause of action. Even in such a case it may be possible to hold as a matter of Mahomedan law having regard to the relation of husband and wife that it is such a relationship in which the creditor has to seek the debtor and the debtor has not to seek the creditor and in such a case an antecedent demand may be necessary to make a cause of action. But these considerations do not apply to a case where the prompt dower has not been fixed either under agreement or by custom and the

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Court has to determine the amount after contest. In such a case demand can only be for settlement of claim of dower and for fixation of amount by negotiation and agreement. In such a case it cannot be said as a matter of Mahomedan Law that a previous demand and refusal of payment of an unascertained sum of dower is part of the contract of payment of dower and is necessarily a part of the cause of action of the plaintiff A suit in such circumstances is at once a suit for determination of the amount and for its recovery and for the success of such a suit a previous demand and refusal is not a condition precedent. If a demand were necessary, it will be sufficient, if she makes a demand generally for the settlement of her prompt dower without limiting herself to any definite sum or she may treat her entire dower as prompt and make a demand for it or she may make a demand for a lesser sum and in each case a demand so made will entitle her later on to reduce her claim before enforcing it without being under the necessity to make a fresh demand of the precise sum which she eventually decides to enforce by an action in Court. (*Bajpai and Dar, JJ.*) MOHAMMAD TAQI AHMAD KHAN *v* FARMOODI BEGAM.

I.L.R (1941) All. 326 = 195 I.C. 353 = 14 R.A. 28 = 1941 A.W.R. (H.C.) 75 = 1941 O.A (Supp) 135 = 1941 A.L.W. 183 = 1941 A.L J. 118 = 1941 O.W.N. 283 = A.I.R. 1941 All. 181.

——*Dower—Prompt dower —Portion not fixed—Considerations to as to fixing.*

Where the proportion to be treated as prompt dower has to be fixed by Court, the essential matters to be taken note of are no doubt the status of the woman and the amount of the dower fixed. But it is permissible to the Court to look to other circumstances as well. There is no practice of Court governing the proportion of the prompt dower and each case must be decided on its own merits. (*Baipai and Dar, JJ*) MOHAMMAD TAQI AHMAD KHAN *v.* FARMOODI BEGAM.

I.L R. (1941) All. 326 = 195 I.C 353 = 14 R.A. 28 = 1941 A.W.R. (H C.) 75 = 1941 O.A (Supp) 135 = 1941 A.L W 183 = 1941 A.L J. 118 = 1941 O.W.N. 283 = A.I.R. 1941 All. 181.

——*Dower—Prompt—Time for payment—Law and practice as to—Long lapse of time since marriage—Presumption of payment.*

Although prompt dower, according to Mahomedan Law is payable immediately on demand, yet in a large majority of cases it is rarely demanded and is rarely paid ; in practice a Mahomedan husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. (*Thomas, C. J. and Ghulam Hasan, J.*) FAQIR BUX *v.* THAKUR PRASAD.

194 I.C 588 = 14 R O. 6 = 1941 O.W.N. 801 = 1941 A L W. 640 = 1941 O.A. 519 = 1941 A.W.R. (C.C.) 222 = A I.R. 1941 Oudh 457

——Dower—Sunnis governed by Hanafi law — Divorce of wife before consummation of marriage—Right to claim dower—If extends to whole dower or only half. *See* 1940 Dig., Col. 880. TAJBI *v.* NATTAR SHERIF. **191 I.C. 728 = 13 R.M. 514 = (1940) 2 M.L.J 345.**

——Dower—Widow in possession in lieu of dower —Nature of her right. *See* 1940 Dig., Col. 880. MUNIRAN *v.* MUKHTAR BEGAM. **192 I.C. 600 = 13 R.A. 346.**

MAHOMEDAN LAW—Gift.

——*Dower—Widow's lien for—Widow in possession of husband's property—Right to retain possession till payment of dower—Transferability.*

Quaere.—Whether a Mahomedan widow in possession of her husband's estate, and entitled to retain possession of it until her dower debt is paid, is competent to transfer that right. (*Meredith and Shearer, JJ.*) SHAIKH MAMOMED ZOBAIR *v.* MT. BIBI SAHIDAN. **20 Pat. 798.**

——Gift—Delivery of possession—Constructive delivery—Sufficiency. *See* 1940 Dig., Col. 881 HALIMBI *v.* RAHMATALI. **I.L.R. (1941) Nag. 669.**

——Gift—Delivery of possession—Rule as to—When applicable. *See* 1940 Dig., Col. 881. HALIMI *v.* RAHMATALI. **I.L.R. (1941) Nag. 669.**

——*Gift*—Hiba-bil-ewaz—*Validity—Conditions necessary.*

In the case of a *hiba-bil-ewaz* only two conditions are necessary to establish the validity of the transaction (1) actual payment and (2) a *bona fide* intention of the donor to divest himself *in praesenti* of the property and to confer it upon the donee. There must be an actual payment of the consideration be it whatever it is, for adequacy of consideration is not material. The declaration in the deed as regards delivery of possession is binding upon the heirs and representatives of the donor and is quite sufficient to establish delivery of possession, even if it were necessary to do so. (*Ghulam Hasan, J.*) MAHOMED KAZIM HUSAIN *v.* NADRI BEGAM.

194 I C. 87 = 13 R.O. 537 = 1941 A.W.R. (C.C.) 129 = 1941 A.L.W. 385 = 1941 O.L.R. 395 = 1941 O.W N. 532 = 1941 O.A. 338 = A.I.R. 1941 Oudh 348.

——*Gift—Marz ul maut — Conditions necessary to invalidate death-bed gift.*

In order to invalidate a death-bed gift it must be shown that at the time of the execution of the deed of gift, the donor was suffering from a serious disease which it was known would in all probability terminate fatally, that the disease was such as to engender in the patient the apprehension of death and that the illness incapacitated him from the pursuit of his ordinary avocations. It is however not necessary to show that the disease was in fact the immediate cause of death. (*Dalip Singh and Sale JJ.*) SAKINA BEGUM *v.* HAFIZUDDIN.

194 I.C. 77 = 13 R.L. 500 = A.I.R. 1941 Lah. 58.

——*Gift—Marz-ul-maut—Gift to heirs without consent of other heirs—Validity.*

So far as Sunni law is concerned a death-bed gift to an heir is void *in toto* in the absence of consent by the other heirs (*Dalip Singh and Sale, JJ.*) SAKINA BEGUM *v.* HAFIZUDDIN. **194 I.C. 77 = 13 R.L. 500 = A.I.R. 1941 Lah. 58.**

——*Gift—Sale—Conveyance by Mahomedan to wife of property—Reliquishment by latter of dower debt—Nature of transaction.*

There is no reason why it should be assumed that a transaction whereby a Mahomedan conveys property to his wife and the latter relinquishes the dower debt due to her from him, is a true *hiba-bil-ewaz*, and not a sale, merely because the property which is the subject-matter of each of the two gifts is separated property to which the doctrine of Musha does not apply and in each case the donor has made over possession of that property to the donee. The question in each case is one of fact. (*Meredith and Shearer, JJ.*) SHAIKH MAHOMED ZOBAIR *v.* MT. BIBI SAHIDAN. **20 Pat. 798.**

—— Gift—Validity—Gift *in futuro*. *See* 1940 Dig., Col. 882. MAHOMED ALI *v.* DINESH CHANDRA RAY. **193 I.C. 540 = 13 R.C. 413.**

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———*Gift—Validity—Registered gift in lieu of dower debt—Possession stated to be delivered and deed handed over to donee—Sufficiency.*

Where a registered deed of gift by a husband in favour of his wife stated that it was in lieu of the dower debt and that the donee had been put in possession of the property and the deed was handed over to the donee after registration, it was held that it was a valid gift and it could not be held to be invalid merely because the donee had not obtained actual possession. (*Yorke and Agarwil, JJ.*) BASHIRAN *v.* MAHOMED HUSAIN.

16 Luck. 615=13 R.O. 433=193 I.C 161=1941 O L.R 259=1941 O.A. 211=1941 A.W.R. (C.C.) 98=1941 O W.N. 249=A.I.R. 1941 Oudh 284.

———*Guardianship—Alienation by guardian—Difficulty of management of property—If valid ground.*

Under Mahomedan Law, the fact that it is difficult for a legal guardiau to manage the property as it is some distance away from his permanent residence and that he is not getting any profits from the property owing to the difficulty of management, is not a valid ground for the sale of immovable property belonging to a minor. (*Sen, J.*) BHARAT CHANDRA *v.* MD. RAMJAN.

45 C W.N. 489.

———*Guardianship — Minor*—De facto *guardian—Sale by mother—If void.*

A mother of a Mahomedan minor, being merely the *de facto* guardian of the minor has no power to sell any of the immovable properties of the minor Such a sale by a *de facto* guardian is absolutely void. (*Agarwala, J.*) SAMBHU GOSAIN *v.* PIYARI MIAN

193 I C 253=13 R.P. 561=1941 P.W.N. 497=7 B R. 520=A.I.R. 1941 Pat. 351.

———*Guardianship—Mortgage by guardian—Powers—Existence of debts of deceased.*

A mortgage by a legal guardian of a Mahomedan minor can be authorised where there are debts of the deceased and no other means of paying them. *Stone, C.J. and Bose, J.*) ABBAS HUSSAIN *v.* KIRAN SHASHI DEVI. **1941 N.L.J. 447.**

———Guardianship—Right to—Female relation having preferential right to custody of minor marrying stranger—It thereby disqualified from being appointed guardian—Considerations for Court. *See* GUARDIANS AND WARDS ACT, S. 17. **45 C.W.N. 515.**

———*Guardianship — Shafei sect — Daughters—Guardianship and custody—Right to maintenance from father after attaining puberty till marriage*

Among the Shafeis the mother is competent to retain her daughters' custody in spite of their having attained puberty up to the time that they are actually married If the father has any right to the custody of his children; he may no doubt enforce that right, but the fact that he has not done so or that his daughters are residing elsewhere does not deprive them of their right to recover maintenance from him till their marriage which is absolute. The right cannot legitimately be linked with the right of the father, if any, to the custody of the children and the father being the legal guardian is also beside the point. (*Abdur Rahman, J.*) KACHI MUHAIDIN THARAGANAR *v.* SAINAMBU AMMAL.

I.L.R. (1941) Mad. 760=1941 M.W.N. 308=53 L.W. 548=A.I R 1941 Mad. 582=(1941) 1 M L J. 503.

———*Maintenance—Daughter—Right of—Claim to separate maintenance—Father's liability.*

A Mahomedan father is under an obligation in law to maintain his daughter till her marriage; but if the daughter desires to claim separate maintenance, *i.e.* maintenance allowance while she insists on living away

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from her father, she has to make out the necessary grounds for that. In default, if the father offers to keep her in the house and maintain her there, the daughter has no absolute right to separate maintenance. Plaintiff, a Mahomedan girl, lived with her mother who was divorced by her father when she was 11 years old, She was not called on to live in her father's house and never in fact lived there. Her father married a second wife and became a lunatic. In a suit by her claiming separate maintenance,

Held, that there was sufficient justification for permitting the plaintiff to stay away from her father's house and her claim to separate maintenance must therefore be allowed. (*Kania, J.*) BAYABAI *v.* ESMAIL AHMED. **179 I.C. 161=43 Bom.L.R. 823=A.I.R. 1941 Bom. 369.**

———*Marriage—Dissolution—Charge of adultery—Retraction—Principle of.*

It is well established that a marriage can be dissolved only by a decree of the Court, and the Court has got to determine judicially whether a charge of adultery was or was not unjustly made. It has also been held in accordance with the spirit of Mahomedan law relating to *lian* that the husband has the right to retract the charge he made, though by doing so, he renders himself liable to punishment for slander and on retractment of the accusation, the wife's suit fails. The purpose behind this principle of retraction is obviously to give the husband a *locus poenitentiae*. An unretracted accusation of this kind cannot but render conjugal affection impossible, but if there is a *bona fide* retraction in the written statement, the Court should not order dissolution of the marriage. (*Mukherjea, J.*) SAJU BIBI *v.* MUKSED MALLAH **45 C.W.N. 122.**

———*Marriage—Dissolution—Rule entitling convert to Islam to dissolve marriage on refusal of unconverted spouse to adopt Islam—If applicable to Muslims with foreign domicile—Woman contracting Christian marriage and thereby acquiring Russian domicile becoming convert to Islam in India—If can seek dissolution of marriage in Indian Court—Christian marriage—Meaning of.*

The rule of Mahomedan Law which entitles a wife who has become a convert to Islam to dissolve her marriage on the refusal of her husband to adopt Islam after its presentation to him, does not apply to Muslims with a foreign domicile. If, therefore, a woman who is converted to Islam in a country in which Islamic law is in force, has a foreign domicile, she cannot be allowed to dissolve a Christian marriage contracted by her by observing the procedure prescribed for this purpose by the above-mentioned rule. By the expression "Christian marriage", it must not be taken to mean a marriage celebrated in a Christian church according to the formalities prescribed by any particular Christian sect. A Christian marriage may be celebrated with equal efficacy according to civil rites and is merely a marriage which precludes the possibility of a marriage with another person during the lifetime of the first spouse, unless the first marriage has been duly dissolved by the *lex fori* of the country in which the parties to the marriage are domiciled A marriage celebrated even in Soviet Russia is in essence a Christian marriage, although the present law of Russia may possibly provide parties to it with facilities for its dissolution, which do not exist in English Law. If a woman who has contracted a Christian marriage and has thereby acquired her husband's Russian domicile, becomes a convert to Islam in India and seeks the dissolution of the marriage her right to obtain the relief which she seeks must be decided in the Russian Courts and does not depend in

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any way upon the personal law of her religion, even if it be assumed that such personal law forms part of the *lex fori* of the Indian Courts. (*Edgley, J.*) NOOR JEHAN BEGUM *v.* EUGENE TISCENKO.
74 C.L.J. 212=45 C.W.N. 1047=A.I.R. 1941 Cal. 582.

———*Marriage—Dissolution—Rule entitling convert to Islam to dissolve marriage on refusal of unconverted spouse to adopt Islam—Procedure prescribed—Rule, if applicable in India.*

The rule of Mahomedan Law which entitles a wife who has become a convert to Islam in an Islamic country to dissolve her marriage on the refusal of her husband to adopt Islam after its presentation to him, lays down that Islam is to be presented to the unconverted party by the kazi and, on refusal by him to embrace the faith, the kazi must pronounce a decree of divorce. The authorities on Mahomedan Law envisage the actual physical presence of the parties before the kazi and, in the absence of the unconverted party, it is difficult to see how Islam can be effectively presented to him. A mere request by a cable from a convert to her husband asking him to embrace Islam is not sufficient to constitute a valid offer of the faith to the unconverted party. In any case, it is the kazi and not the convert who should present Islam to the unconverted party and it is for him in a suitable case to pronounce a decree dissolving the marriage. It is, of course, essential for the convert to satisfy him that her conversion is of a *bona fide* character. It is not, however, the law of India that convert to Islam can obtain dissolution of his or her marriage by complying with the procedure prescribed by this rule. The rule must be regarded as obsolete and contrary to public policy. It is not also in accordance with the principles of justice, equity and good conscience, as it conflicts with the most fundamental principles of English Law, which are followed in India in matrimonial cases. It is unsupported by the provision of any statute and does not form part of the common law. (*Edgley, J.*) NOOR JEHAN BEGUM *v.* EUGENE TISCENKO.
74 C.L.J. 212=45 C.W.N. 1047=A.I.R. 1941 Cal. 582.

———*Marriage—Minor— Contract by guardian for marriage on behalf of minor husband relating to divorce—Validity.*

Under Mahomedan Law, a person cannot contract a marriage, unless he or she is of sound mind and has attained puberty. But even if the parties are minors, consent on his or her behalf can be expressed by the guardian for marriage, who is legally authorised to make a valid contract of marriage. The terms of such a contract are enforceable in a Court of law if they are not incompatible with any rule or policy of Mahomedan Law. An agreement entered into by the father of a minor husband acting as a guardian for marriage authorising the wife to effect a divorce if the husband takes a second wife without her consent, does not contravene any principle of Mahomedan Law, and is valid and enforceable against the husband. (*Mukherjea, J.*) MARFAT ALI MIRJA *v.* JABDANNESSA BIBI.
I.L.R. (1941) 1 Cal. 401=45 C.W.N. 910=A.I.R. 1941 Cal. 657.

———*Marriage — Option of puberty—Exercise of—Time limit—Proper rule as to.*

The rule of immediate repudiation of marriage on attaining majority cannot be enforced in India where ignorance of that right would be the general rule rather than an exception. It is impossible to lay down a hard and fast rule applicable to every case as to what length of time would be reasonable. A period of 3 months should be allowed as reasonable time requisite for

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necessary enquiry and reflection. (*Niyogi, J.*) MAHOMED UMAR *v.* MST. BANOBI. **1941 N.L.J. 162.**

———*Marriage—Proposal and acceptance—Form, if any—Long lapse of time—Presumption as to formalities.*

The Mahomadan Law does not prescribe that the proposal and acceptance should be made in any particular form. Where there has been a long lapse of time, under the circumstances of each case, all the necessary formalities should be presumed to have been complied with. (*Yorke and Agarwal, JJ.*) BASHIRAN *v.* MAHOMED HUSAIN. **16 Luck. 615=13 R.O. 433=193 I.C. 161=1941 O.L.R. 259=1941 A.W.R. (C.C.) 98=1941 O.A. 211=1941 O.W.N. 249=A.I.R. 1941 Oudh 284.**

———Mosque—Mutawalli surrendering functions of mutawalli to committee but continuing as pesh imam—Committee exercising general supervision over imam—Power of dismissal. *See* 1940 Dig., Col. 885. SHAHUL HAMEED MARAKAYAR *v.* MAHOMED HUSSAIN SAHIB. **193 I.C. 131=13 R.M. 622=A.I.R. 1941 Mad. 42=(1940) 2 M.L.J. 446.**

———Mosque—Suit by, as atificial person—If can be brought. *See* 1940 Dig., Col. 885. SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **I.L.R. (1940) Kar. (P.C.) 251=22 Pat.L.T. 140=73 C.L.J. 199=(1940) 2 M.L.J. 903 (P.C.).**

———*Mujawar—Office of—Right of female to hold and perform duties.*

Under the Mahomedan Law, where the duties of the *mujawar* of a shrine consist of sweeping and cleaning the place, reading the Fatiha, offering prayers and incense, and looking after the general management of the shrine, females are competent to hold the office of mujawar and perform such duties. These functions are purely ministerial or menial and a female is not incompetent to perform them. (*Broomfield and Divatia, JJ.*) ABDUL AZIZ *v.* MAHOMED IBRAHIM.
196 I.C. 181=14 R.M. 112=43 Bom. L.R. 126=A.I.R. 1941 Bom. 238.

———*Pre-emption—Right to— Pre-emption suit in respect of share of estate sold—Defendant purchaser between pre-emption sale and institution of suit purchasing interest of another co-sharer—Plaintiff's right, if lost.*

On the purchase of a share in the estate by a stranger the co sharer plaintiff instituted a suit for pre-emption, But between the date of the pre-emption sale and the date of the institution of the pre-emption suit the defendant purchaser purchased the interest of another co-sharer in the estate. The title of the defendant to the second share had not completely matured on the date of the pre-emption decree of the trial Court as the period of limitation for a suit to pre-empt the second share had not then expired:

Held, that the defendant's title to the second share could not be said to have stood on an equal footing with that of the plaintiff on the date of the decree of the trial Court inasmuch as he could not be said to have acquired an indefeasible title to that share on that date and therefore the purchase by the defendant of a second share in the estate after the pre-emption sale could not affect the plaintiff's right to pre-empt the first share purchased by defendant. (*Nasim Ali and Mahomed Akram, JJ.*) MAHOMED MOTTAKI *v.* MT. SHAMSUNNESSA KHATUN. **196 I.C. 30=14 R.C. 154=A.I.R. 1941 Cal. 314.**

———*Pre-emption—Share in large estate—If can be pre-empted.*

A share in a large estate can be a subject-matter of pre-emption under the Muslim law. (*Nasim Ali and*

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Mahomed Akram, JJ.) MAHOMED MOTTAKI *v.* MT. SHAMSUNNESSA KHATUN. **196 I.C. 30 = 14 R.C. 154 = A.I.R. 1941 Cal. 314.**

——Succession—Exclusion from—Murderer and his descendants. *See* 1940 Dig., Col. 886. MUZAFFAR SARFRAZ *v.* RAHIM JANA. **13 R. Pesh. 25.**

——*Succession—Shias—Asna Ashari sect—Succession—Family custom of exclusion of women—Proof of—Requisites.*

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so, by clear and unambiguous evidence." Where the plaintiffs claimed that by reason of a family custom prevailing among Shiah Mahomedans of the Asna Ashari sect women were excluded from succession and the evidence produced in support of it was neither clear nor unambiguous and the cases deposed to of succession in the family by males only were of comparatively recent date and capable of some explanation other than the alleged custom and no case of any such succession was proved which was consistent only with the existence of the alleged custom, *i.e.*, which could only have taken place if the alleged custom in fact prevailed in the family, it was held that the custom alleged was not proved to exist in the family. (*Lord Russel.*) NISAR ALI KHAN *v.* FATIMA SULTAN. **195 I.C. 639 = 14 R.P.C 12 = 1941 A.W.R (Rev.) 750 = 1941 A.L.W. 808 = 1941 O L.R. 617 = 7 B R. 984 = 1941 O.W.N. 1345 = 1941 O.W.N. 946 = 1941 O.A. 683 = A.I.R. 1941 P.C. 62 (P.C.).**

——Wakfs. *See also* (*i*) MUSSALMAN WAKF ACT (XLII OF 1923).
(*ii*) MUSSALMAN WAKF VALIDATING ACT (VI OF 1913).

——Wakf—Agreement to create "suitable wakf"—If void for uncertainty. *See* 1940 Dig., Col. 886. MAHOMED ALI *v.* DINESH CHANDRA RAY. **193 I.C. 540 = 13 R.C. 413.**

——Wakf—Creation of— Essentials — Property, if must belong to wakf at time of dedication. *See* 1940 Dig., Col. 886. MAHOMED ALI *v.* DINESH CHANDRA RAY. **193 I.C. 540 = 13 R.C. 413**

——*Wakf—Creditor of mutawalli—Recovery of debt out of estate—Subrogation to Indemnity—Proof required.*

A creditor of a mutawalli of a wakf estate suing to recover the debt out of the estate must make the mutawalli a party to the suit and establish his right against the estate through the medium of a "clean account". Generally speaking that accounting involves (1) establishing that the money was taken for the purposes of administration of the estate, (2) that the money was spent on the estate, (3) that on balance of account the mutawalli has not in fact taken or reimbursed himself from the income of the estate. (*Ameer Ali, J.*) ABBAS ALI *v.* ABID JEHAN. **I.L.R. (1941) 2 Cal. 347.**

——*Wakf—Mutawalli—Nomination of successor—Validity—Marz ul-maut.*

Under the Mahomedan Law the nomination of his successor by the mutawalli for the time being is valid only if it is made while he was in death illness (marz-ul-maut). Neither diarrhoea nor general debility due to old age can be called mortal maladies. Hence nomination of successor during such illness is not valid. (*Tek Chand and Dalip Singh, JJ.*) MT. KAMMON *v.* ALLAH BAKHSH. **193 I.C. 323 = 13 R.L. 447 = A.I.R. 1941 Lah. 36.**

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——*Wakf—Mutwalli—Power of congregation to appoint—Power of* de facto *mutwalli to collect rent.*

The congregation can appoint a mutwalli in cases where the institution is confined to a particular locality. A *de facto* mutwalli is entitled to collect rents on behalf of a mosque. (*Clarke, J.*) CHINDOO *v.* HAIDARKHAN. **1941 N.L.J. 161.**

——*Wakf* —Mutawalli—*Powers of—Lease for fifty-one years—Validity—Sanction obtained by Court after suit to set aside lease—Sufficient power to sanction—If confined to District Judge.*

Under the Mahomedan Law, the *mutawalli* of a *dargh* has power to grant a long term lease of wakf property, *e.g.*, for fifty-one years, for a necessary purpose with the sanction of the Court. Even if sanction is not antecedently obtained, it is open to the Court to grant sanction retrospectively in a suit to set aside the lease by a succeeding *mutawalli* ; and sanction can be granted by any Civil Court, not merely by the District Judge. (*Divatia, J.*) ZAFARBHAI GULJARBHAI *v.* CHHAGANLAL ADITRAM. **43 Bom.L.R. 854.**

——Wakf—Provision for annuity—Wakf not valid—Charge if created for payment of annuity. *See* 1940 Dig., Col. 887. KANIZ KUBRA BIBI *v.* MUZAFFARUD-DIN. **192 I.C. 410 = 13 R.A. 321.**

——*Wakf — Subject-matter — Property previously leased out by wakif — Shia law.*

Per *Mitter, J.*—All property which produces income or profits and which would not be consumed by use can be dedicated by way of wakf, except those which are expressly excluded by the Muslim jurists. The condition of delivery of possession does not require that there should in all cases be physical delivery. The nature of the delivery would depend upon the nature of the subject and the purpose for which the subject has to be applied according to the terms of the wakfnama. A property which has been leased out at a rent cannot be possessed by the landlord in *khas*. Through receipt of rent he possesses the subject. If he grants lease and thereafter makes wakf of such property he can transfer his possession to the mutwalli by asking the lessee to attorn to the mutwalli or by authorising the mutwalli to receive the rent reserved by the lease. That is the only way in which he can deliver possession to another. If the wakfnama directs the income to be utilised for the object of the wakf, the inclusion of a property previously leased out by the wakf would not render the wakf invalid. In fact the Muslim jurists recognise that a property which is subject to a lease in favour of a third person can be made the subject-matter of a wakf. Before the determination of the lease the lessor's profits would be appropriated to the purposes of the wakf and would enure to its benefit, and after determination of the lease the profits which had been intercepted by the lease would automatically enure to the benefit of the wakf by way of accretion.

Per *Khundkar, J.*—Where property which is subject to a lease is made the subject of a wakf, there is an immediate appropriation of property in the actual possession, presumably of tenants who were paying rent to a lessee from the settlor, the latter being at the time of the dedication under a contractual liability to pay rent to the wakif. What is immediately appropriated as corpus is the property, to which attaches the right to receive in the present a smaller rent from one person, the lessee, and to receive in the future a large rent from other persons, the tenants who happen to be in actual or *khas* possession. The delivery of seisin is effected by vesting in the endowment the right to receive rent. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

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———*Wakf—Validity— Provision for payment of maintenance to servants—If contravenes provisions of Mussalman Wakf Validating Act.*

A wakf providing for maintenance in favour of servants is a perfectly valid wakf under Mahomedan Law. There is nothing in the Mussalman Wakf Validating Act which invalidates any such wakf. (*Bennett and Ghulam Hasan, JJ.*) AKHTAR BANU BEGAM *v.* KANHAIYA LAL **195 I.C. 326 = 14 R.O. 74 = 1941 O W.N 829 = 1941 O L R. 572 = 1941 A.L.W. 690 = 1941 A.W.R. (C.C.) 220 = 1941 O.A. 531 = A.I.R. 1941 Oudh 492.**

———*Wakf—Validity—Provision made in deed for pension for faithful servants—Shia law.*

Per *Mitter, J.*—A provision in a deed of wakf for a small pension for certain faithful servants will not render the wakf invalid, when the main purpose of the wakf is not to make a settlement on those servants. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM **74 C.L.J. 261.**

———*Wakf—Validity—Provision made in deed for reserve fund—Shia law.*

Per *Mitter, J.* - A provision in a wakfnama for a reserve fund to be applied for the improvement and extension of the wakf and in rebuilding a *mosque* and *imambara* on certain contingencies cannot invalidate the wakf. The benefit of reserve fund is to result to objects of the wakf. The income of the property dedicated being trust money, so to say, any property acquired from a portion of the accumulated income of those properties, that is the portion which goes to make up the reserve fund, would be impressed by the trust.

Per *Khundkar, J*—The moment there is a change in the character of possession of the wakif, the entire property, both corpus and income, becomes impressed with the trust. That share of the income which is to be accumulated is as much an asset of the wakf as is the corpus itself. The future application of this fund to the erection of a *mosque* and *imambara*, or its investment in other immovable properties will amount to no more than the conversion of one form of wealth (money) into another form of wealth, land and buildings. It is not a future appropriation, but a present appropriation to future uses which will enure to the benefit of the wakf (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

———*Wakf—Validity—Shia Law—All rights in the properties reserved to wakifs—Wakifs to have right of residence, in some properties and to enjoy rents and profits of other properties—If valid wakf under the Shia system of Mahomedan Law.*

A wakif cannot, under the guise of salary, reserve to himself a life interest in a portion of the income in excess of what is assigned to future mutawallis, and could reasonably have been assigned to them ; a wakf containing such a reservation is wholly void and not merely as to the reservation. Where under the terms of a wakf, there is something more than a reservation to a mutawalli of an excessive remuneration, all rights in the properties being reserved to the wakifs at the outset, and they enjoy right of residence in one of the properties of the wakf and right to enjoyment of the rents and profits of the other properties, the wakf is not a valid wakf under the Shia Law at all. (*Davis, C. J and Weston, J.*) SHAHBAN MOHIB *v.* HEMRAJ RAGHAVJI. **I.L.R. (1941) Kar. 474.**

———*Wakf—Validity—Test—General principles.*

MAHOMEDAN LAW—Wakf.

A trust for charity simpliciter, so long as it is confined to charity exclusively, is a perfectly good trust and it is not necessary that the objects of trust or charity need be specified. This is the English law as also the Indian law. If a Mahomedan settlor creates a wakf in favour of the poor or a trust for religious, pious or charitable purposes of a permanent character recognized by Mahomedan Law without specifying the religious, pious or charitable objects or he makes a trust for religious, pious or charitable purposes of a permanent character recognized by Mahomedan Law either one or the other or all or in any combination, such a trust would be perfectly valid and should not fail simply because the objects were not specified. A trust for *khairat* or a trust for *khairati kam* is a perfectly good trust and *khairat* and *khairati kam* should be taken as equivalent to charity and charitable objects, and in such a case specification of objects of charity is not necessary. If a trust is for *umure khair* or *kare khair* it is a question of construction in what sense the expression is used and if it is used in the sense of benevolent purposes or good purposes, the trust will be void for uncertainty, but if it is used in the narrower sense of *khairat*, it will be a good trust. (*Bajpai and Das, JJ.*) MAHOMED YUSUF *v.* AZIMUDDIN. **I.L.R. (1941) All. 443 = 196 I.C. 324 = 14 R.A. 145 = 1941 A.L W. 509 = 1941 A.W.R (H.C.) 175 = 1941 O.A. (Supp) 400 = 1941 A L.J. 269 = A.I.R. 1941 All. 235.**

———Wakf—Validity of—Wakf alal-aulad—Gift to charity without specifying sum—Mutwali required to render accounts showing fulfilment of this object—Residue of income after making specified payments substantial. *See* 1940 Dig., Col. 888. MOHIUDDIN AHMED *v.* SOFIA KHATUN. **192 I.C. 693 = 13 R.C. 339.**

———*Wakf—Validity — Wakif appointing himself mutwalli and taking remuneration—Shia law.*

Per *Mitter, J.*—A Shia wakif can appoint himself *mutwalli* by the terms of the wakfnama and make it a condition that he should receive an amount of remuneration which *mutwallis* generally are to receive under the terms of the wakfnama. The wakf would not be void if such a condition is made. The rule which requires that the wakif *qua mutwalli* cannot reserve to him a salary or remuneration more than what has been fixed for *mutwallis* generally, means that he must not make a distinction in his favour between himself and other mutwallis following him. The fact that two classes of mutwallis were contemplated with different scales of remuneration would not make any difference.

Per *Khundkar, J.*—There is authority both textual and judicial to warrant the following propositions:—(1) A wakif may not reserve to himself any benefit under the wakf, that is as a beneficiary. (2) When any beneifit is given to a class of persons, and the wakif becomes adventitiously a member of that class, he may partake of the benefit. (3) He may appoint himself mutwalli and reserve to himself a remuneration as mutwalli provided that is the remuneration reserved for mutwallis generally, and such as could reasonably be reserved for them. (4) He may not make a settlement for life upon himself under the guise of mutwalli's remuneration. (5) Gross disproportion between the remuneration reserved by the wakif for himself as mutwalli and the remuneration provided for subsequent mutwallis would ordinarily be evidence of an intention to participation as a beneficiary under the wakf. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L J. 261.**

———*Wakf—Validity—Wakf under pressure of threatened litigation—No acting upon—Validity.*

MAHOMEDAN LAW—Wakf.

Where a trust amounted to a virtual transfer of the entire estate of the settlor under pressure of a serious litigation relating to the entire estate, and the objects were such for which the settlor had not shown in his life any previous or subsequent leanings, and from its inception, nothing worth mentioning was spent for the purpose of the trust or in carrying out the objects of the trust and the operation of the trust had remained a dead letter, it was *held* that the settlor never intended to found the charity embodied in the deed of 'wakf', and that the deed and the ostensible acting on it were all sham and illusory proceedings and consequently the wakf was void in law. (*Bajpai and Dar, JJ.*) HIDAYAT BEG *v.* BEHARI LAL. **I.L.R. (1941) All. 377 = 196 I.C. 3 = 14 R.A. 132 = 1941 A.L.W. 472 = 1941 A.L.J. 295 = 1941 O.A. (Supp.) 312 = 1941 A.W.R. (H.C.) 147 = A.I.R. 1941 All. 225.**

———*Wakf—Validity—Who can challenge.*

The question whether a wakf was meant to be operative or not can be raised not necessarily in a suit by the creditors of the wakif. In a suit by the legal representatives of the wakif or those claiming in his right, facts can be examined for the purpose of finding whether the deed of wakf (even when followed by delivery of possession by the wakif to the mutwalli) had been executed without the wakif having any intention of divesting himself of his ownership and that his real intention was to utilise the document, should occasion arise, as a shield against claims against him which may ultimately affect his worldly possessions. If the facts establish that such was his intention the wakf will have to be declared invalid. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

———Will—Bequest of more than a third to stranger—Consent of heirs—If should be express—If can be inferred from conduct. *See* 1940 Dig., Col. 888. FAKIR MOHAMAD KHAN *v.* HASAN KHAN. **16 Luck. 93 = A.I.R. 1941 Oudh 25.**

———Will—More than one-third given to different objects—Validity. *See* 1940 Dig., Col. 888. KANIZ KUBRA BIBI *v.* MUZAFFAR-UD DIN. **192 I.C. 410 = 13 R.A. 321.**

———Will—Revocability. *See* 1940 Dig., Col. 889. MAHOMED ALI *v.* DINESH CHANDRA RAY. **193 I.C. 540 = 13 R.C. 413.**

———Will—Sunnis—Power of testator to leave life interest to widow with remainder to another. *See* 1940 Dig., Col. 889. FAKIR MAHOMED KHAN *v.* HASAN KHAN. **16 Luck. 93 = A.I.R. 1941 Oudh 25.**

MAINTENANCE.

See (*i*) HINDU LAW—MAINTENANCE.
(*ii*) MAHOMEDAN LAW—MAINTENANCE.
(*iii*) CR. P. CODE, S. 488.

MALABAR LAW.

See also MADRAS ACTS (*i*) MALABAR TENANCY ACT.
(*ii*) MARUMAKKATHAYAM ACT.
(*iii*) NAMBUDRI ACT.

———*Alienation—Karnavan living away being employed elsewhere—Mother doing minor acts of management—Mortgage by mother—If binds tarwad.*

Where the karnavan of a Malabar tarwad was employed and lived elsewhere, and the mother of the karnavan who lived in the family house, plucked the fruits from the trees on the parambas and paid the purapad due to the jenmi, executed a mortgage of the tarwad property.

Held, that the mortgage was not binding on the tarwad, as the mere fact that the mother performed minor acts of management during the absence of her son would not constitute her the karnavastri of the tarwad entitled to alienate the property of the tarwad; so long as there was a karnavan capable of acting who has not renounced, either directly or by implication, he alone could bind the tarwad, and the mother was not justified in acting without him. (*Leach, C.J. and Horwill, J.*) KRISHNAN CHETTIAR *v.* AMMALU AMMA. **54 L.W. 379 = 1941 M.W.N. 849 = (1941) 2 M.L.J. 472.**

———Will—Incidents of *tavazhi* inconsistent with provisions in will—Effect. *See* WILL—CONSTRUCTION. **(1941) 2 M.L.J. 287.**

MALABAR TENANCY ACT (XI OF 1930). *See* MADRAS ACTS—MALABAR TENANCY ACTS.

MALICIOUS PROSECUTION. *See* TORTS—MALICIOUS PROSECUTION.

MANDAMUS. *See* SPECIFIC RELIEF ACT, S. 45.

MARRIAGE.

See (*i*) HINDU LAW—MARRIAGE.
(*ii*) MAHOMEDAN LAW—MARRIAGE.
(*iii*) HUSBAND AND WIFE.
(*iv*) INDIAN AND COLONIAL DIVORCE JURISDICTION ACT.

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6—*Applicability—Mahomedans—Policy of life insurance for benefit of wife and children—If creates trust—Beneficiary—If can release right or interest.*

S. 6 of the Married Women's Property Act applies to Mahomedans and would govern a policy effected by a Mahomedan male on his own life for the benefit of his children. A trust is therefore created in favour of the person or persons for whose benefit the policy is effected though the interest taken by them is contingent. Such interest may be transferred and may also be released by the beneficiaries as it is not in the nature of a mere right to sue. The effect of such a release is to revoke the trust. (*Venkataramana Rao, J.*) ENAYATULLAH SAHEB *v.* JEELANI SAHEB. **54 L.W. 544 = (1941) 2 M.L.J. 740.**

———**(as amended in 1923), S. 6 (2)**—*Construction and scope—Policies effected before* 1913—*If governed by S.* 6.

S. 6 of the Married Women's Property Act as amended in 1923 would apply to a policy effected before 1913. Sub-S. (2) of S. 6, which was added by the amending Act of 1923 cannot be construed as a declaratory enactment declaring what the previous law was, and therefore from the positive nature of the enactment that from a particular date the Act should apply, it does not arise by necessary implication that the Act would not apply to a policy effected before that date. (*Venkataramana Rao, J.*) ENAYATULLAH SAHEB *v.* JEELANI SAHEB. **54 L.W. 544 = (1941) 2 M.L.J. 740.**

MASTER AND SERVANT—Clerk—Dismissal—Reasonable notice. *See* 1940 Dig., Col. 909. SUKHRAM DAS DEBI DUTT *v.* RAM KRISHNA. **A.I.R. 1941 Oudh 10.**

———*Dismissal of servant for misconduct—Past misconduct or offence—If can be taken into account as justifying dismissal for subsequent misconduct.*

When an offence or misconduct on the part of a servant has been condoned or dealt with and the offender retained in service, it is not open to the employers to subsequently dismiss him for the same offence; but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offence or misconduct. (*Fazl Ali and*

MASTER AND SERVANT.

Varma, JJ.) VENKATA SITAPATI *v.* KRISHNA-CHANDRA GAJAPATI NARAYAN DEO. **7 Cut L.T. 67.**

———Dismissal of servant—Grounds for—Onus of proof—Habitual negligence of servant—When would justify summary dismissal—Difference between out-turn of servant and that of his predecessor—Failure to keep book duly entered up—If sufficient ground. *See* 1940 Dig., Col. 910. GUJARAT GINNING AND MANUFACTURING CO., LTD. *v.* GOVINDAN NAIR.

I.L.R. (1940) Kar. (P.C.) 224 = 1941 O.W.N. 37 = 1941 A.L.W. 42 = 43 P.L.R. 287 (P.C.).

———*Dismissal—When wrongful—"Misconduct"—What amounts to—Suit for damages—Question for determination of Court.*

If a servant's conduct is incompatible with his duty, it would amount to misconduct justifying his dismissal by the master. Under the Indian law of master and servant, damages for termination of employment before expiry of the agreed term cannot be recovered as a matter of course. It is only where such termination is without *sufficient cause* that damages can be recovered. The circumstances of each case must determine the question whether there is sufficient cause. It would depend largely on the nature of the service to which the employment relates, the prescribed qualifications which existed when the contract of service was entered into, the altered conditions which might since come into existence, and their probable effect on the interests of the employer. No hard and fast rule can be laid down for any class of cases. Misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. If the servant or employee does any act which is likely to discredit his master in the eyes of the public or which shows utter disregard of rules or a spirit of obstructiveness, his dismissal by the master cannot be said to be wrongful so as to entitle the servant to any damages. What the Judge has to determine is whether there was justification for the dismissal which has given rise to an action for damages, and not whether he personally would have dismissed for such conduct. (*Fazl Ali and Varma, JJ.*) VENKATA SITAPATI *v.* KRISHNA CHANDRA GAJAPATI NARAYAN DEO.

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———*"Permanent" appointment or employment—Meaning of—If denotes duration of appointment or merely indicates nature or character of same.*

The word "permanent" as used in connection with a service or appointment imports no more than the employment is of a permanent as opposed to a purely temporary or acting character; in other words, it is more descriptive of the nature and character of the appointment than indicative of the duration of the appointment. (*Fazl Ali and Varma, JJ.*) VENKATA SITAPATI *v.* KRISHNA CHANDRA GAJAPATI NARAYAN DEO.

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———*Local bodies—Position of, with reference to their employees—Power to suspend—Right to salary during suspension—Condonation of misconduct—Effect.*

The power or authority of a local body over its servants and employees is just like that of any other master and servant, except of course where special powers are conferred by statute. An ordinary master has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. Where a master has no power of suspension, then he can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that instead of

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exercising the right, he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forego his salary during that period and to continue to serve on fresh terms. But the master has to prove all these. Once a master has condoned any misconduct which would have justified dismissal or fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss his servant or otherwise to punish him for the offence condoned. (*Bose, J.*) DISTRICT COUNCIL, AMRAOTI *v.* VITHAL VINAYAK. **193 I C. 658 = 13 R.N. 350 = 1941 N.L.J 98 = A.I.R. 1941 Nag. 125.**

———Lodging provided for by master—Occupation by servant—If as tenant or as servant—Points for consideration. *See* 1940 Dig., Col. 910 CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. **193 I.C. 457 = 13 R.C. 436 = A.I.R. 1941 Cal. 60.**

———*Rights of servant—Pension—Plaintiff employed on basis of special contract—No provision therein for grant of pension—Rules allowing pension to employees subsequently framed—If entitle plaintiff to pension—Pension granted as matter of grace—If can be withdrawn.*

Where the plaintiff had been employed on the basis of a special contract which did not contain any provision for the grant of a pension to him on his retirement, the mere fact that rules were subsequently framed by the employer for the grant of pension to the employees does not entitle the plaintiff to pension on the basis of these rules unless there is any indication in the contract itself that the rules are to be considered as incorporated in the contract. If the employer grants a pension to him as a matter of grace, he is competent to withdraw it subsequently. Although past services may form a good consideration for the grant of pension, there can be no question of compensating the plaintiff for past services when such services had been remunerated by the grant of salary and commission to him. (*Bhide, J.*) AMIR SINGH *v.* NATIONAL BANK OF INDIA, DELHI.

193 I.C. 384 = 13 R.L 453 = 42 P.L.R. 794 = A.I.R. 1941 Lah. 87.

———Vicarious liability. *See* TORTS—VICARIOUS LIABILITY.

———*Wrongful dismissal—Contract of service providing for permanent appointment not to be terminated ordinarily—Dismissal on ground of financial stringency—If justified—Burden of proof.*

A contract of service between the appellant and the respondent provided that the appointment of the appellant was permanent and would not "ordinarily be terminated" by the employer (respondent). The appellant's services were terminated "due to the stress of financial circumstances." In a suit by the appellant for damages for wrongful dismissal,

Held, that it was not every financial stringency that would come under the definition of other than "ordinary," but it must be of a sufficiently grave character as to necessitate the termination of the contract with the appellant, and that the burden was on the employer (respondent) to prove that there was such an extraordinary financial stringency. (*Pandrang Row and Abdur Rahman, JJ.*) LAKSHMINARASIMHACHARYULU *v.* MCLAURIN HIGH SCHOOL, COCANADA.

A.I.R. 1941 Mad. 788 = (1941) 2 M.L.J. 270.

———Wrongful dismissal—Damages—Measure of—Principles. *See* 1940 Dig., Col. 911. GOKAK MUNICIPALITY *v.* RAJARAM SHRIDHAR.

I.L.R. (1941) Bom. 123 = 191 I.C. 749 = 13 R.B. 195.

MAXIM—*Actio personalis moritur cum persona*—Applicability—Limits. *See* C. P. CODE, O. 22, R. 1

MERCHANDISE MARKS ACT (1889), S. 6.

—SURVIVAL OF RIGHT TO SUE—TEST.

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MERCHANDISE MARKS ACT (IV OF 1889), S. 6—Charge not tried at place of commission of offence—Defect, if curabl —Cr. P. Code, S. 531. *See* 1940 Dig., Col. 911. A. K. SEN *v.* MADHU MONGAL DAS. **192 I.C. 835=13 R.C. 355=42 Cr.L.J. 334.**

MERCHANT SHIPPING ACT (XXI OF 1923), S. 63 —*Order dismissing seaman's suit for wages—Revision—Cr. P. Code, S.* 439.

An order of a Magistrate under S. 63 of the Merchant Shipping Act dismissing a suit by a seaman for wages is final and cannot be interfered with in revision under S. 439, Cr. P. Code. (*Bartley and Roxburgh, JJ.*) **A.F.** NORONHA *v.* GLADSTONE WYLLIE & CO., LTD.

I.L.R. (1941) 1 Cal. 166=195 I.C. 827=14 R.C. 167=42 Cr.L J. 785=45 C.W.N. 55=A.I.R 1941 Cal. 448.

———**(Burma), S. 100 (ii)**—'Reasonable cause'—What may be—Contract to sail on commercial voyage—War—Person contracting, if can refuse to sail. *See* 1940 Dig., Col. 912. MAHOMED ISMAIL *v.* THE KING.

191 I.C. 453=13 R.R. 158=42 Cr.L.J. 194.

———**S. 274 (1)**—*Applicability—Accused recovering planks floating down river from his timber yard in low tide—Conviction under section—Sustainability.*

The accused had a timber yard from which some planks were disturbed one night and floated down the river towards the sea in low tide. He asked his men to bring them back, which they did, before they reached the sea. The accused did not report the fact to the receiver of wrecks.

Held, that the accused was not guilty of any offence and could not be convicted under S. 274 (1) of the Merchant Shipping Act. (*Lakshmana Rao, J.*) ABDURAHIMAN HAJI *v.* EMPEROR. **1941 M.W.N. 673=A.I.R 1941 Mad. 832 (2).**

MESNE PROFITS—Liability for—Lease for building—Lessee to be entitled to market value of building before eviction—Determination of lease—Tender of low amount as value of building—Tenant refusing and continuing in possession—If trespasser—Liability to mesne profits. *See* LEASE—CONSTRUCTION.

(1941) 2 M.L.J. 711.

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See also (i) GUARDIANSHIP.
(ii) HINDU LAW—MINOR.
(iii) MAHOMEDAN LAW—MINOR.

———Alienation by guardian — Void and voidable transactions—Distinction—Void alienation—If can be ratified by minor after majority—Repudiation—Necessity—Sale by guardian in excess of powers—Subsequent sale by same guardian to another free of encumbrances—Effect of. *See* 1940 Dig., Col. 913. GUNDUCHI SAHU *v.* BALARAM BALABANTRA. **13 R.P. 428=192 I.C. 196=7 B.R. 339.**

———Contract by—Surety for the performance of—Contract being void, if absolves surety from liability. *See* 1940 Dig., Col. 914. TIKKI LAL *v.* KOMAL CHAND. **193 I.C. 178=13 R.N. 297.**

———Debt by guardian—Binding nature—Powers of a guardian. *See* 1940 Dig., Col. 1015. GARAMLAL *v.* TULARAM. **I.L.R. (1941) Nag. 255.**

———Decree against—If can be passed. *See* 1940 Dig., Col. 914. TIKKI LAL *v.* KOMAL CHAND **193 I.C. 178=13 R N. 297.**

———Decree against—Plea against binding nature—When open. *See* 1940 Dig., Col. 914. JAGARNATH PRASAD *v.* CHUNILAL. **191 I.C. 647=13 R.A. 260.**

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———*Decree against proper guardian* ad litem—*Presumption as to propriety of decree—Minor's remedy — Improper representation and negligence of guardian—Difference between.*

Where there is a properly appointed guardian *ad litem* and a decree has been passed by a duly constituted Court it must be presumed that there was justification for it and the presumption can only be rebutted in a suit brought with that object. The existence of a flaw in the appointment of a guardian, resulting in the minor not being properly represented, is one thing; the negligence of a properly appointed guardian is quite another. Though a minor on attaining majority has a right to sue to set aside a decree obtained against him on the ground of his guardian's negligence, it is not open to him to assume such negligence and to treat the decree as void on that ground. (*Bennett and Madeley, JJ.*) MOHAMMAD BAKHSH *v.* ALLAH DIN.

196 I.C. 457=14 R.C. 172=1941 O.W.N. 1079=1941 A.W.R (C.C.) 291=1941 A.L.W. 898=1941 O.L.R. 689=1941 O. A. 766.

———*Decree against—Setting aside—Grounds—Gross negligence—What amounts to—Guardian* ad litem *appearing and raising all defences open and adducing all evidence available—Decree against minor—Failure to appeal—If ground for setting aside decree.*

Where the guardian *ad litem* of a minor defendant puts forward all the defences that are open to the minor, appears at the trial and adduces all the evidence, the decree passed against the minor in the suit cannot be challenged on the mere ground that the guardian fails to carry the matter in appeal. It cannot be said in such a case that there is any fraud or gross negligence in the conduct of the suit. (*Somayya, J.*) NAGAYVA *v.* VENKATAYYA.

1941 M.W.N. 857=54 L.W. 370.

———*Decree against—Setting aside of—Grounds—Negligence of guardian* ad litem.

Gross and culpable negligence, apart from fraud or collusion, on the part of the guardian *ad litem* would be a sufficient ground to enable a minor to set aside the decree obtained against him. The failure on the part of the guardian to defend the suit when there was a perfectly good defence available, resulting in serious loss of rights of the minor would amount to gross and culpable negligence. (*Mukherjea, J.*) MAHESH CHANDRA *v.* MANINDRA NATH. **I.L.R. (1941) 1 Cal. 477=196 I.C. 779=45 C.W.N. 508=A.I.R. 1941 Cal. 401.**

———Decree against—Setting aside—Right of minor—Gross negligence of guardian—Sufficiency—Proof of fraud or collusion—If necessary. *See* 1940 Dig., Col. 914. MAHOMED SHADAK KOYI SAHEB *v.* VENKATA KOMARAJU. **193 I.C. 353=13 R.M. 766=(1940) 2 M.L.J. 433.**

———*Execution proceedings—Absence of proper representation—Right to have sale set aside.*

A minor is not entitled to maintain a claim for having an execution sale set aside on the mere ground that he was not properly represented in the execution proceedings, when he has not in fact been prejudiced thereby. (*Beckett, J.*) NAZIR *v.* DHARM PAL.

192 I.C. 879=13 R.L. 424=42 P.L.R. 796=A.I.R. 1941 Lah. 47.

———*Suit by, for breach of promise to marry—Maintainability.*

A minor girl entering into a contract of marriage with a person of full age cannot sue for compensation for breach of promise of marriage. The fact that her father consented to her making the contract does not make it any the more a valid contract, although it might make

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the marriage a valid marriage if it had taken place. (*Mackney, J.*) MA E THWE *v.* U THA YIN.

194 I.C. 785=14 R.R. 8=A.I.R. 1941 Rang. 179.

———Voidable transaction—Repudiation by minor—Suit, if necessary. *See* 1940 Dig., Col. 915. LALIT KUMAR DAS *v.* NOGENDRA LAL DAS.

193 I.C. 168=13 R.C. 375.

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See also (i) T. P. ACT, SS. 58-98.
(ii) C. P CODE, O. 34.

———Accounts—Mortgagee in possession—Liability to account—Extent of—Sale by mortgagee—Liability to account for sale proceeds on footing of wilful default—Rule. *See* 1940 Dig., Col. 915. KARSON CHAMPSI *v.* MEGHJI ASARIA SHAH. **13 R.B. 257=192 I.C. 569=A.I.R. 1941 Bom. 28.**

———*Anomalous mortgage — Mortgagee's choice of remedy—If absolute—Discretion of Court—Scope of O. 34, R. 4 (3), C. P. Code.*

O. 34, R. 4 (3), C.P. Code, is a clear statutory provision that in the case of anomalous mortgage the mortgagee's choice of remedy, between a sale and foreclosure is to be subject to the discretion of Court. That is a statutory limitation of the Court. This discretion, as every other discretion vested in a Court, must be exercised judicially and not arbitrarily, and will be exercised in any case in which for a proper reason foreclosure is not in the interests of the parties or in which as a matter of practical business, a sale is clearly indicated as the more desirable course. Where the security is deficient, or where it is a matter of speculation whether it is sufficient or deficient, a mortgagee will not be deprived of his remedy by way of foreclosure, if he prefers it. (*Braund, J.*) UJAGAR LAL *v.* BAHADUR LOKENDRA SINGH. **I.L.R. (1941) All. 240=194 I.C. 520=13 R.A. 502=1941 A.W.R. (H.C.) 84=1941 O.A. (Supp.) 144=1941 A.L.W. 66=1941 A.L.J. 111=A.I.R. 1941 All. 169.**

———*Assignment—How done.*

A mortgage of immovable property can only be assigned by a registered deed of assignment and not by a document which merely purports to recite a previous partition. (*Mya Bu and Mosely, JJ.*) MAHOMED OSMAN *v.* JAMBULINGAM CHETTIAR.

195 I.C. 221=14 R.R. 30=A.I.R. 1941 Rang. 122.

———Beneficiary under trust—Mortgage by—Validity. *See* 1940 Dig., Col. 915. HEM CHANDRA ROY *v.* SURADHANI DEBYA. **67 I.A. 309=I.L.R. (1940) Kar. (P.C.) 271=72 C.L.J. 298=45 C.W.N. 253=1941 P.W.N. 63=(1940) 2 M.L.J. 505 (P.C.).**

———Conditional sale—Option to repurchase—Sale to become absolute in default of payment—Effect of. *See* DEED—CONSTRUCTION. **1941 O.W.N. 994.**

———Construction — Covenant to pay—What is—Provision for redemption on payment at specified period and in default thereof mortgage to hold good till payment—If promise by mortgagor to pay. *See* T. P. ACT, S. 68 (1) (*a*). **22 Pat.L.T. 529.**

———Construction—Lease or mortgage. *See* DEED—CONSTRUCTION—MORTGAGE OR LEASE. **1940 O.A. 1284.**

———*Construction—Mortgage by conditional sale executed in* 1873—*Condition that in default of redemption within two years properties should become absolute property of mortgagee—Enforceability—Law applicable.*

A mortgage executed in Madras in 1873 should be taken to be governed by the law relating to mortgages then prevailing in Madras, and in the case of a mortgage by conditional sale, the English rules of law would

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apply. A condition in such a mortgage that unless it was redeemed within two years the property should become the absolute property of the mortgagee cannot be enforced. The law then prevalent would regard the deed as merely conferring a mortgagee's rights on the mortgagee. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) VENKATASUBBIAH CHETTY *v.* JUMMA MOSQUE, MYLAPORE. **53 L.W. 731=1941 M.W.N. 532=A.I.R. 1941 Mad. 666=(1941) 1 M.L.J. 754.**

———*Construction—Personal covenant.*

Where the promise to pay the mortgage debt is introduced in the deed for the purpose of fixing the interest and the date by which the balance of interest as well as the principal sum are to be satisfied, and is clearly intended as introductory to the second clause which indicates the only manner in which the mortgage dues are to be satisfied, the deed does not create a personal obligation to pay. (*R. C. Mitter and Khundkar, JJ.*) GAIBANDHA BANK, LTD. *v.* TAZAL ISLAM MAHOMED NURANUBI. **73 C.L.J. 246.**

———*Construction—Usufructuary mortgage—Personal covenant—Undertaking to redeem after giving notice and paying the money—If personal covenant—Suit for sale—Maintainability.*

A deed of usufructuary mortgage provided *inter alia*: "In any year after giving you notice in *Panguni* and after paying your money in *Chitrai* I shall redeem the properties". In a suit for sale on the mortgage by the mortgagee,

Held, that the mortgage deed contained no personal covenant on the part of the mortgagor enforceable by the mortgagee, and the mortgagee had therefore no right to sue for sale. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) PALANIAPPA CHETTIAR *v.* PERIASAMI KONAR. **54 L.W 320=1940 M.W.N. 1024=A.I.R. 1941 Mad. 885=(1941) 2 M.L.J. 447.**

———*Co-sharer's undivided share—Nature of security—Subsequent partition among co-sharers—Mortgagee's rights.*

Where a mortgage is of a co-sharer's undivided share in property held jointly, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition; and when such a partition takes place and the mortgaged properties are allotted to other co-sharers, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to his mortgagor in substitution for his undivided share. (*Roberts, C.J. and Mosely, J.*) DAW SHIN *v.* ARJANDAS. **1940 Rang. L.R. 826=193 I.C. 294=13 R.R. 242=A.I.R. 1941 Rang. 79.**

———Discharge—What amounts to—Executory contract of sale of mortgaged property to mortgagee—Effect of—Suit on mortgage after contract becomes infructuous—Maintainability. *See* 1940 Dig., Col. 918. SATYANARAYANAMURTHY *v.* KRISHNAMOORTHY. **192 I.C. 69=13 R.M. 521=(1940) 2 M.L.J. 346.**

———Extinguishment—Purchase by mortgagee of equity of redemption in part of the mortgaged property subject to his debt in execution sale—Effect of—Right to proceed against other part of mortgaged property. *See* 1940 Dig., Col. 919. SURAJ NARAIN CHOWDHURY *v.* BISHESHWAR SINGH. **191 I.C 773=13 R P. 348=7 B.R. 250.**

———*Hypothecation—Non-existent property—Effect.*

A hypothecation of property not in existence at the time of the hypothecation will operate not as a hypothecation but only as an agreement to hypothecate. But as soon as the property comes into existence, equity treating as done that which ought to be done, fastens upon the property and the contract to hypothecate it becomes a

complete hypothecation. (*Sen, J.*) SONARAM DUTTA *v.* SITARAN CHAMARIA. **192 I.C. 679= 13 R.C. 332=72 C.L.J. 526=45 C.W.N. 50= A.I.R. 1941 Cal. 28.**

———*Merger—Purchase of part of mortgaged property—Effect—Extent to which mortgagee can enforce his right.*

Where a mortgagee purchases part of the mortgaged property and thereby the rights of the mortgagee and the mortgagor, as regards the portion purchased, become vested in the same person, the result is that a part of the mortgage debt is wiped out by reason of the fusion of interests and the balance only is recoverable from the remainder of the mortgaged property. If such a mortgagee purchaser comes to the Court and claims to enforce his entire mortgage against the remaining portion of the property in respect of the whole unabated mortgage debt, the burden must lie heavily upon him of showing that special circumstances existed or that there was some form of special bargain in the particular transaction between him and the mortgagor, from which it must be concluded that no part of the mortgage debt was to be extinguished. (*Braund, J.*) HIMMAT SAHAI *v.* MAHOMED MOIN. **I.L.R. (1941) All. 220= 195 I.C. 533=14 R.A. 47= 1941 A.W.R. (H.C.) 207=1941 O A. (Supp) 502= 1941 A.L.J. 234=A.I.R. 1941 All. 200.**

———Mortgagee in possession —Nature of possession—Test—Onus. *See* 1940 Dig., Col. 920. ANGNU RAM *v.* BHIKHI. **1941 O.L.R. 13=191 I.C. 716= 13 R.O. 269=A.I.R. 1941 Oudh 84.**

———*Mortgagee in possession obtaining decree on the loan—Liability to be ejected.*

A mortgagee put in possession of the property in lieu of interest, does not become a trespasser on his obtaining a money decree on the loan and cannot be ejected on that ground. (*Sathe, J.M.*) KISHUN RAI *v.* RAMTAHAL RAI. **1941 A.W.R. (Rev.) 643.**

———Mortgage suit—Burden of proof—Consideration and legal necessity for mortgage—Onus. *See* 1940 Dig., Col. 921. BHAGWAN SINGH *v.* BISHAMBAR NATH. **I L.R. (1940) Kar. (P.C.) 267= 72 C.L.J. 440=(1940) 2 M.L.J. 452 (P.C.).**

———*Mortgage suit—Decree—Suit based on equitable mortgage—Subsequent mortgagee also made a party—Equitable mortgage found to be invalid and plaintiff declared an unsecured creditor—Proper decree to pass—Declaration as to validity of subsequent mortgage—Propriety.*

Where in a suit based on an alleged equitable mortgage brought against the representatives of the mortgagor a subsequent mortgagee from the latter is also added as a party and it is found that equitable mortgage was invalid and that the plaintiff was only an unsecured creditor, the only decree that could properly be made after the declaration of the invalidity of the mortgage is a simple money decree in favour of the plaintiff. It is wrong in such circumstances to direct a sale of the property in suit or to make any pronouncement as to the validity or otherwise of the subsequent mortgage, or to give the subsequent mortgagee any relief whether as against the property or as against the representatives of the estate. (*Lord Romer.*) KRISHNASWAMI AIYANGAR *v.* KAMALAMMA. **196 I.C. 497= 14 R.P.C. 35=46 C.W.N. 29=8 B.R. 86= 1941 P.W N. 683=54 L.W. 613=1941 O.A. 922= 1941 O.L.R. 721=1941 A W.R. (P.C.) 94= A.I.R. 1941 P.C. 90=(1941) 2 M.L.J. 894 (P.C.).**

———*Mortgage suit—Equitable mortgage—Suit to enforce—Subsequent mortgagee impleaded as party defendant—Finding that mortgage sued on invalid for want of registration—Proper decree to be passed—Adjudication as to validity or otherwise of subsequent mortgage—Order for sale with relief to subsequent mortgagee—Propriety of.*

Where in a suit to enforce a mortgage by deposit of title-deeds, to which a subsequent mortgagee is also made a party defendant, it is found that the equitable mortgage sued on required registration and it is declared that it is invalid for want of registration, the only decree that can properly be made is a simple money decree in favour of the plaintiff; it is wrong to direct a sale of the property in suit or to make any pronouncement as to the validity or otherwise of the subsequent mortgage or to give the subsequent mortgagee any relief whatsoever in that suit. (*Lord Romer.*) KRISHNASWAMI AIYANGAR *v.* KAMALAMMA. **14 R.P.C. 35=46 C.W.N. 29= 8 B.R. 86=1941 P.W.N. 683=196 I.C. 497= 1941 A.W.R. (P.C.) 94=1941 O A. 922= 54 L.W. 613=1941 O.L R. 721= A.I.R. 1941 P.C. 90=(1941) 2 M.L.J. 894 (P.C.).**

———*Mortgage suit—Paramount title—Plaintiff seeking to displace prior title of defendant—Defendant failing to establish his priority—If can re-agitate that question in execution.*

As a general rule, a paramount title cannot be drawn in controversy in a mortgage action; but if a plaintiff in such an action alleges a distinct case in his plaint in derogation of the priority which may be claimed by the defendant and seeks in his suit to displace that prior title and postpone it to his own, and the defendant takes up the challenge but fails to establish his priority, he cannot be allowed to agitate that question in the proceedings in execution of the mortgage decree. (*Agarwala, J.*) CENTRAL CO-OPERATIVE BANK *v.* KASHI SAHU. **193 I.C. 108=13 R.P. 545=7 B.R. 577= A.I.R. 1941 Pat. 243.**

———Mortgage suit— Valuation —Co-mortgagees—Suit by one only for his share—Valuation for Court-fee and jurisdiction. *See* COURT-FEES ACT, S. 7 (1). **(1941) 2 M.L.J 986.**

———Mortgagor and mortgagee—Stranger or trespasser in possession—Rights of parties. *See* 1940 Dig., Col. 922. UMAR HAJI *v.* BADRIDAS. **193 I.C. 306= 13 R.N. 304=A.I.R. 1941 Nag. 72.**

———Mortgagor and mortgagee—Transfer by—Distinction as between—Nature of the mortgagor's and the mortgagee's right. *See* 1940 Dig., Col. 922. GIRDHAR *v.* MOTILAL CHAMPALAL. **I.L.R.)1941) Nag. 615= 13 R.N. 267=192 I.C. 556=A.I.R. 1941 Nag. 5.**

———*Mortgagor, if can plead his own fraud to avoid.*

A mortgagor will not be permitted to plead his own fraud to establish a plea of non-liability under the deed. (*Davies, J.*) BISHEN DEVI *v.* GANGA DUTT PANDIT AND ANOTHER. **1941 A.M.L.J. 59.**

———Movables—Growing crops—Mortgage of—Validity—Assignee from mortgagor with notice of mortgage—Rights of. *See* 1940 Dig., Col. 922. VENKATACHALAM CHETTI *v.* VENKATARAMI REDDI. **I.L.R (1941) Mad. 144=193 I.C. 679= 13 R.M. 725=(1940) 2 M.L.J. 456.**

———*Nature—Test.*

The test whether a particular document is a mortgage by conditional sale or is some other kind of mortgage, is not what the parties have said it is, but is rather whether it fulfils the statutory requirements which the legislature has laid down. The parties calling it by whatever name they like, will not make it a mortgage of that particular kind. (*Braund, J.*) UJAGAR LAL *v.* BAHADUR LOKENDRA SINGH. **I.L.R. (1941) All. 240=194 I.C. 520=**

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13 R.A. 502=1941 A.W.R. (H.C.) 84=1941 O.A. (Supp.) 144=1941 A.L.W. 66=1941 A.L.J. 111=A.I.R. 1941 All. 169.

———*Power of sale—Exercise of—Suit for injunction to restrain—Mortgagor's right to maintain—Grounds—Payment or tender of mortgage money—If condition precedent.*

A mortgagee cannot be restrained from exercising his power of sale merely by reason of the mortgagor filing a suit for redemption, unless he pays the mortgage amount to the mortgagee or tenders the same. There is, however, nothing to prevent a mortgagor from seeking to restrain the exercise of the mortgagee's power of sale if the power is exercised in a wrong and improper manner, contrary to the terms of the contract. Where the mortgage money has not become payable and the right to redeem has not accrued, a suit merely for an injunction, is not incompetent, for in such a case that is the only remedy which the mortgagor can seek. (*Wadia, J.*) BABAMIYA MOHIDEEN SHAKKAR *v* JEHANGIR DINSHAW. **A.I.R. 1941 Bom. 339=43 Bom.L.R. 553.**

———*Power of sale—Mortgage debt falling due—Suit by mortgagor for injunction to restrain sale by mortgagee —Maintainability —Absence of offer to redeem or tender—Effect—Discretion of Court.*

After a mortgage-debt has become due, the mortgagor cannot be held entitled to file a suit for an injunction to restrain the mortgagee from exercising the power of sale, without offering to redeem the mortgage and tendering the amount. The relief by way of injunction is always discretionary, and the Court will be slow to grant such relief to a party who admits having committed a breach of contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract. Where the contract of mortgage provides that in the event of the power of sale being exercised improperly or irregularly or unnecessarily, the remedy of the mortgagor, aggrieved party, is to be only in damages, the Court will be most reluctant to give an injunction to the mortgagor. (*Kania, J.*) MULRAJ VIRJI *v.* NAINMAL PRATAPCHAND.

43 Bom.L.R. 890.

———*Power of sale—Right to exercise—Option given to mortgagee to demand money before date fixed for payment —Exercise of—What amounts to appropriate act on mortgagee's part.*

In order that the mortgage moneys may become payable to the mortgagee on the exercise of the mortgagee's option given to him under a clause in the mortgage deed, so as to entitle him to exercise his power of sale there must be an act indicating to the mortgagor the exercise of that option so as to enable the mortgagor to realise his position and save his equity of redemption. An advertisement of the property for sale by public auction, by the mortgagee, without any intimation being given to the mortgagee cannot amount to such an appropriate act by the mortgagee as will make the mortgage amount immediately payable at his option. The mere fact that the mortgagee becomes entitled to call in the mortgage moneys immediately, is not an exercise of the option given to him under the mortgage deed. The money can only become due and payable as soon as the option is exercised upon an intimation on which the mortgagor can come to know his position. (*Wadia, J.*) BABAMIYA MOHIDIN SHAKKAR *v.* JEHANGIR DINHAW.

43 Bom.L.R. 553=A.I.R. 1941 Bom. 339.

———*Prior and subsequent mortgages—Decree on prior mortgage and sale in execution—Rights of purchaser—Suit on later mortgage impleading purchaser —Nature of relief available to latter.*

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In the case of a sale in execution of a mortgage decree, the purchaser acquires the rights of both the mortgagor and the mortgagee. As purchaser of the equity of redemption, he is entitled, if he wishes to redeem a later mortgage, or as purchaser of the rights of the mortgagee he can claim priority over the later mortgage. In a suit, on a subsequent mortgage impleading the purchaser of the property at a sale in execution of a prior mortgage as a party to the suit, the latter as the purchaser and as the party in possession, can claim that he should either be redeemed or that the sale in execution of the decree to be passed on the subsequent mortgage should be subject to his rights. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) PUTTAMADAPPA *v.* NAGAMMA.

19 Mys. L.J. 373.

———*Prior and subsequent—Puisne mortgagee not impleaded in prior mortgagee's suit—Right to fall back on original mortgage.*

A puisne mortgagee who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree made in the previous suit and to fall back upon the original mortgage only. (*Din Mahomed, J.*) UDHO DASS *v.* GIRDHARI LAL. **193 I.C. 656=13 R.L. 491=43 P.L.R. 6=A.I.R. 1941 Lah. 96.**

———*Prior and subsequent—Sale in execution of prior mortgage decree—Puisne mortgagee not impleaded in suit—Right of purchaser.*

If a mortgagee leaves out a puisne mortgagee or a person interested in the equity of redemption and obtains a decree, the security is not merged in the decree and extinguished. If a sale takes place in execution of the decree of such a defectively constituted suit, the purchaser at the Court sale acquires the rights of the mortgagee plaintiff, and of the defendant mortgagor, provided that the equity of redemption was not entirely unrepresented in the suit. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH.

I.L.R. (1941) 1 Cal. 514=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

———*Prior and subsequent—Sale in execution of prior mortgage decree—Purchaser paying off decree under another prior mortgage—Suit by non-impleaded puisne mortgagee to enforce mortgage against purchaser—Puisne mortgagee, if may be directed to redeem prior mortgages as condition precedent to getting decree —Liability of purchaser to account for profits.*

A prior mortgagee obtained a decree on his mortgage without impleading the puisne mortgagee in the suit. In execution of that decree, the mortgaged property was sold and purchased by a third party. The purchaser thereafter paid up the dues of another prior mortgagee who had also obtained a decree in a suit to which the puisne mortgagee was not a party. The purchaser took possession through Court and the puisne mortgagee filed a suit to enforce his mortgage against him.

Held, (*i*) that a decree could be properly passed making the redemption by the puisne mortgagee of the two prior mortgages a condition precedent to his getting a decree on his mortgage, if at the date of his suit those two mortgages were not barred by time; (*ii*) that the purchaser was not accountable to the plaintiff puisne mortgagee for the profits he had received since he went into possession till the time for redemption fixed in the suit. The purchaser in his character as the purchaser of the prior mortgagee's rights had no legal right to collect the rents and profits as the prior mortgage was a simple mortgage, but as the purchaser of the right of the mortgagor he had the lawful right to do so. The collection of rents and profits by him must be attributed to him in that character in which he could have lawfully collected them (*i.e.*) in his character of the purchaser of

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the mortgagor's interest. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH.
I.L.R. (1941) 1 Cal. 514=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484

———*Prior and subsequent—Suit by each mortgagee without impleading the other—Purchase by each in execution of decree—Puisne mortgagee's purchase prior in point of time—Suit by prior mortgagee purchaser for possession against him—Maintainability.*

Where both the prior and puisne mortgagees sued on their mortgages without impleading the other as party defendant and each purchased the property in execution of his decree, and the purchase of the puisne mortgagee was prior in point of time and the prior mortgagee purchaser whose mortgage was a simple mortgage instituted a suit to recover possession from the puisne mortgagee purchaser.

Held, (*i*) that the suit for possession was not maintainable. The plaintiff *qua* mortgagee could not sue for possession, for his mortgage being a simple mortgage did not give him the right to possession. He could only maintain such a suit in his character as purchaser of the equity of redemption of the mortgagor. But he did not acquire the interest of the mortgagor as his purchase at the Court sale was later than the puisne mortgagee's purchase; (*ii*) that no decree directing the puisne mortgagee to redeem the prior mortgage could be passed in the suit, if at the date of the suit the claim under that mortgage was barred by time against the puisne mortgagee; (*iii*) but that if the claim under the prior mortgage was still alive, it would be proper for the Court, on the principle of avoidance of multiplicity of suits, to proceed on the footing as if a suit had been brought by the prior mortgagee purchaser to enforce his prior mortgage and pass a decree subject to the exercise of the right of redemption by the puisne mortgagee. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH. I.L.R. (1941) 1 Cal. 514=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

———*Prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Decree and sale—Rights of purchaser and puisne mortgagee.*

Where a prior mortgagee who is not aware of a subsequent mortgage sues on his mortgage without impleading the subsequent mortgagee and obtains a decree, the purchaser of the mortgaged property in execution of that decree acquires the property as it exists at the date of the sale, discharged of the mortgage lien, but subject to the right of redemption of the non-impleaded subsequent mortgagee. (*Mukherjea and Biswas, JJ.*) ROWSHAN KHAN *v.* ABDUL KHALEQ.
45 C.W.N. 705=74 C.L.J. 1.

———Priority—Third mortgage in favour of first mortgagee to pay off the first and a second mortgage—Money for discharge left with first mortgagee—Payments not made—Effect—Second mortgagee if entitled to priority over first. *See* 1940 Dig., Col. 923. RAMACHARAN *v.* RAGHUBIR SARAN. 192 I.C. 58=13 R.A. 289

———Recitals—Value—Old transaction. *See* 1940 Dig. Col. 923. TEJ SINGH *v.* HANNU PRASAD.
191 I. C. 786=13 R. A 272.

———*Redemption—Accounts—Consideration not paid by mortgagee—Suit by mortgagor for possession after expiry of term—Nature of—Liability of mortgagee to account for income of property.*

Where a mortgagee was given possession of the mortgaged property but the consideration for the mortgage was not paid by him, a suit by the mortgagor for possession of the property after the expiration of the specified

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period should be regarded as a suit for redemption after taking of accounts. In such a suit, nothing is payable by the mortgagor on account of the principal as the consideration was never paid by the mortgagee, but the mortgagee is liable to account for the income of the property during the period of his possession. (*Agarwala, J.*) BRAHAMDEO NARAIN RAI *v.* JAIKISHUN CHAUDHURY. 193 I.C. 172=13 R.P. 553=7 B.R. 587=A.I.R. 1941 Pat. 452.

———Redemption—Mortgagee purchasing shares of same mortgagors—Effect—Remaining mortgagors, if can claim to redeem whole of remaining property. *See* 1940 Dig., Col. 923. DURGA PRASAD *v.* CHUNNI.
192 I.C. 668=13 R.A. 354.

———*Redemption—Puisne mortgagee not party to prior mortgagee's suit—Redemption by—Amount payable—Method of calculation.*

If a puisne mortgagee was not a party to the suits instituted by the prior mortgagees for enforcement of their mortgages, the amount payable by him for redeeming those mortgages must be calculated not on the footing of the decrees obtained by the prior mortgagees or of the price paid by the purchasers at the Court sale but of the securities. Subject to statutory restrictions that amount must be the outstanding principal together with interest calculated at the bond rates up to the date fixed for redemption. (*Mitter and Khundkar, JJ.*) SAILENDRA NATH *v.* AMARENDRA NATH.
I.L.R. (1941) Cal. 514=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

———Redemption—Right of—Subsistence—Point of time. *See* 1940 Dig., Col. 924. JAGARNATH PRASAD *v.* CHUNILAL. 191 I.C. 647=13 R.A. 260.

———*Right and remedy of purchaser—Sale in execution of mortgage decree—Person interested in equity of redemption not impleaded in mortgage suit.*

In cases where a person interested in the equity of redemption is not impleaded in the mortgage suit, the question whether the remedy of the purchaser in execution of the mortgage decree is a suit against him for possession or for enforcement of the security itself would depend upon the fact as to whether the mortgagor was or was not a party to the mortgage suit. If the mortgagor himself or the person in whom the mortgagor's rights were vested was impleaded as a party defendant but some person interested in the equity of redemption, as for example, a puisne mortgagee, was left out, then the purchaser acquires not only the rights of the mortgagee plaintiff but the interest of the mortgagor as well, and he can sue for possession as purchaser of the mortgagor's rights, subject to his first mortgagee rights being redeemed by the puisne mortgagee, and he in turn being allowed to redeem the latter in his capacity as a mortgagor. But when the equity of redemption is entirely unrepresented in the mortgage suit and the holder of the equity of redemption is not at all made a party to such suit, the position of the purchaser cannot be higher than that of the assignee of the mortgagee's rights. As a purchaser of the mortgagee's rights he cannot sue for possession and his only remedy would be to institute a suit for enforcement of the mortgage bond. (*Mukherjea and Roxburgh, JJ.*) BIDHURANJAN SARKAR *v.* SOLEMAN PRAMANIK.
I.L.R. (1941) 2 Cal. 209=73 C.L.J. 578=45 C.W.N. 883=A.I.R. 1941 Cal. 613.

———*Rights of mortgagee—Mortgage of undivided share of co-sharer—Subsequent partition.*

A mortgagee of an undivided share of one co-sharer takes the security subject to the right of the other co-sharers to enforce a partition, and thereby to convert

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what was undivided share of the whole into a defined portion held in severalty. The mortgagee, however, can neither compel a partition, nor claim to be a party to the partition proceedings as of right. After a partition between the mortgagor and his co-sharers, his security will be upon the divided share or separate allotment of his mortgagor. In other words, he can have no recourse against the parcels allotted to the other co-sharers with whom he has no privity of contract, but must pursue his remedy only against the properties that may be allotted to the mortgagor. In order, however, that the mortgagee may be so bound, it is a fundamental condition that the partition must be a fair and proper one. Merely because the original security was in respect of an undivided share, it does not follow that the mortgagee should be held bound by a partition to which he was not a party, even where it is shown that such share had not received a proper allotment and the partition was the result of a collusive or fraudulent arrangement between the mortgagor and his co-sharers to the prejudice of the mortgagee. (*Edgley and Biswas, JJ.*) SARADINDU MUKHERJEE *v.* JAHARLAL AGARWALLA.
74 C.L.J. 61 = 46 C.W.N. 33.

———*Rights of mortgagee—Simple mortgage—Property belonging to member of agricultural tribe—Interest transferred—Punjab Alienation of Land Act, S. 60.*

If a mortgagor gives his property as security for the payment of debt without surrendering possession, the implication is that he intends that the mortgagee should have power to enforce the sale of whatever interest he has which can be brought to sale by the Courts. In other words, the intention is that mortgage should operate as a simple mortgage over whatever interest can be brought to sale. In the Punjab where the T. P. Act is not in force and where by virtue of a local enactment, *viz.*, S. 60, Punjab Alienation of Land Act, the Civil Courts are debarred from enforcing a simple mortgage by bringing the property to sale when the property belongs to a member of an agricultural tribe, the interest transferred in such a case would be a right to have the property leased out for twenty years for the purpose of paying off the debt. (*Tek Chand and Beckett, JJ.*) SAMPURAN SINGH *v.* AHMAD DIN.
43 P.L.R. 277 = A.I.R. 1941 Lah. 274.

———*Simple—Receiver.*

Where after a final decree on a simple mortgage, owing to the obstructive tactics of the judgment-debtor the decree-holder is not able to bring the property to sale and the property is allowed to deteriorate in value and the land revenue is not being paid, it is within the powers of the Court to appoint a receiver in the execution proceedings. (*Stone, C.J. and Bose, J.*) SUKHARANIA-BAI *v.* LAXMIKANTRAO. **1941 N.L.J. 568.**

———*Subrogation—Extent of right of—Prior mortgage—If can be enforced against property not covered by same.*

The right of subrogation gives full right to enforce the previous mortgage bonds which have been redeemed and kept alive and therefore the persons claiming such right have full right to enforce the earlier bonds even against property not covered by the bond in their favour. (*Harries, C.J. and Manohar Lall, J.*) TIKA SAO *v.* HARI LAL. **195 I.C. 428 = 14 R.P. 122 = 7 B.R. 924 = A.I.R. 1941 Pat. 276.**

———Subrogation—Right of, prior to amendment of T. P. Act. *See* 1940 Dig., Col. 926. JAGARNATH PRASAD *v.* CHUNILAL. **191 I.C. 647 = 13 R.A. 260.**

———*Suit to enforce claim on—Production of original when necessary—Production of copy when enough—Admissions, effect of.*

MOTOR VEHICLES ACT (1939), S. 16.

In order to enforce a claim on a mortgage the plaintiff is required to produce the original bond or its copy when circumstances exist which entitle the plaintiff to produce its copy. Cases, however, may occur where admissions are available to the plaintiff, admissions made in the course of pleadings or outside pleadings which go to prove his claim. In such cases he can rest on admissions alone and he need not produce and prove the original document or its copy. But the admissions must be sufficient to cover the entire claim and must relieve the plaintiff of the necessity of relying on the document or on any portion of it. If the admissions are not available or if they are indefinite or insufficient, then the plaintiff can succeed only in the ordinary way, that is in a mortgage suit, by producing the original bond or copy. (*Bajpai and Dar, JJ.*) PEAREY LAL *v.* HIRA DEVI. **195 I.C. 50 = 14 R.A. 17 = 1941 O.W.N. 239 = 1941 O.A. (Supp.) 284 = 1941 A.L.W. 172 = 1941 A.W.R. (H.C.) 18 = 1941 A.L.J. 33 = A.I.R. 1941 All. 150.**

———*Unregistered—Use of evidence—Limited purpose.*

Although a person cannot sue for redemption on the strength of an abortive or invalid usufructuary mortgage, yet if he sues for possession and proves his title and then the defendant sets up adverse possession the plaintiff may prove that the character or the possession was not adverse to him by giving evidence of the factum of the unregistered mortgage though not of its terms. But where the plaintiff's evidence as to ownership is vague, an unregistered mortgage cannot be used for proving the plaintiff's title to the land evidence of the unregistered mortgage can be given only for "the collateral purpose of showing the nature of the defendant's possession." (*Roberts, C.J., Ba U and Dunkley, JJ.*) MAUNG DAW NA *v.* MAUNG WA MAUNG.
1941 Rang.L.R. 706 = 196 I.C. 542 = 14 R.R. 89 = A.I.R. 1941 Rang. 261 (F.B.).

MOTOR VEHICLES ACT (IV OF 1939), S. 3 (1)—*Scope—Expiry of licence—Application for renewal some days after—Driving after expiry and before renewal—Offence.*

Where a person whose licence for driving a bar has expired, does not apply for a renewal of his licence until some days afterwards, he must be held to be guilty of the offence of contravening S. 3 (1) of the Motor Vehicles Act, if he drives the car after the expiry and before the renewal of his licence. The subsequent application for and grant of the licence cannot have the effect of cancelling the offence committed by him before he obtained a renewal. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* KRISHNASWAMI. **54 L.W. 730 = (1941) 2 M.L.J. 1040.**

———**(Burma)—S. 16**—*Burma Motor Vehicles Rules—R. 24 (b)—Conductor, if in charge of the bus—Overloading—Who is to be charged.*

R. 24 (*b*) of the Burma Motor Vehicles Rules does not treat the conductor of a bus as a person in charge of it though in practice he attends to the passengers. In the case of overloading or carrying passengers on the footboard, the person to be prosecuted, would seem to be the owner or person in charge of the vehicle, and not the conductor. (*Mosely, J.*) RADHAMOHAMOG *v.* THE KING. **1941 Rang. L.R. 587.**

———**S. 16**—*Rules under, R. 7 (1)—Offence under—Power of police to demand name and address of accused.*

There is no provision in the Motor Vehicle Rules or in the Act which authorises a head constable to demand the name and address of a person who has committed an offence under R 7 (1). (*Din Mahomed, J.*) DEVKI NANDAN *v.* EMPEROR. **197 I.C. 136 = A.I.R. 1941 Lah. 422.**

MOTOR VEHICLES ACT (1939), S. 16.

——**S. 16**—*Summons not indicating nature of charge—Case taken up before date fixed—Legality of conviction.*

The practice of issuing summons under S. 16 of the Motor Vehicles Act charging the accused merely with an offence under that section without indicating the nature of the charge against him, should be condemned. Where such a summons was issued to the accused and the case itself was taken up before the date fixed and the accused was not granted time to produce his defence, his conviction is not legal a d is liable to be set aside. (*Skemp, J.*) GHULAM QADIR *v* EMPEROR.

I L.R. (1940) Lah. 678 = 193 I.C. 673 = 13 R.L 498 = 42 Cr.L.J. 481 = A I.R. 1941 Lah. 114.

——**Ss. 31 and 34**—Change of ownership of Vehicle—Fresh registration—Necessity for—Rules under new Act not come into operation. *See* MOTOR VEHICLES RULES, 1930, RR 6 (2) AND 4 (4). **45 C.W.N. 111.**

——**S. 112**—*Madras Motor Vehicles Rules, R.* 138—*Motor lorry registered for private use—Owner allowing driver to carry goods of another for hire—Offence.*

Where the registered owner of a motor lorry for private use suffers his driver to carry goods of another person for hire, he is unquestionably guilty of an offence under R 138 of the Motor Vehicles Rules which is punishable under S. 112 of the Motor Vehicles Act. (*Lakshmana Rao, J.*) GOVINDARAJULU NAIDU, *In re.*

192 I.C. 596 = 13 R.M. 621 = 1940 M.W N. 1268 = 42 Cr L.J. 320 (2) = 52 L.W. 948 = A.I.R. 1941 Mad. 352 = (1941) 1 M.L.J. 470.

——**S. 112 and U. P. Motor Vehicles Rules (1940), Rr. 2 (g) and 79 (viii)**—*Offence under R.* 79 (*viii*)—*Honorary Magis trate, if incompetent to try.*

R. 2 (*g*) of the Motor Vehicles Rules merely means that the word 'Magistrate' means a stipendiary Magistrate where this word is used in the rules. The mere fact that a person was charged with certain acts made offences by R. 79 (viii) is no reason for holding that the Magistrate trying the case must be such a Magistrate as is defined in the rules and that an Honorary Special Magistrate is incompetent to try it. (*Bennett, J.*) SOBHA RAM *v.* EMPEROR

193 I.C. 50 = 13 R.O 439 = 1941 A.W.R. (C.C.) 73 = 1941 O.L.R. 251 = 42 Cr.L.J. 350 = 1941 O A. 145 = 1941 A.Cr.C. 81 (1) = 1941 O.W.N. 193 (1) = A.I.R. 1941 Oudh 266.

——**S. 112**—'*This Act*'—*Construction—Conviction under Act of* 1914—*If can be taken into account.*

The words in S. 112 of the Motor Vehicles Act 'convicted of any offence under this Act' mean only convicted of an offence under the present Act and does not include convictions under the old Act of 1914 and so the latter cannot be taken into consideration in fixing the fine payable. (*Thomas, C. J.*) BISHUN NARAIN *v.* EMPEROR.

16 Luck 644 = 193 I.C. 340 = 13 R.O. 455 = 1941 A.Cr.C. 97 = 1941 O.L.R. 269 = 42 Cr.L.J. 406 = 1941 O.W.N. 351 = 1941 O A. 262 = 1941 A.W.R. (C.C.) 105 = A.I.R. 1941 Oudh 250.

——**S. 123 (1)**—*Contravention of S.* 42 (1)—*Transport Vehicle driven on public road without permit—Liability of driver to conviction.*

The driving of a transport vehicle on the public road without a licence or permit authorising the use of that vehicle in that place contravenes S. 42 (1) of the Motor Vehicles Act; and whoever drives such a vehicle in a public place without such a permit is punishable under S. 123 (1) of the Act. That the permit is to be obtained by the owner makes no difference and a driver cannot escape liability for such driving on that ground.

MUSLIM DIS. OF MARRIAGES ACT (1939), S.2.

(*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* JEVAN. **196 I.C. 633 = 54 L.W. 480 = A.I.R. 1941 Mad. 845 = (1941) 2 M.L.J. 349.**

——**S. 128 (2)**—*Applicability.*

Before sub-S. (2) of S. 128 of the Motor Vehicles Act applies, it is the duty of the prosecution to establish that the offending driver was required under the provisions of the Act to give his name and address. (*Din Mahomed, J.*) DEVKI NANDAN *v.* EMPEROR. **197 I.C. 136 = A.I.R. 1941 Lah. 422.**

MOTOR VEHICLES RULES (1930), Rr. 6 (2) and 4 (4)—*Change of ownership of Vehicle—Fresh registration—Necessity for—Rules under Motor Vehicles Act*, 1939, *not come into operation—Motor Vehicles Act*, 1939, *Ss.* 31 *and* 34.

Before the new rules under the Motor Vehicles Act, 1939, came into operation, the old rules must be read subject to the provisions of the Act of 1939 after that Act has come into force. Under Rules 4 (4) and 6 (2) of the Motor Vehicles Rules of 1930 read in the light of Ss. 31 and 34 of the Act of 1939, a Motor Vehicle must be registered afresh when its ownership is transferred, unless the Vehicle in question has been destroyed or has become permanently incapable of use. The mere fact that it was not in use at the time when the ownership changed is not enough. (*Edgley, J.*) GHISON RAM HIRA LALL *v.* EMPEROR. **45 C.W.N. 111.**

MUNICIPAL CORPORATIONS—*Acts of a meeting—Binding nature.*

The acts of a meeting of a corporation are not absolutely binding on a subsequent meeting. (*Niyogi and Clarke, JJ.*) C. B. PARAKH *v.* P. N RUDRA.

I.L.R. (1941) Nag. 266 = 1941 N.L J. 211.

——*Exercise of discretion by—Interference by Civil Court.*

Where a Municipal Committee acts within its rights in giving sanction for the construction of a building, its act being a lawful act cannot be interfered with although it may be prejudicial to an individual. The law has conferred discretionary authority on the Municipal Committee. If the Civil Court were to interfere with the exercise of its discretion as exercised it would be substituting its own discretion for the discretion of the Committee. The law does not intend Civil Courts to usurp the powers granted to local bodies or other corporations but only to see that those who are vested with the authority do not exceed its limits. (*Niyogi and Clarke, JJ.*) C. B. PARAKH *v.* P. N. RUDRA.

I.L.R (1941) Nag. 266 = 1941 N.L.J. 211.

MURSHIDABAD ESTATE ADMINISTRATION ACT, S. 19—"Arrears of rent—Rent falling due before Act—If included. *See* 1940 Dig., Col. 926. SECRETARY OF STATE *v.* SYED SADEK REZA.

193 I.C. 807 = 13 R.C. 453 = A.I.R. 1941 Cal. 167.

MUSLIM DISSOLUTION OF MARRIAGES ACT (VIII OF 1939), S. 2 (ii)—*Suit for dissolution of marriage by wife—Husband neglecting and failing to provide for wife's maintenance for ten years—Husband on Magistrate's order paying maintenance to wife for some months during two years prior to suit—If debars wife from relying on S.* 2 (*ii*) *in respect of earlier period of ten years.*

A Muslim husband neglected and failed to provide maintenance for his wife for a period of ten years. In pursuance of a Magistrate's order, however, he had been paying maintenance allowance to his wife for some months during two years preceding the suit by the wife for the dissolution of the marriage.

Held, that the payment of maintenance during two years preceding the suit did not debar the wife from relying on S. 2 (*ii*) in respect of the earlier period of ten

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years as a good ground for the dissolution of her marriage. (*Tyabji, J.*) ASMABAI *v.* UMER MAHOMED SIDIK MIRZA. **I.L.R. (1941) Kar. 114 = 193 I.C. 847 = 13 R.S. 237 = A.I.R. 1941 Sind 23.**

——**S. 2 (viii) (a)**—*"Cruelty"—Husband's ill treatment—Wife forced to degrading position of having to live with and being burden upon her parents—Effect of.*

The wife was forced to live away from her husband for about 12 years on account of his ill-treatment and her life was being made miserable by reason of the fact that a return to her husband's house was out of the question as it meant submission to conditions impossible to a self respecting woman. She was compelled to do without the society of her husband and could not marry any other person. She was forced to the degrading position of having to live with and be a burden upon her parents.

Held, that it was reasonable in the circumstances to say that the husband was making her life miserable by cruelty of conduct within the meaning of S. 2 (*viii*) (*a*). The fact that she could by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month —a sum wholly insufficient for maintaining her in any comfort—was not enough to relieve her of her misery. (*Tyabji, J.*) ASMABAI *v.* UMAR MAHOMED SIDIK MIRZA. **I.L.R. (1941) Kar. 114 = 193 I.C. 847 = 13 R.S. 237 = A.I.R. 1941 Sind 23.**

——**S. 2 (viii) (f)**—*Only very gross failure to render to wife her just rights will be considered by Court as ground for dissolution of marriage—Wife separating from husband due to ill-treatment—No real intention or positive effort on husband's part to treat wife as wife at all much less to treat her equitably in accordance with injunctions of Quran—Case falls within purview of S. 2 (viii) (f).*

It is only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution of the marriage. Where there has never, after the separation of the wife due to ill-treatment, been any real intention on the part of the husband or positive effort to treat the wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which, having regard to human imperfections and to the circumstances of the husband, could be considered as an honest effort in that direction, the case falls within the purview of S. 2 (*viii*) (*f*). (*Tyabji, J.*) ASMABAI *v.* UMAR MAHOMED SIDIK MIRZA. **I.L.R. (1941) Kar. 114 = 193 I.C. 847 = 13 R.S. 237 = A.I.R. 1941 Sind 23.**

——**S. 4**—*Applicability—Suit by wife before Act—Act coming into force during pendency of appeal.*

A wife sued for a declaration that her marriage with her husband had come to an end on account of her conversion to Christian faith. The suit was decided before Act VIII of 1939 came into force. During the pendency of the appeal Act VIII of 1939 came into force;

Held, that the right claimed by the wife had not vested in her under any statute and consequently she could not insist that that right was indefeasible. The law applicable was as contained in S. 4 of Act VIII of 1939 by which no marriage was dissolved merely on account of change of faith. (*Din Mahomed, J.*) FAZAL BEGUM *v.* HAKIM ALI. **193 I.C. 327 = 13 R.L 451 = A.I.R. 1941 Lah. 22.**

——**S. 4**—*If retrospective.*

S. 4 of the Act is not retrospective in its operation, and it applies only to renunciations or conversions which take place after the Act came into force. If the renunciation took place before the Act came into force, the

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marriage would be dissolved automatically without any decree of Court. (*Beckett, J.*) RABIAN BIBI *v.* GHULAM ALI. **196 I.C. 139 = 14 R.L. 135 = 43 P.L.R. 394 = A.I.R. 1941 Lah. 292.**

——**S. 4**—If retrospective. *See* 1940 Dig., Col. 927. MT. MARIAM *v.* FAZAL KARIM. **191 I.C. 420 = 13 R.L. 299.**

——**S. 4**—*Retrospective effect.*

The words "the renunciation . . . . shall not by itself operate to dissolve the marriage," are incapable of the interpretation "never has had the effect of dissolving the marriage." Indeed, the words of the statute are capable of only one meaning, namely, in future the renunciation will not dissolve a marriage. The enacting words being unambiguous, there is no occasion to resort to the preamble for aid in construing the statute. The Act is therefore not retrospective. Before the passing of the Act the law was that a marriage between Muslims became, under the texts, null and void, on either party apostatizing. (*Monroe, J.*) RASHID BIBI *v.* TUFAIL MAHOMED. **196 I.C. 127 = 14 R.L. 126 = A.I.R. 1941 Lah. 291.**

MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT (XXVI OF 1937), S. 2—Effect of. *See* 1940 Dig., Col. 927. MOHIUDDIN AHMED *v.* SOFIA KHATUN. **192 I.C. 693 = 13 R.C. 339.**

——**S. 5**—*Petition pending on date of repeal of Act—Order made after repeal—If* ultra vires—*General Clauses Act*, S. 6 (*e*).

A petition under S. 5 of the Act of 1937 which was pending before the District Judge on the date when the repealing Act of 1939 came into force does not automatically lapse, and a final order passed by him on that petition after the repeal of the Act is not, therefore, *ultra vires*. There being no provision in the repealing Act of 1939 affecting proceedings which had been initiated under Act of 1937 when it was in force and were pending at the time of its repeal, the matter is governed by S. 6 (*e*) of the General Clauses Act. (*Tek Chand and Beckett, JJ.*) KARIM SHAH *v.* MST. ZINAT BIBI. **195 I.C. 304 = 14 R.L. 62 = 43 P.L.R. 103 = A.I.R. 1941 Lah. 175.**

MUSSALMAN WAKF ACT (XLII OF 1923), (as amended by Bombay Act 1935)—Applicability to Bombay Presidency. *See* 1940 Dig., Col. 927. PIR SHAH DINO SHAH *v.* DISTRICT JUDGE, HYDERABAD. **191 I.C. 429 = 13 R.S. 132.**

——Plea as to inapplicability of Act—District Judge, if can decide. *See* 1940 Dig., Col. 927. SYED ABDUL HADI *v.* ABDUL LATIF. **I.L.R. (1941) Nag. 613.**

——**S. 2 (e)**—*Wakf—Dedication—What constitutes—If to be by beneficial owner—Dedication by trustee—Validity.*

"Wakf" as defined by S. 2 (*e*) of the Mussalman Wakf Act means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mahomedan Law as religious, pious or charitable. The purpose of benefiting a Madressa is a purpose recognised as charitable by the Mahomedan Law. It is not however necessary that the dedication should be by a beneficial owner. There may be a dedication by a trustee as well, though of course he must keep within the terms of the trust. Where certain persons collect monies for the purpose of building a Madressa and then build the same, and the trustees purchase immovable property out of the funds of the Madressa and execute a declaration of trust admitting the purchase for the support of the Madressa and declaring that they hold the property upon trust, in substance for the Madressa, there is a good dedication for the purpose of a wakf. (*Beaumont, C.J. and Sen,*

MUSSALMAN WAKF ACT (1923), S. 3.

J.) EMPEROR *v.* GULAMHUSSAIN ALIBHOY.
I.L.R. (1941) Bom. 328 = 194 I.C. 115 = 13 R.B. 362 = 42 Cr.L.J. 517 = 43 Bom L.R. 152 = A.I.R. 1941 Bom. 152.

——(as amended by Bombay Act of 1935), S. 3—*Applicability—Mutawalli of wakf holding property of wakf within jurisdiction of Local Court—Liability to furnish particulars.*

S. 3 of the Mussalman Wakf Act applies to any property of a wakf within the jurisdiction of the local Court. So that if one finds a mutawalli with property within the local limits of the Small Causes Court at Bombay, it is clear that he has to furnish the required particulars, although other properties of the wakf may be situate, and those who benefit from the wakf may be resident outside Bombay or outside British India. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GULAM HUSSEIN ALIBHOY. I.L.R. (1941) Bom. 328 = 194 I C. 115 = 13 R.B 362 = 42 Cr.L J. 517 = 43 Bom L.R. 152 = A.I.R. 1941 Bom. 152.

——Ss. 3 and 4—*Powers of Court—Nature of—Judicial or administrative.*

Per *Young, C. J.*—The Mussalman Wakf Act merely confers administrative powers upon the "Court". The object is to have on record full particulars of all wakf property and to enforce that the Mutwalli shall honestly carry out the provisions of the trust imposed upon him, and to have in a convenient place information available to the public, or to any beneficiary of the wakf, in order that they may see whether the wakf property is being properly administered and, if it is not, that any one may file an information against the Mutwalli so that the penalty imposed by S. 10 of the Act may be inflicted upon him. The "Court" is nowhere in the Act said to be acting in its judicial capacity. (*Young, C.J., Tek Chand and Beckett, JJ.*) SHIA YOUNG MEN'S ASSOCIATION, PUNJAB, LAHORE *v.* SAYED FATEH ALI SHAH. I.L.R. (1941) Lah. 395 = 194 I C. 351 = 13 R.L. 532 = 43 P.L R. 208 = A.I.R. 1941 Lah. 145 (F.B.)

——S. 5—*Construction — No statement delivered under S. 3—Offence under S. 5—If committed.*

On the wording of S. 5 of the Mussalman Wakf Act, there cannot be any offence under that section unless a statement has been delivered under S. 3 of the Act. S. 5 cannot come into operation unless S 3 has been complied with. (*Beaumont, C J. and Sen, J.*) EMPEROR *v.* GULAMHUSSAIN ALIBHOY.
I.L.R. (1941) Bom. 328 = 194 I.C. 115 = 13 R.B. 362 = 42 Cr L.J. 517 = 43 Bom L R. 152 = A.I.R. 1941 Bom. 152.

——S. 10—*Jurisdiction to punish offence—District Court — If empowered—Plea that property is not wakf—Jurisdiction to hold enquiry—Cr. P. Code, S. 29.*

It is not correct to hold that the District Court is the Court which can impose the fine provided in S. 10 of the Mussalman Wakf Act. S. 10 of the Act creates an offence and says in so many words that the omission described in the section is an offence. Since there is no Court mentioned in the Act as the Court which shall try offences under S. 10, it follows that the Court which can try those offences is the ordinary Criminal Court, *i.e.*, the Court indicated in the Cr. P. Code, which can try such offences, in view of S. 29 (2), Cr. P. Code. It would be contrary to all principle that the Court of the District Judge should have power to punish offences under S. 10, for in such case the Court of the District Judge would be virtually in the position of prosecutor and Judge at the same time.

MUSSAL. WAKF VAL. ACT (913), S. 3.

Quaere: whether in proceedings under S. 10, the District Judge has jurisdiction to hold an enquiry into the nature of the property where the alleged *mutawalli* denies the existence of the *wakf*. (*Burn, J.*) SYED ISMAIL SAHIB *v.* ETHIKASHA SARGURU.
54 L.W. 377 = 1941 M.W.N. 867 (2) = A.I R. 1941 Mad. 897 = (1941) 2 M.L.J. 541

——S. 10—*Power of District Judge—Enquiry into nature of property.*

The District Judge has no jurisdiction in proceedings under S. 10 of the Mussalman Wakf Act to hold an enquiry into the nature of the property where the alleged Mutwalli denies the existence of the wakf. (*Young, C. J., Tek Chand and Beckett, JJ.*) SHIA YOUNG MEN'S ASSOCIATION, PUNJAB, LAHORE *v.* SAYED FATEH ALI SHAH. I.L.R. (1941) Lah. 395 = 194 I.C. 351 = 13 R L. 532 = 43 P.L R. 208 = A.I.R. 1941 Lah. 145 (F B.)

——S. 10—*Power of District Judge—Imposition of fine—Cr. P. Code, Ss. 28 and 29.*

The District Judge is not empowered himself to impose a fine on a Mutwalli under S. 10 of the Mussalman Wakf Act, when he has not complied with the provisions of the Act. It must be dealt with by a Court constituted under the Criminal Procedure Code (*i e.*) by a Magistrate. (*Young, C J., Tek Chand and Beckett, JJ.*) SHIA YOUNG MEN'S ASSOCIATION, PUNJAB, LAHORE *v.* SAYED FATEH ALI SHAH. I.L.R. (1941) Lah. 395 = 194 I.C 351 = 13 R.L. 532 = 43 P.L.R. 208 = A.I R. 1941 Lah. 145 (F.B.).

——(as amended by Bombay Act XVIII of 1935), S. 10-B and R. 26—*Compliance—Sanction—Grant of—Form of—Formal sanction—If necessary.*

Where a person is called upon to deliver accounts under S. 3 of the Mussalman Wakf Act and fails to do so, and the Court, holding that the person fell within the terms of Act, directs that the papers be sent to the Public Prosecutor of Bombay in order that he might take the appropriate action against that person, that sufficiently complies with R. 26 of the Rules under the Act which prescribes the manner of giving sanction under S. 10-B of the Act as amended by the Bombay Act of 1935 though it would be better to give formal sanction independently of the judgment in the case under S. 3. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GULAMHUSSAIN ALIBHOY. I L.R. (1941) Bom. 328 = 194 I.C. 115 = 13 R.B. 362 = 42 Cr.L.J. 517 = 43 Bom L.R. 152 = A.I.R. 1941 Bom. 152.

MUSSALMAN WAKF VALIDATING ACT (VI OF 1913)—Wakf subsequent to and apart from provisions of—Validity—Test to be applied. *See* 1940 Dig., Col. 928. KANIZ KUBRA BIBI *v* MUZAFFAR-UD-DIN. 192 I.C. 410 = 13 R.A. 321.

—— S. 3, Proviso—*Effect of—Ultimate gift to "proper acts of charity"—Validity of wakf.*

Per *Mitter, J.*—The proviso to S. 3 of Act VI of 1913 does not effect any change in the Muslim conception but simply states what the Muslim law is. The effect of that proviso must, therefore, be judged by the principles propounded by Muslim jurists. According to them there are two distinct principles: One is analogous to the *cypres* doctrine. The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakif, the usufruct is to be applied to the benefit of the poor. The proviso to S 3 of the Act states that the ultimate benefit in a *wakf-al-aulad* can also be impliedly reserved for the poor or for any purpose recognised by the Mussalman Law as religious, pious, or charitable purposes of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama.

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If in the wakfnama the wakif designs the ultimate gift to "proper acts of charity", these words used in the wakfnama will *imply* a gift to the poor, which is an effective gift, and the wakf will comply with the provisions of the Act. Further, if the wakf deed manifests an overriding intention to give to charity in the contingency of the failure of the descendants of the wakif, that would call in the application of the *cypres* doctrine.

Per *Khundkar, J.*—If the objects of the wakf are indicated with reasonable certainty, it is not necessary that they should be named. A gift for "Kar-i khair" (works of charity) in a deed of wakf cannot be condemned as vague and indeterminate, as the objects of the donor's bounty are possible of ascertainment by reference to the principles of Mahomedan Law. Even if the expression "Kar-i-khair" does not indicate the objects of bounty intended by the wakif with sufficient certainty, the doctrine of *cypres* could be invoked. (*Mitter and Khundkar, JJ*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C L.J. 261**

——**S. 3**—Validity of Wakf — Condition. *See* 1940 Dig., Col. 928. MAHOMED ALI *v* DINESH CHANDRA ROY. **193 I.C. 540=13 R.C. 413**

——**S. 3, Proviso**—*Applicability—Construction of deed.*

Where among other things a deed of waqf recited that 'if, may god forbid, there be extinction of my descendants, at any time. the amounts allotted above to my heirs, shall be utilised for some charitable purposes according to the scheme to be prepared by Court and the Court shall, in that case, have power to utilise the money only for such *kare khair* as would be correct and valid according to entire Mahomedan religion. It was held that the words *kare khair* were used in a larger sense so that money may be devoted not only to objects of *khairat* but for objects which might or might nol be charitable and that the settlor deliberately used a wider language to give a greater discretion to the Court and to the mutwalli to administer the trust. It was held further that the condition laid down in the proviso to S. 3 of the Mussalman Waqf Validating Act had not been duly complied with and the waqf failed for uncerainty. (*Baipai and Das. JJ.*) MAHOMED YUSUF *v.*. AZIMUDDIN. **I.L.R (941) All. 443=196 I.C. 324= 14 R.A. 145=1941 A.L.W. 509=1941 A L.J. 269= 1941 A.W.R. (H.C.) 175=1941 O.A. (Supp.) 400= A.I.R. 1941 All. 235**

——**S. 3, Proviso**—Maintenance of family—If pious purpose. *See* 1940 Dig.,Col. 929. MOHIUDDIN AHMED *v.* SOFIA KHATUN. **192 I.C. 693=13 R.C. 339.**

——**S. 4**—Degree of remoteness permissible. *See* 1940 Dig., Col. 929. MOHIUDDIN AHMED *v.* SOFIA KHATUN. **192 I.C. 693=13 R.C. 339.**

MUTATION—*Alteration—Notice to recorded owner—Necessity for.*

The revenue officer must serve notice of the proceedings on the recorded owner if the entries in the revenue papers are proposed to be altered to his disadvantage. (*Mitchel, F.C.*) RUR SINGH *v.* SURAIN SINGH. **20 Lah.L.T. 146.**

——*Alteration—Permissibility.*

A mutation entry when it has been incorporated in a Jamabandi should not be altered except on the basis of an obvious clerical error or patent fact. It cannot be altered on the ground that it was made by the fraud of a party in collusion with the subordinate revenue staff. (*Alan Mitchel, F.C.*) AZIZ ULLAH *v.* GHULAMAN. **20 Lah L.T. 54.**

——*Duty of revenue officers—Colony tenancies—Materials newly placed in appeal.*

MUTATION.

Revenue officers in mutation proceedings have a responsibility to ensure that so far as possible the revenue records are correctly maintained, and especially in the case of colony tenancies governed by statements of conditions and executive orders of Government, it is the duty of revenue officers to examine carefully all Government records that may be available at whatever stage the attention of such revenue officers is directed to the existence of such records. Therefore, the Commissioner hearing an appeal from an order of the Collector should not refuse to allow the parties to place on record material not before the Collector to establish the nature of the tenancy to which succession is being decided. (*Mitchell, F.C.*) ALAM KHATUN *v.* MEHR WALI MAHOMED. **20 Lah.L.T. 130.**

——*Duty of Revenue officer—Judgments of Civil Court.*

There is an obligation laid on all Revenue Officers to brirg the revenue records into conformity with fact and in particular to incorporate therein any final judgments of Civil Courts. Therefore, when it is brought to the notice of a Revenue Officer that there is in existence a judgment of the High Court on which one of the parties bases his title, he should insist on the production before him of a copy of the judgment in question in order to enable him to satisfy himself that the order passed is in accordance with the order of the High Court. (*Alan Mitchell, F C.*) IBRAHIM *v.* MADHO SINCH. **20 Lah.L.T. 57.**

——*Duty of Revenue Officer—Mistake in document—If can be rectified.*

It is the duty of the officers in mutation proceedings to give effect to the document as made and registered. If there has been a mistake, that mistake can be rectified not by a Revenue Officer in mutation proceedings but only in a Civil Court. (*Garbett, F.C.*) BISRA STONE LIME CO. *v.* RAJA MOHAMMAD AFZAL KHAN. **20 Lah.L.T. 11.**

——*Effect on title.*

In mutation proceedings revenue officers are required to reach a decision, in so far as they are able to do so in summary proceedings, as to the disputed title to the land in question. The decision on a mutation is not a final adjudication on a question of title, it is the formal recording of what the revenue officers dealing with the case consider the facts in regard to title to be, and the final adjudication on a question of title between parties is a matter for the Civil Courts, except in so far as the legislature may by special statute take away the jurisdiction of the Civil Courts in regard to certain matters and confer that jurisdiction on another authority. (*Alan Mitchell, F.C.*) MELU *v.* GAJJU. **20 Lah.L.T. 183.**

——If confers title. *See* 1940 Dig., Col. 929. SALAMAT RAI *v.* MOKAND LAL. **191 I C. 190= 13 R.L. 269.**

——*Oral transaction—Practice.*

The practice in regard to mutation proceedings is that the person who alleges an oral transaction in his favour which is not admitted by the other party must be refused mutation and left to seek his remedy in the Civil Courts. (*Mitchell, F. C.*) RUR SINGH *v.* SURAIN SINGH. **20 Lah.L.T. 146.**

——*Order behind back of party—Legality.*

An order passed in mutation proceedings behind the back of the party concerned is irregular, and is liable to be cancelled in revision. (*Garbett, F.C.*) SHAUKAT ALI *v.* RALA RAM. **20 Lah L T. 14.**

——Proceedings in—Nature of. *See* 1940 Dig., Col. 929. NAND KISHWAR BUX ROY *v.* GOPAL BUX RAI. **I.L.R. (1940) Kar. (P.C.) 235.**

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MUTATION.

——*Review of order—Duty of officer to summon party concerned.*

A Revenue Officer cannot review his own order passed in mutation proceedings without summoning the party whose rights are in issue. (*Garbett, F.C.*) DAROPATI DEVI *v.* SAHNJI MAL. **20 Lah.L.T. 13.**

MYSORE ACTS AND REGULATIONS ETC.

Civil Courts Act (I of 1883).
Civil Procedure Code (III of 1911).
Companies Act.
Court Fees Act (III of 1900).
Criminal Procedure Code (II of 1904).
District Boards Act (III of 1926).
High Court Act (I of 1884).
Hindu Women's Rights Act (X of 1933).
Inam Rules (1867).
Income-Tax Act (V of 1923).
Insolvency Act (VI of 1911).
Land Acquisition Act (VII of 1894).
Land Revenue Code (II of 1888).
Limitation Act (IV of 1911).
Motor Vehicles rules.
Negotiable Instruments Act (VII of 1917).
Registration Act.
Religious and Charitable Institutions Act (VII of 1927).
Transfer of Property Act (IV of 1918).

MYSORE CIVIL COURTS ACT (I OF 1883), S. 17-A—*Applicability—Appeals before High Court.*

S. 17 A is not inapplicable to appeals disposed of by the High Court. The word "appeal" in S. 17-A refers to appeals before the High Court also. (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) SRI RANGACHAR *v.* SRIRANGACHAR. **19 Mys.L.J 216= 45 Mys.H C.R. 477.**

——**S. 17-A**—*Construction—Appeal—When can be said to be disposed of "without contest"—Settlement between parties after hearing in part—Right to refund of Court fee.*

Contest in an appeal begins at the time when, after being posted for hearing, the appellant's advocate begins his arguments. Till that stage the appeal is merely in the stage of a contentious appeal and not a contested appeal. The moment the arguments commence, the contest begins, after which even if the parties report compromise or settlement, they are not entitled to a refund of the institution fee, (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) SRI RANGACHAR *v.* SRIRANGACHAR. **19 Mys.L J. 216= 45 Mys H C R 477.**

MYSORE CIVIL PROCEDURE CODE (III OF 1911), S. 9—*Suit of civil nature—Suit for declaration that plaint mutt and not defendant mutt is main mutt—Maintainability—Right to exclusive use of particular name such as* "vyasaraya mutt."

The question whether one or other of two rival mutts is the main mutt is a question affecting the status or legal character of the mutts, although no mutt has an absolute or exclusive right to a particular name, such as "*vyasaraya mutt*" to the extent of entitling that mutt to prevent the assumption of that name by another mutt. A suit for a declaration in regard to such status or legal character would lie in the Civil Court, and is not barred under S. 9, C. P. Code. (*Abdul Ghani and Subramania Aiyar, JJ.*) SRI VIDYA VARIDHI THIRTHA SRIPADANGALAVARU *v.* SRI LAKSHMI MANOGNA THIRTHA SRIPADANGALA VARU. **45 Mys.H.C.R. 362=19 Mys L.J. 46.**

——**S. 11**—*Connected suits—Common judgment based on findings recorded in one—Separate decrees—Appeal against one only—Maintainability.*

MYS. C. P. CODE (191), S. 11.

There is no warrant or authority for the theory that a decree which has not been reversed or modified in appeal, review or revision, or set aside in appropriate proceedings on the ground of fraud or any other reason, or declared as not binding on one of the parties to it, can yet be superseded by the result of another suit. Where two suits are tried together, a suit for partition of certain items of properties and a suit for declaration in respect of some of those items of properties, and a common judgment is given or two judgments are pronounced one dependent on the other, it cannot be said that it is really necessary to appeal against the judgment and decree in one of the two suits only, namely the suit for declaration, and that the appellate decision in the suit which is taken in appeal will supersede the decree in the connected suit. In such a case the declaratory decree in one suit based on the findings arrived at in the other (partition suit) is superfluous. If the decree in the connected partition suit is not appealed against and becomes final, the appeal in the suit for declaration is incompetent; any decision given in that appeal would also be superfluous and would leave the decree in the other suit unaffected. (*Reilly, C.J. and Subramanya Aiyar, J.*) AYESHA BIBI *v.* MIRZA ABDULLA BAIG. **46 Mys.H.C.R. 287=19 Mys.L.J. 192.**

——**S. 11**—*Directly and substantially in issue—Matter not raised or made subject of issue—No finding given—If* res judicata.

For a matter to operate as *res judicata*, it is not necessary that the point should be specifically put in issue and a formal finding recorded. To attract the provisions of S. 11, it is sufficient if the matter is substantially and directly in issue in the previous suit. If the decree in the previous suit necessarily involves a finding on the issue raised in the subsequent suit, that is sufficient for purposes of S. 11. But where a point was not raised in the prior suit, when there was no issue at all about it and no finding was given regarding that point, the decree in that suit cannot be taken to operate as *res judicata* on the point in the later suit. If there was a definite finding on a specific point raised in the prior suit, it must be said to have been directly and substantially in issue, and if it was disposed of after contest, that would operate as *res judicata* in a later suit. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) RANGACHAR *v.* SESHADRI IYENGAR. **19 Mys.L.J. 202=45 Mys.H.C.R. 403.**

——**S.11**—*Directly and substantially in issue—Prior suit for declaration of title to land as owner—Dismissal—Subsequent suit for declaration of right of easements of light and air right of way and of right to discharge rain water, etc.—If barred.*

In 1936, *L* the owner of a house and site, sued for a declaration of his title to a strip of land adjoining the site, claiming to have bought the same along with the house and site, in 1934, and for an injunction to restrain the defendant from interfering with his enjoyment of that strip, which he alleged was part and parcel of the land which he purchased under the sale deed of the house and site; he also alleged that he was in possession of it, and that he had been in open and continuous enjoyment of it for 12 years adversely to the claim of any other person. The suit was dismissed on the finding that *L* was not the owner of the strip of land, that the defendant was the owner thereof, that *L* had not shown that he was in possession and that he had not also shown that he had been in possession for 12 years as alleged. Subsequently in April, 1938, *L* transferred the house and site to his wife *N*. *N* filed a suit in 1939 against the same defendant for a declaration that as owner of the house and site, she was en-

MYS. C. P. CODE (1911), S. 11, Expl. IV.

titled to several easements over the strip of land adjoining the site of the house, namely a right to light and air for her house, a right of way over it, a right to discharge rain water on it and to take sewage water and surplus water across it by a drain, and a right to use a privy in the strip; she also claimed an injunction restraining the defendant from interfering with her enjoyment of any of those easements. It was pleaded that the dismissal of the prior suit by *L* precluded his transferee *N* from afterwards suing successfully to establish right of easement over the strip of land.

Held, (1) that so far as the claim to the easement of light and air was concerned, *N* should not be shut out and was not precluded from claiming the same in her suit by reason of the unsuccessful suit brought by her husband and assignor, *L*, claiming to be owner of the strip of the land; (2) that with regard to the claim of the other easements, the position was quite different; in the case of these other easements, *N* had to show, in order to succeed, that she and her predecessor-in-title were not only peaceably and openly enjoying the easements but had been claiming title to them as easements and as of right for the necessary period of 20 years. *L* having claimed in the previous suit to have been in possession and enjoyment of the strip of land by right of ownership, it was irreconcilable with the theory that he was claiming these easement rights, and therefore the suit in respect of these other easements was clearly barred. (*Reilly, C.J. and Subramanya Aiyar, J.*) RAMAMURTHI *v.* NARASAMMA. **19 Mys.L.J. 339.**

——**S. 11, Expl. IV**—"*Might and ought*"—*Meaning of—Alternative or inconsistent pleadings—Failure to raise—If operates as* res judicata.

Alternative pleadings are allowed and may often be necessary. Apart from claims for alternative reliefs a plaintiff may base his claim on two or more different sets of facts or on alternative legal results from the same set of facts. A defendant likewise may resist a plaintiff's claim by denying or refusing to admit the facts alleged by the plaintiff or by denying the alleged legal consequences from those facts or by pleading in addition to the facts alleged by the plaintiff, further facts leading to different legal consequences. Or he may adopt all those lines of defence; and if he can do so, he ought to do so in order that all his defences may be before the Court. But neither a plaintiff nor a defendant is required or permitted by the Code to allege facts which he does not know or believe to be true. It cannot therefore be said that a party ought to make an allegation of fact within the meaning of Expl. IV to S. 11, C. P. Code, unless he at least believes it to be true, though it may subsequently be found to be true. In such a case omission to plead such an alternative or inconsistent allegation of fact cannot have the result of constructive *res judicata* under Expl. IV to S. 11, C. P. Code. (*Reilly, C.J. and Subrahmanya Aiyar, J.*) NAGAPPA *v.* NANJUNDAPPA. **46 Mys.H.C.R. 213=19 Mys.L.J. 146.**

——**S. 47**—*Appeal—Assignee of decree applying for execution—Objection by attaching decree-holder of decree assigned—Dispute—If falls under S. 47—Order—Appealability—O. 21, Rr. 16 and 53 (3).*

An attaching decree-holder who attaches a decree obtained by his judgment debtor is a representative of the holder of the decree attached under O. 21, R. 53 (3). An assignee of a decree is likewise a representative of the decree-holder. Where an attaching decree-holder objects to the assignment of the decree attached by him, the dispute is one which falls under S. 47 (3), C. P. Code, and it is for the executing Court under S. 47 (3) to decide the question as to who is the real representative of the holder of the decree attached and assigned and as

MYS. C. P. CODE (1911), S. 92

such entitled to execute that decree. The order passed in the case is therefore appealable. The fact that the judgment-debtor under that decree does not oppose the application of the assignee does not make any difference or take the case out of S. 47. (*Nageswara Aiyar and Subramanya Aiyar, JJ.*) N. SUBBARAYAPPA *v.* JWALANAPPA. **45 Mys.H.C.R. 521.**

——**S. 64**—Applicability—Attachment before judgment. *See* 1940 Dig., Col. 934. NANJUNDAPPA *v.* JINNADATHAPPA. **45 Mys.H.C.R. 347.**

——**S. 64**—Applicability—"Private transfer"—Arbitration and award after attachment—Distribution of property effected—Award filed in Court and made decree of Court—If void. *See* 1940 Dig., Col. 935. NANJUNDAPPA *v.* JINNADATHAPPA. **45 Mys.H.C.R. 347.**

——**S. 92**—*Scope—Suit in respect of properties belonging to temple—Allegations of mismanagement by defendant—Prayer for possession of properties and for accounts—Sanction of Deputy Commissioner—Necessity—Mysore Religious and Charitable Institutions Act S. 40.*

A suit brought in a representative capacity on behalf of all the villagers of a village by some of them, to vindicate or establish the right of the public in respect of a public trust, comes within the scope of S. 92, C. P. Code, and cannot be maintained without the sanction of the Deputy Commissioner. The plaintiffs who were inhabitants of a village brought a suit in regard to the management of certain properties belonging to a temple, which was alleged to belong to the village; the plaintiffs alleged that about 25 years ago, the defendant was appointed manager on behalf of the inhabitants of the village to manage the affairs of the temple, that the properties were delivered to him, that he was directed to meet the expenses of the temple including the salary of the archaka out of the income of the properties and to manage the affairs of the temple property, that the defendant after some time neglected to manage properly, that he failed to meet the expenses and misappropriated the income of the properties reducing the affairs of the temple to a chaotic condition. It was further alleged that at a meeting of the villagers a resolution was passed removing the defendant from management and appointing the first plaintiff as manager, and that as the defendant failed to deliver the properties to the 1st plaintiff, the villagers resolved to file the suit. The 1st plaintiff and three other villagers filed the suit on behalf of all the villagers after obtaining permission of the Court under O. 1, R. 8, C. P. Code. The plaintiffs prayed for a declaration of the title of the temple and the village to the properties in suit, for delivery of possession of the said property, for a direction to the defendant to render an account of his management, and for mesne profits, etc. The defendant pleaded that the temples belonged to his family and that the properties were endowed by his ancestors, and that the suit was barred, having been brought without the sanction of the Deputy Commissioner as required by S. 92, C. P. Code.

Held, that on the allegations in the plaint, the defendant was a trustee against whom there were allegations of breach of trust in respect of a trust created for public purposes of a religious nature, that the reliefs prayed really came under S. 92, C. P. Code, though worded differently in order to evade the application of the section, and that the suit fell under S. 92, C. P. Code. S. 92 (2), C. P, Code, therefore barred the suit as the permission of the Deputy Commissioner was not obtained.

Held, further, that S. 40 of the Mysore Religious and Charitable Institutions Act also barred the suit, as the

MYS. C. P. CODE (1911), S. 146.

Muzrai officer had power to take action under S. 17 of the Act. (*Abdul Ghani and Subrahmunya Aiyar, JJ.*) SUBBIAH *v.* VENKATAGIRIYAPPA.
46 Mys.H.C.R. 105.

——**S. 146**—*Applicability*—Ex parte *decree—Sale in execution—Purchase by decree-holder—Purchaser from representatives of decree-holder purchaser—Right to oppose subsequent application to set aside* ex parte *decree—Right to be made party to such application.*

A purchaser from the representatives of a decree-holder a ction-purchaser is entitled to oppose an application filed under O. 9, R. 13, C. P Code, to set aside the decree in execution of which the property purchased by him was sold, by virtue of S. 146, C. P Code. He is a person claiming under the decree-holder auction-purchaser so far as the property purchased by him is concerned, and he is also a legal representative of the decree holder auction-purchaser so far as that property is concerned. Such a purchaser who is interested in maintaining the execution sale which would be affected by the setting aside of the decree sought to be set aside under O. 9, R. 13, C. P. Code, has a right to oppose the application and is therefore entitled to be made a party respondent if he wishes to do, although he may not be entitled to notice of the application as a matter of course under O. 9, R. 14. (*Singaravelu Mudaliar, J.*) MAHOMED NAZIR *v.* MAHOMED KHASIM.
19 Mys.L.J. 297.

——**S. 152**—*Applicability—Decree in conformity with judgment—Patent error in decree and judgment—Remedy — Application for amendment— Maintainability.*

It is clear and well established that where a decree conforms to the judgment, it cannot be amended under S. 152, C. P. Code, on the ground that there is a patent error in the judgment which is repeated in the decree; the proper remedy in such a case is to appeal from the decree or to apply for review of judgment and not by means of an application under S. 152. (*Abdul Ghani, J.*) HANUMA SETTY *v.* MADA SETTY.
19 Mys. L.J 286.

——**O. 1, R. 1**—*Frame of suit—Joinder of plaintiff—Suit for partition by Hindu widow for herself and on behalf of her son who is an idiot—Relief claimed in favour of one or either of them—If bad for misjoinder.*

Several persons may join as plaintiffs where they claim relief jointly for all or in the alternative for one or the other of them on the same cause of action. Where a suit is brought by a Hindu widow for herself and on behalf of her son who is an idiot, for partition, and relief is claimed in favour of them, the suit is not bad for misjoinder. Such a suit is properly framed under O. 1, R. 1, C. P. Code. (*Abdul Ghani and Subramania Aiyar, JJ.*) RANGACHAR *v.* SRINIVASARANGACHAR. **45 Mys.H C.R 450= 19 Mys L J. 24.**

——**O. 1, R. 3**—*Partition suit by Hindu coparcener—Prayer to declare invalid several alienations—Alienees joined as defendants if bad for multifariousness.*

In a suit for partition by a Hindu coparcener, claiming that several alienations made by the manager are invalid and not binding on the plaintiff, all the alienees may be impleaded as parties, under O. 1, R. 3, C. P. Code. It cannot be said that the suit, is on that account bad for misjoinder of parties and causes of action. In such suits for partition it is not only usual but very often necessary to make the alienees of properties in which a share is claimed, parties to the suit. (*Abdul Ghani and Subramania Aiyar, JJ.*) RANGACHAR *v.* SRINIVASARANGACHAR. **45 Mys. H C.R. 450= 19 Mys L J. 24.**

MYS. C. P. CODE (1911), O. 31, R. 2.

——**O. 1, R. 10**—Scope—Suit by foreign company carrying on business in Mysore—Winding up in foreign state—Official Liquidator appointed by Foreign Court—Right to apply for permission to come on record and continue suit in Mysore. *See* MYSORE COMPANIES ACT, S. 271 (3). **45 Mys. H.C R. 555.**

——**O. 21, R. 16**—*Applicability—Decree obtained benami in name of person—Death of decree-holder—Assignment of decree by real owner—Assignee's right to execute.*

O 21, R. 16, C. P. Code, regulates procedure and does not affect substantive rights. A person who is really entitled to a decree or the money due under a decree is clearly entitled to deal with the decree as owner and in any manner he likes after the death of the person in whose name the decree was obtained and stood. An assignee from the real owner of the decree after the death of the benami decree holder is therefore entitled to execute the decree under O. 21, R. 16, C. P. Code, whether he be regarded as the assignee under an assignment in writing by the person really entitled to the money due under the decree, or under an assignment by a person he on whom the decree devolved by operation of law after the death of the decree-holder. On the grounds of equity also such an assignee ought to be permitted to execute the decree. (*Abdul Ghani and Venkataranga Iyengar, JJ.*) RAMANNA SETTY *v.* CHANDRA KALAPPA.
45 Mys. H C.R. 532.

——**O. 21, R. 72**—*Scope—Permission to bid—If necessary for every adjourned or fresh sale—Permission once obtained—If sufficient.*

Under O. 21, R. 72, C. P. Code, it would be enough for a decree-holder to obtain the permission of the Court to bid at the sale in one execution; it is not necessary that on every occasion on which a sale takes place after an adjournment he should apply for and get a fresh permission to enable him to bid at the sale. (*Venkataranga Iyengar, J.*) KRISHNIAH SETTY *v.* KRISHNAMURTHY. **19 Mys.L J 223.**

——**O. 21, Rr 72 (3) and 90**—*Scope—Purchase by decree-holder without leave—Sale—If void—Setting aside—Considerations.*

An execution sale is not void merely because the decree-holder has purchased the property at the sale without leave of the Court. It is only voidable under O. 21, R. 72 (3). In considering whether the sale is to be set aside or not the Court has to consider whether or not the property has been realised to the best advantage; the sale cannot be set aside under O 21, R. 90, C. P. Code, unless substantial injury is proved, even if it be held that a purchase by the decree-holder without permission under O. 21, R. 72, amounts to material irregularity within the meaning of O. 21, R. 90. (*Venkataranga Iyengar, J.*) KRISHNIAH SETTY *v.* KRISHNAMURTY. **19 Mys L J. 223.**

——**O. 21, R. 90**—Material irregularity—Sale—Purchase by decree-holder without leave of Court—If void—Setting aside—Proof of substantial injury—Necessity. *See* MYSORE C. P. CODE, O. 21, RR. 72 (3) AND 90. **19 Mys L J. 223.**

——**O. 31, R. 2**—*Scope—Mandatory character of—Suit against trust— all trustees not made parties—Effect—Decree—If binds trust.*

The provisions of O. 31, R. 2, Mysore C P. Code, are imperative and specifically require that all the trustees must be made parties to a suit against one or more trustees, unless those omitted happen to reside outside Mysore. The analogy of some defendants actually on record sufficiently representing those who are not on

MYS. C. P. CODE (1911), O. 41, R. 22.

record cannot hold good in the case of suit concerning trust property. In so far as a trust is concerned, all trustees to the endowment form one entity and they are treated together as one collective trustee who alone can represent the trust. Where the suit is against a trust all the trustees must be on record; otherwise the trust will not be a party to the suit at all. (*Abdul Ghani and Venkataranga Iyengar, JJ.*) RAMASWAMIAH *v.* THE JAIN BRAHMIN BOARDING HOME, MYSORE.
19 Mys.L.J. 378.

——**O. 41, R. 22**—*Scope—Claim for two independent reliefs on same cause of action—Decree awarding one and disallowing other—Appeal by defendant—No cross-objections by plaintiff—Right to support decree awarding relief.*

Under O. 41, R. 22, C. P. Code, a respondent can support the decree of the first Court on any of the grounds decided against him. Although a portion of his claim based on a particular cause of action is disallowed, that would not disentitle him from supporting the decree of the lower Court awarding him another relief on the ground that the finding of the lower Court on the point is not correct, although he has not filed a memorandum of cross-objections against the finding. Where two independent reliefs, one of which is not directly connected with the other, arise out of the same cause of action, it is open to a respondent to give up one of the reliefs and support the decree of the lower Court awarding him the other relief on the ground that the finding of the lower Court is erroneous, although he cannot get a decree for that relief in the appellate Court without filing cross objections in that behalf. The test to be applied is whether, if the ground urged by the respondent without a memorandum of cross-objections is up held, it would necessarily destroy the decree of the lower Court. (*Nigesvara Iyer and Singaravelu Mudaliar, JJ.*) BANGALORE WOOLLEN, COTTON AND SILK MILLS CO., LTD. *v.* SESHA. 46 Mys.H.C.R. 199=19 Mys.L.J. 100.

——**O. 41, R. 33**—*Powers of appellate Court - Decree in favour of party not appealing or filing cross-objections.*

The object of O 41, R. 33, C. P. Code, is to empower the appellate Court to do justice between the parties; and coupled with O. 41, R. 4, the rule would give the Court ample power to make the order appropriate to the ends of justice. Express power is given under the rule to the appellate Court to make a decree which ought to have been made; and this power can be exercised in favour of parties who have not appealed or filed cross-objections. (*Abdul Ghani and Subramania Aiyar, JJ.*) RANGACHAR *v.* SRINIVASA RANGACHAR. 45 Mys.H.C.R. 450=19 Mys.L.J. 24

MYSORE COMPANIES ACT (as amended in 1938), S. 271 (3)—*Foreign company carrying on business in Mysore—Liquidation in foreign state and appointment of Official Liquidator—Suit filed by company in Mysore prior to liquidation—Right to continue—Liquidator appointed by foreign state—Competency of.*

A foreign company carrying on business in Mysore State and having a registered office in the State, can, if it ceases to carry on business in Mysore, be wound up as an unregistered company under S. 271 (3) of the Mysore Companies Act. Ordinarily the Official Liquidator appointed by a Court in Mysore in such winding up would have power to institute or continue and conduct suits in the Mysore State Courts on behalf of such company. The Official Liquidator appointed for the company by a foreign Court has no right to proceed with a suit which has been filed by the company in the Mysore State. It is not therefore competent for an Official Liquidator appointed by the foreign Court to apply to the Mysore Court under O. 1, R. 10, C. P. Code, to permit him to continue a suit filed by the foreign company carrying on business in Mysore State prior to its winding up in the foreign state. (*Nageswara Aiyar and Subramanya Aiyar, JJ.*) INDO CARNATIC BANK, LTD. *v.* BHAVANAGAR MOTOR AND CYCLE IMPORTING CO.
45 Mys. H.C.R. 555.

MYS. CR. P. CODE (1904), S. 255-A.

MYSORE COURT-FEES ACT (III OF 1900), S. 4 (iv) (a)—*Applicability—Mortgage decree against joint family—Suit by member to exempt his share of family property challenging decree—Court-fee payable.*

In a suit in which the plaintiff prays for exempting his share of family properties from the liability under a mortgage decree passed in another suit which is challenged by him, court-fee is payable under S. 4 (iv) (*a*) of the Court-Fees Act, *i.e.*, on the plaintiff's share of the value of the property calculated in the manner prescribed by S. 4 (v) of the Act, and not on the corresponding portion of the decree amount, except when the decree amount itself is less than the value of the properties. (*Abdul Ghani, O.C.J.*) DEVEERAMMANNI *v.* NANASWAMI RAO. 19 Mys.L.J. 36.

——**Ss. 4 (iv) (c) and (d) and Sch. II, Art. 11 B**—Applicability—Suit for declaration of right to managership of mosque and to collect rents of properties thereof and for injunction—Valuation—Court fee payable—Mysore Civil Courts Act, S. 11—Applicability. *See* 1940 Dig., Col. 940. SHEIKH BUDAN *v.* ABDUL SHUKOOR.
46 Mys.H.C.R. 35.

MYSORE CRIMINAL PROCEDURE CODE (II OF 1904), S. 103—*Search list or mahazar—If to be exhibited in criminal trial—Evidence given of contents of search list and judgment discussing contents without search list being exhibited—Propriety.*

Where a search list or mahazar prepared according to the provisions of S. 103, Cr. P Code, is not exhibited in a case and is not part of the record of the case, it is entirely irregular and improper for the Court to allow witnesses to give evidence about its contents or to discuss the contents thereof in its judgment in the case. To do so is to permit evidence of the contents of an existing and accessible document to produce which no attempt is made. Such a procedure is not only mistaken but also absurd and improper. There is no warrant for the view that mahazars are never to be exhibited in a criminal trial. Mahazars on the other hand may, and often should, be exhibited. It can be used not only for the purpose of refreshing the memory of a witness or as a substitute for his memory, but also to corroborate the evidence of the writer or any signatory to it or to contradict the witnesses concerned. Mahazars, apart from being used to corroborate or contradict a witness in the case, should be exhibited to show that the due formalities required by law in regard to the search have been fulfilled, and the Court should insist upon the search list made in regard to the search being exhibited in the case. (*Reilly, C.J. and Subramanya Aiyar, J.*) HANUMANTHACHARI *v.* GOVERNMENT OF MYSORE.
46 Mys. H.C.R. 18=19 Mys.L.J. 322.

——**S. 255-A**—*Scope—Duty of Magistrate—Postponing judgment and conviction until after proof of previous conviction—Legality of procedure.*

Under S. 255-A, Cr. P. Code, it is the duty of a Magistrate, in a case where the accused is charged with previous convictions under S. 75, I. P. Code, to write a judgment finding the accused guilty and convicting him of the main offence, as soon as the evidence in respect of that offence is closed and arguments heard, and should only postpone passing sentence until after evidence is

MYS. CR P. CODE (1904), S. 348.

recorded in respect of the charge under S. 75, I. P. Code. A Magistrate who merely finds the accused guilty of the main offence after evidence and arguments deferring the judgments, and adjourns the case for proof of the previous convictions and then after such proof only delivers judgment convicting the accused of the main offence and sentencing him, acts in contravention of the provisions of S. 255-A, Cr. P. Code. Such a procedure is highly irregular and is not justified by any provision in the Code. (*Venkataranga Iyengar, J.*) ABDUL MAJID, *In re.* **19 Mys. L J. 78.**

——**Ss. 348 and 349**—*Applicability and construction—Second class Magistrate finding accused guilty—Accused previously convicted and deserving sentence beyond Magistrate's powers—Proper procedure — If bound to commit to Court of Session.*

Where a second class Magistrate after hearing the evidence in a case is of opinion that the accused is guilty, but that because the accused had been previously convicted, he cannot impose on him a sufficiently heavy sentence, he can, if he is convinced that a sufficient sentence can be imposed by the District Magistrate, submit his proceedings to the District Magistrate under S. 349, Cr. P. Code, it is not obligatory on him to commit the accused to the Court of Session under S. 348, Cr. P. Code. When the Magistrate thinks that the accused would be amply punished by the District Magistrate, it cannot be said that he is satisfied within the meaning of S. 348, Cr. P. Code that there are sufficient grounds for committing the accused to the Court of Session. In such a case, it is reasonable and proper and in accordance with public interest that a second class Magistrate should submit the proceedings to the District Magistrate; it is unnecessary for him to proceed under S. 348 and to worry the Court of Session with the case at all and to waste the time of that Court. (*Reilly, C.J. and Venkataranga Iyengar, J.*) ABDUL KHADER, *In re.*

19 Mys. L J. 302.

——**S. 387**—*Scope—Mandatory nature of—Warrant of attachment—Execution beyond local limits—Absence of endorsement by District Magistrate—Effect—Illegality—If curable by S. 538.*

S. 387, Cr P. Code, restricts the authority of the warrant of attachment of a Magistrate to the local limits of his jurisdiction. A warrant of attachment issued by a Magistrate has no authority for execution at a place beyond the local limits of his jurisdiction. It can be executed outside, such limits only if there is an endorsement by the District Magistrate. The authority to attach outside the local limits is derived from the endorsement of the District Magistrate. The provision that the warrant should be endorsed by the District Magistrate if it has to be executed in an area outside the local limits of the Magistrate issuing the warrant is an obligatory or mandatory provision and hence an attachment effected on the basis of a warrant not so endorsed is an attachment without authority and illegal. The omission to endorse is not a mere defect or want of form and therefore S. 538 of the Code would not apply as to cure such a material irregularity or illegality. S. 538, Cr. P. Code, only applies to mere errors of procedure arising out of mere inadvertence and does not apply to cases of disregard of a mandatory and imperative provision of the Code, such as is contained in S. 387 (*Subramania Aiyar, J.*) GOVERNMENT OF MYSORE *v.* KARI GOWDA. **19 Mys. L.J. 187.**

——**S. 417**—*Acquittal—Appeal from—Interference by High Court—Rule as to.*

The rule followed in the Mysore High Court in respect of appeals from acquittals under S. 417, Cr. P. Code,

MYS. HINDU WOMEN'S RIGHTS ACT (1933), S. 8.

is that the High Court will interfere only when the order of acquittal depends upon a mistake of law or a clearly unreasonable finding of fact. (*Reilly, C.J. and Abdul Ghani, J.*) GOVERNMENT OF MYSORE *v.* MADDURA. **46 Mys. H C.R. 98 = 19 Mys. L J. 358.**

——**S. 538**—Applicability—Warrant of attachment—Execution beyond local limits of issuing Magistrate—Absence of endorsement of District Magistrate—If curable. *See* MYSORE CR. P. CODE, S. 387.

19 Mys. L.J. 187.

MYSORE DISTRICT BOARDS ACT (III OF 1926), S. 36—*Scope—Contract not in accordance with statute—Enforceability—Suit by Board—Maintainability—Plea of want of mutuality—Sustainability—Executed and executory contracts—Distinction.*

In a suit brought by a District Board on a contract that is not executed in accordance with S. 36 (2) of the Mysore District Boards Act, it is not open to the defendant to urge that the suit based on such a contract is not maintainable, when the contract has been executed. If it is found that the defendant has received the benefit of all the stipulations for which he contracted or if the District Board has performed all the obligations on its part, and thus the full consideration has been executed by the Board, a defence based upon want of mutuality is untenable, and the contract may be enforced against the defendant by the Board. If, on the other hand, at the time the Board wants to enforce the contract against the defendant it is found that the contract is still executory, a defence based upon want of mutuality is a good defence, and the suit by the Board must fail on that ground. (*Nagesvara Iyer and Venkataranga Iyengir, JJ.*) PARASURAMAPPA *v.* SHIMOGA DISTRICT BOARD. **46 Mys H.C.R. 258 = 19 Mys. L J. 160.**

MYSORE HIGH COURT ACT (I OF 1884, Ss. 16 (b) and 19 and R. 31 Civil Rules of Practice—*Application under S. 339, Cr. P. Code—Power of single judge to hear and dispose of or to refer to a Bench.*

An application under S. 339, Cr.P. Code, for sanction to prosecute a person for perjury under S. 193, I. P. Code, does not fall within the scope of S 19 of the Mysore High Court Act or R. 31 of the Mysore Civil Rules of Practice, and a Judge of the High Court sitting alone is not therefore competent to dispose of such an application. He is also not competent to refer such a case to a Bench for disposal, because under S. 16 (*b*) of the High Court Act, he is competent to refer to a Bench only such cases as he can hear and dispose of sitting alone. (*Nagesvara Iyer and Subrahmanya Iyer, JJ.*) GOVERNMENT OF MYSORE *v.* MARILINGA GOWDA.

46 Mys H.C.R. 157 = 19 Mys L.J. 110.

MYSORE HINDU WOMEN'S RIGHTS ACT (X OF 1933), S. 8 (1) (a)—*Construction—"Widows of predeceased sons who have left no male issue"—Meaning of—Son of predeceased son dying before partition—Effect—Right of widow of predeceased son to claim share.*

The whole of S. 8 (1) (a) of the Hindu Women's Rights Act refers to what is to happen at a partition and the words "who have left no male issue" must be interpreted as applying to the time at which the partition takes place, that is, the time at which the women's right to claim a share arises. The widows of predeceased sons who come within the words of the section are not only widows of predeceased undivided sons who never had any male issue or who did not ever leave any male issue but also widows of predeceased sons of whom there is no male issue left at the time of the partition. The material time is not the date of death

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of the son but the date of the partition at which the widow is entitled to share. (*Reilly, C.J. and Venkataranga Iyengar, J.*) NARASIMHA SETTY *v.* NANJAMMA. **45 Mys H.C.R. 460.**

——**S. 8 (1) (b) and (c)**—*Applicability—Partition between uncle and nephew—Mothers of uncle and nephew—Right to shares.*

Under S. 8 (1) (*c*) of the Mysore Hindu Law Women's Rights Act in all partitions not explicitly provided for by S. 8 (1) (*a*) or S. 8 (1) (*b*), the principle contained in them have to be applied so far as they are applicable. In a partition between coparceners one of whom is the uncle of the other, the provisions of S. 8(1) (*b*) have to be applied to S. 8 (1) (*c*), and the mothers of both the uncle and the nephew must be held to be entitled to share with them. In cases of partition which come within sub S. (1) (*c*) of S. 8, the mother of a coparcener concerned must be treated as entitled to a share except when she is the widowed daughter-in-law of a coparcener taking part in the partition. (*Reilly, C.J. and Venkataranga Iyengar, J.*) NAGENDRASA *v.* RAMAKRISHNASA. **19 Mys.L.J. 277.**

MYSORE INAM RULES (1867), Rr. I, II, III, XX XXI and XXII—*Applicability and scope—Minor inams—Omission to confirm or recognise inams granted by inamdars in settlement—Effect of—Right of minor inamdars.*

The object of effecting an inam settlement is to settle the extent of the land concerned and of the extent of land revenue remitted and also the person entitled to the benefit of the inam. It is not the function of the Inam Commissioner to decide the validity or the nature of any gifts or alienations made by an inamdar, that is to say, to make any inquiry into those matters and record his decision in the inam register. Alienations of holding in the village made by an inamdar are not within the scope of the investigations which the Inam Commissioner was to be required to conduct under the rules. These rules have effect only on the inams granted by the Government and are not concerned with any grants that might have been made by the inamdars themselves. Private inams do not come within the scope of the rules. It cannot therefore be said that private inams fail because of omission to record them as inams in the inam register. The omission to confirm or recognise these private inams in the inam settlement does not affect the rights of the holders of private inams, as minor inams do not come within the mischief of the inam rules. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) VASUDEVA SETTY *v.* MAHANTADEVARU. **19 Mys L J. 254 = 46 Mys.H.C.R. 25.**

MYSORE INCOME-TAX ACT (V OF 1923), Ss. 13 and 23 (3)—*Scope—Accounts produced by assessee—If can be rejected and turnover basis adopted—Grounds for—Duty of Income-tax Officer—S. 23 (3)—If excludes proviso to S 13—Discretion of Income-tax Officer.*

S. 23 (3) of the Income-tax Act does not exclude the proviso to S. 13. Under the latter section, the income, profits and gains have to be computed in accordance with the method of accounting regularly employed by the assessee. Accounts produced by the assessee should not be rejected and the turnover basis adopted unless there are good grounds, which should be placed on record, to consider them to be unreliable and not worthy of acceptance. S. 13 relates only to the method of accounting and the books cannot be rejected merely because the method of accounting does not appeal to the Income-tax Officer. But the Income-tax Officer is not precluded from adopting any other method of assessing the taxable income when accounts are produced, though the accounts

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may be inaccurate or defective, and the Income-tax Officer, in spite of a sincere attempt, cannot find out the assessable income. If the accounts tendered by the assessee are found to be incorrect or incomplete, if they are "cooked" or are "fictitious," it would not be wrong to say that the method of accounting is such that it is not possible to deduce the total income of the assessee therefrom. Therefore, while making assessment under S. 23 (3) of the Act, it would be open to the Income-tax Officer to invoke the proviso to S. 13 of the Act, if, after examining the accounts produced by the assessee under S. 22 (4), or after recording the evidence led by the assessee under S. 23 (2), he still remains unconvinced as to the reliability of the assessee's accounts, and considers that they do not serve as a safe guide in calculating the assessee's taxable income. The absence of the words "assess to the best of his judgment" in S. 23 (3), does not take away the power vested in the Income-tax Officer by the terms of the proviso to S. 13. The Income tax Officer should, of course, try his best from a careful scrutiny of the accounts furnished, to arrive at the taxable income, and should not avoid the labour and time involved in the scrutiny by resorting to the proviso to S. 13. The discretion of the Income-tax Officer in this matter should not be arbitrary. (*Abdul Ghani and Subrahmanya Aiyar, JJ.*) KAPURCHAND & CO. *v.* COMMISSIONER OF INCOME-TAX, MYSORE. **19 Mys.L.J. 134.**

——**S. 66 (3)**—*Question of law—Jurisdiction of High Court to interfere with conclusions of fact.*

Under S. 66 (3) of the Mysore Income-tax Act, it is only a question of law that can be referred to the High Court. Whether there is evidence on which a certain finding of fact can be arrived at is, as a rule, a point of law. The High Court is entitled to see whether there are materials for the conclusions arrived at by the Income tax Officer on a question of fact. Where the case is not one of want of evidence to justify a finding or one where the conclusion can be characterised as capricious or injudicial the High Court cannot interfere. Where the Income-tax Officer finds that from the materials placed before him he cannot calculate the taxable income correctly, it is an inference of fact from a certain set of facts, and no question of law is involved which would justify the High Court in interfering. (*Abdul Ghani and Subrahmanya Aiyar, JJ.*) KAPURCHAND & CO. COMMISSIONER OF INCOME-TAX, MYSORE. **19 Mys.L.J. 134.**

MYSORE INSOLVENCY ACT (VI OF 1911) S. 16 (2) *Applicability—Suit for relief not against person or property of insolvent.*

S. 16 (2) of the Insolvency Act of 1911 (which corresponds to S. 28 (2) of the present Act) only applies to a suit by a creditor of the insolvent in respect of any debt provable under the Act It does not apply to a suit in which the plaintiff does not seek any remedy against the property or person of the insolvent. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) AMEER BI *v.* BUDAN SAB **46 Mys.H.C R. 61 = 19 Mys L J. 113.**

——**S. 16 (2)**—*Scope — Non-compliance—Effect—Decree against debtor — Subsequent adjudication of debtor as insolvent—Execution of decree—Sale without leave of Court—If nullity—Insolvent and creditors not objecting—Effect—Waiver of objection.*

A sale of an insolvent's property in execution of a decree obtained against him before the adjudication in insolvency, cannot be held to be a nullity on the ground that the sale was held without the permission of the Insolvency Court. An execution sale held in violation of S. 16 2) of the Insolvency Act of 1911 [S. 28 (2) of the present] without the leave of the Court is not *ab*.

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initio void. Such a sale would only be voidable at the instance of the receiver on behalf of the general body of the creditors. Where, however, no creditor objects to the sale and no officer of the Court objects to such a sale, the sale is not invalid and cannot be ignored merely because the insolvent who has kept quiet all along challenges it long afterwards. The omission to obtain leave under S. 16 (2) of the Insolvency Act would not deprive the executing Court of its jurisdiction to hold the sale. In holding the sale the Court does not act without jurisdiction, but only irregularly in the exercise of its jurisdiction. The objection to the irregularity may be waived and must be assumed to be waived when not taken at the time when the exercise of jurisdiction is first claimed to the knowledge of the party affected. When the insolvent does not raise the objection of want of leave at the time the sale is applied for or held, it must be deemed to have been waived and cannot be later pressed. There is really no inherent want of jurisdiction, for the prohibition in S. 16 (2) is merely a restraint on the exercise of jurisdiction and is a matter of procedure. (*Nagesvara Iyer and Venkataranga Iyengar, JJ*) AMEER BI *v.* BUDAN SAB.

46 Mys H.C.R. 61 = 19 Mys.L.J 113.

MYSORE LAND ACQUISITION ACT (VII OF 1894), Ss. 29 and 30—Persons interested—Persons holding under permanent leases from swami or head of mutt—Repudiation of lease by succeeding swami—Effect—Right of tenants to claim share in compensation on compulsory acquisition of lands leased—Swami—Position and powers of. *See* 1940 Dig. Col 944. YELLAPPA *v.* SRI GURUSIDDA DESIKENDRASWAMIGALU.

45 Mys H.C.R. 423

MYSORE LAND REVENUE CODE (II OF 1888), S. 79 (2)—*Applicability—Tenancy originating during lifetime of defendant's grandfather—Presumption of permanency—If can be raised.*

A defendant claiming the benefit of the presumption of permanency of tenancy, cannot have the benefit of S. 79 (2) of the Mysore Land Revenue Code when the origin of the tenancy according to him was during the time of his grandfather. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) THIRUPATHI BHATRACHAR *v.* VENKATARAYAPPA. **46 Mys.H.C R. 79 = 19 Mys.L.J. 86.**

MYSORE LIMITATION ACT (IV OF 1911), Arts. 61, 81 and 120—*Applicability—Loan incurred by Court guardian for marriage expenses of minor girl—Surety for—Decree by creditor against guardian and surety—Payment by guardian—Right to reimbursement from person succeeding to estate—Limitation for suit—Starting point.*

A surety for the Court guardian of a minor girl in respect of a loan raised by such guardian with the permission of the Court for a purpose binding on the minor's estate, namely, for the marriage expenses of the minor, who pays off the debt to the creditor under a decree obtained by the creditor against the surety and the guardian, is entitled under S. 69 of Contract Act, to be reimbursed by the person who succeeds to the estate, the debt being a liability which the estate is bound to discharge, the person who succeeds to the estate is liable to reimburse the surety who pays off the debt to the extent of the payments made by him. The cause of action for the suit accrues from the date of the payment or payments by the surety, each payment giving a distinct right to sue, and the suit must be brought within 3 years from the date of the payment or payments. The article of the Limitation Act applicable is either Art. 61 or Art. 81 and not Art. 120. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) RANGACHAR *v.* SESHADRI IYENGAR.

19 Mys L J. 202 = 45 Mys H C.R. 403.

MYS. LIMITATION ACT (1911), Art. 181.

——Art. 81—Applicability—Surety for Court guardian of minor girl—Payment of debt incurred by guardian with sanction of Court for minor's marriage—Suit by surety for reimbursement from person succeeding to estate—Limitation—Starting point. *See* MYSORE LIMITATION ACT, ARTS. 61, 81 AND 120.

45 Mys.H.C.R. 403.

——Art. 89—*Applicability—Co sharers—Suit by one against another for share of property and profits—Facts disclosing relationship of principal and agent—Limitation.*

If in a suit by one co-sharer against another for his share of the property and for rents collected, the relationship of principal and agent is made out on the facts, Art. 89 of the Limitation Act would apply. (*Abdul Ghani and Subramania Aiyar, JJ.*) RANGACHAR *v.* SRINIVASARANGACHAR. **45 Mys.H.C.R. 450 = 19 Mys.L.J. 24.**

——Art. 120—Applicability—Loan by Court guardian for meeting expenses of minor's marriage incurred with sanction of Court—Surety for—Decree against surety and guardian—Payment by surety—Suit by latter against person succeeding to minor's estate—Limitation. *See* MYSORE LIMITATION ACT, ARTS. 61, 81 AND 120.

45 Mys H.C.R. 403

——Art. 120—*Starting point—Suit for declaration of status or right—Cause of action—Starting point—Successive infringements—Effect of.*

A suit under S. 42 of the Specific Relief Act for a declaration of the plaintiff's status or right, as against the defendant who has infringed that right, is governed by Art. 120 of the Limitation Act. A suit brought within 6 years of an infringement or threatening of the right is in time. The fact that no suit was brought on former occasion when the right was denied would not bar a suit instituted afterwards in respect of a later invasion of the right under different circumstances. (*Abdul Ghani and Subramania Aiyar, JJ.*) SRI. VIDYA VARIDHI THIRTHA SRIPADANGALAVARU *v.* SRI LAKSHMIMANOGNA THIRTHA SRI PADANGALAVARU. **45 Mys.H.C.R. 362 = 19 Mys.L.J. 46.**

——Arts. 181 and 182—*Applicability—Application to revive prior execution application dismissed for statistical purposes—Limitation.*

On the date fixed for sale of properties attached in execution of an *ex parte* decree the judgment-debtor applied to have the *ex parte* decree set aside and also applied for stay of sale. The decree-holder not objecting, the sale was stayed. Subsequently the execution application was dismissed as the sale had been stayed. The judgment debtor's application to set aside the *ex parte* decree was subsequently rejected and the decree-holder again applied for execution, *i.e.*, for a revival of the previous execution case. The lower Courts, treating it as a fresh execution case, dismissed it as barred by limitation as it was made more than three years after the rejection of the application to set aside the *ex parte* decree.

Held, that the dismissal of the prior execution application was not a judicial determination of the proceedings but only a dismissal for statiscal purposes, and that the later application was both in form and in substance one for revival of the prior execution proceedings. Art. 181 of the Limitation Act was not applicable to an application to continue execution proceedings which have been stayed either by an order of the same Court or by an appellate Court.

Held, further, that in the case of a dismissal for statistical purposes, there was no question of the applica-

MYS. LIMITATION ACT (1911), Art. 182.

bility of either Art. 181 or 182 of the Limitation Act. Any application, made at any time after such disposal, would be for revival of the old application which must still be considered to be pending in spite of the dismissal. (*Abdul Ghani and Subramanya Aiyar, JJ.*) VENKATE GOWDA *v.* MUDLI SETTY. **46 Mys.H.C.R. 55 = 19 Mys L J 82.**

——**Art. 182, Expl. I**—Applicability—Application for execution against judgment-debtor—If saves limitation against surety—Latter—If joint judgment-debtor. *See* MYSORE LIMITATION ACT, ART. 182 (5). **46 Mys.H.C.R. 248.**

——**Art 182 (5)**—"*In accordance with law*"—*Mortgage suit*—Ex parte *decree—Setting aside—Surety for judgment-debtor--Bond undertaking liability in the event of decree being passed and defendant failing to pay—Subsequent preliminary and final decree—Sale—Application for personal decree against surety as well as judgment-debtor—If step in-aid and saves limitation against surety—Bond—Construction.*

The appellant obtained an *ex parte* mortgage decree against the mortgagor, who then applied to have it set aside under O. 9, R. 13, C. P. Code. He was called upon to furnish security as additional security, and the respondent then stood surety and executed a bond on 20—12—1929 which recited, *inter alia*. "I hereby bind myself to pay the decree amount with costs in the event of the case being decided against the defendant and the defendant failing to pay the same. For this I shall be personally liable besides my movable and immovable properties, etc." The *ex parte* decree was set aside and thereafter, on 12—6—1931, a preliminary mortgage decree was made. A final decree followed on 22—9—1932, and in execution the mortgaged property was sold and the sale was confirmed on 21—7—1933. On 1—9—1934, the appellant applied for a personal decree under O. 34, R. 6, C. P. Code, making the surety also a party to the application and prayed for a personal decree not only against the judgment-debtor but also against the respondent-surety. A personal decree against the judgment-debtor alone was made on 4—3—1935 and none was made against the surety. The appellant on 29—7—1936 applied for execution of the personal decree both against the judgment debtor and the surety (respondent). The latter pleaded limitation, as the application was more than three years after the sale, while the appellant claimed that his application for a personal decree dated 1—9—1934, was a step in-aid of execution and saved limitation against the surety also under Art. 182 (5) of the Limitation Act.

Held, (1) that the liability of the surety under the bond arose on the failure of the judgment-debtor to pay the decree amount, *i.e.*, after the security was sold, and the present application filed beyond three years even from the date of confirmation of the sale was barred by limitation as against the surety; (2) that the obtaining of a personal decree against the judgment-debtor was not a condition precedent to the enforcing of the surety's liability under the bond; (3) that the application for a personal decree as against the surety was unnecessary and was one in accordance with law within the meaning of Art. 182 (5) of the Limitation Act and did not save limitation, it not having been a step in-aid; (4) that the respondent who became a surety for the judgment-debtor could not be regar ed as a party against whom the decree was passed jointly with the defendant in the suit within the meaning of the last clause of Expl. I to Art. 182, Limitation Act, and therefore the prior application for a personal decree did not save limitation against the surety. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) NINGE GOWDA *v.* DYANE GOWDA. **46 Mys.H.C.R. 248.**

MYS. REL. ETC. ACT (1927), S. 40.

MYSORE MOTOR VEHICLE RULES—*Right to ply motor bus—Transfer of—Agreement without previous permission of District Magistrate—Validity—Right of parties to claim relief.*

An agreement entered into in violation of the Mysore Motor Vehicle Rules is void as it is opposed to public policy. A right to ply a motor bus can be transferred only with the permission of the District Magistrate; in view of the rules framed under the Mysore Motor Vehicles Act. An agreement for the transfer of such a right by a licensee without the previous permission of the District Magistrate is one which is illegal and void and therefore unenforceable. Neither party to such a transaction can claim any relief in a Court of law in respect of such a transaction. (*Abdul Ghani and Subrahmanya Aiyar, JJ.*) KEMPARAMIAH *v.* PEERKHAN SAB. **19 Mys.L.J. 262.**

MYSORE NEGOTIABLE INSTRUMENTS ACT (VII OF 1917), S. 48—*Scope—If exhaustive—Transfer of negotiable instrument by assignment—Rights of transferee—Suit by transferee—Maintainability—Transfer of Property Act, Ss.* 130 *and* 137.

S. 48 of the Negotiable Instruments Act is not exhaustive of the modes of transfer of a negotiable instrument It only prescribes the way in which such instruments can be negotiated according to the rules of the Law Merchants It leaves untouched the ordinary law of transfer of a chose in action or an actionable claim which undoubtedly a negotiable instrument is. A transfer under the ordinary law, *i.e.*, S. 130 of the T. P. Act, would entitle the transferee or assignee only to the right, title and interest of the transferor and not to the superior rights of a holder in due course which a transfer under the Negotiable Instruments Act alone can confer. S. 137, T. P. Act has not the effect of denying to negotiable instruments the method of transfer under S. 130, T. P. Act. S. 137 is in no way restrictive, but on the other hand it gives an extended privilege to mercantile documents. An assignee of a promissory note under the ordinary law, though not as a holder in due course, is entitled to maintain a suit on the note. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) BOMMIAH *v.* SAGARMULL. **19 Mys L J. 327.**

——**S. 80**—Scope and effect — Promissory note silent as to interest—Letter offering to pay interest at particular rate and evidence of payment of interest at that rate—Admissibility—Evidence Act, S. 92, Proviso 2. *See* 1940 Dig., Col. 946. KRISHNANANDAGIRI BAVAJI *v.* VITTAL DAS RAMDAS. **45 Mys.H.C.R. 395.**

MYSORE REGISTRATION ACT, S. 49—*Scope—Unregistered partition deed—Admissibility to prove division in status and nature of possession.*

A deed of partition of immovable properties of a Hindu joint family though inadmissible in evidence to prove the terms of the partition for want of registration, may yet be used for a collateral purpose, *viz.*, to prove a division in status between the parties and the nature of the possession, that is to show that the possession of the parties of the properties was on their own account and adverse to the other members. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) ABDUL RAHIM SAB *v.* ERAPPA. **19 Mys.L.J. 246 = 46 Mys H.C R. 44.**

MYSORE RELIGIOUS AND CHARITABLE INSTITUTIONS ACT (VII OF 1927), S. 30—"Alienation"—Lease—Permanent lease—Validity of. *See* 1940 Dig., Col. 946. YELLAPPA *v.* SRI GURUSIDDA DESIKENDRASWAMIGALU. **45 Mys H C.R. 423.**

——**S. 40**—Scope—Jurisdiction of Civil Court—Suit on behalf of inhabitants of village in respect of public temple — Maintainability without sanction of Deputy Commissioner. *See* MYSORE C. P. CODE, S. 92. **46 Mys.H.C.R. 105.**

MYS. REL. ETC. ACT (1927), S. 40.

——**Ss. 40 and 40-A**—Scope—Powers of Muzrai officer—Limits to—Orders without jurisdiction—Suit in Civil Court—If barred. *See* 1940 Dig., Col. 946. YELLAPPA *v.* SRI GURUSIDDA DESIKENDRASWAMIGALU. **45 Mys.H.C.R. 423.**

MYSORE TRANSFER OF PROPERTY ACT (IV OF 1918), S. 52—Lis pendens *Applicability—Suit for maintenance by Hindu widow—Claiming charge on properties—Alienation of some items pending suit—If affected by* lis pendens—*Consideration utilised to discharge family debts—Effect.*

In a suit for maintenance by a Hindu widow claiming a charge on specific immovable property described in the schedule to the plaint in the suit, the question of title to the properties so described or to rights or interest therein is directly in dispute, and any alienation of any of the properties described in the schedule during the pendency of the suit for maintenance is affected by *lis pendens*, and subject to the final decision in the suit. The fact that the purchase or consideration money paid by the alienee was utilised to discharge the debts due by the family and binding thereon, will not and cannot entitle him to claim priority over the claim for maintenance. The alienee cannot be regarded as a creditor of the family, whose debts would be entitled to preference over the claim for maintenance. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) ANDANAPPA *v.* KEN CHAVVA. **19 Mys.L.J. 266.**

——**(as amended in 1938), S. 53-A**—*Applicability to transactions effected before coming into force of section.*

S 53-A of the Mysore Transfer of Property Act, as amended in 1938, cannot be applied to a document which came into existence long before the section came into force. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) PARADESIAH *v.* NAGIAH. **46 Mys.H.C.R. 188 = 19 Mys.L.J. 126.**

——**(as amended in 1938), S. 53-A** — *Scope — Transferee under defective title—Right to relief on basis of doctrine of part performance—Suit under O. 21, R. 63 for declaration of title.*

Though the amendment of the Transfer of Property Act effected by the enactment of S. 53-A, confers no right of action on a transferee, under the law as it stood prior to the enactment of S. 53-A, the doctrine of part-performance can be applied on equitable grounds to the case of a transferee under a defective title and he can be given relief when he comes to Court as a plaintiff seeking to establish his title against the transferor or his representative in interest. When he is merely seeking to protect the rights to which he is entitled under the doctrine of part-performance, as a plaintiff in a suit under O. 21, R. 63, for a declaration of his vendor's title he is entitled to the benefit of the doctrine. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) PARADESIAH *v* NAGIAH. **46 Mys.H.C.R. 188 = 19 Mys L.J. 126.**

——**S. 106**—"*Contract to the contrary*"—*What amounts to.*

A mere exchange of notices by the lessor and lessee after the expiry of the term fixed in the original lease, each offering certain terms to the other, but neither accepting the offer of the other, does not amount to a contract to the contrary within the meaning of S. 106, T. P. Act, so as to make it unnecessary for the lessor to give a proper notice to quit for the purpose of ejecting the lessee. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SILVA *v.* SHANMUGHAM. **19 Mys.L.J. 226.**

——**Ss. 106 and 116**—*Lease for manufacturing purpose—Holding over by tenant—Effect—Term of new tenancy—If tenancy at will or on sufferance.*

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Where a tenant continues in possession after the expiry of the term in the original lease, it is a case of holding over under S. 116 of the Transfer of Property Act and the tenant is not a tenant at will or on sufferance. The tenancy for the period of the holding over is ordinarily construed to be on the same terms or conditions as the original lease except for the same term or duration. As to the term it will be a monthly tenancy or on annual terms depending on the purpose of the tenancy. In the case of a tenancy entered into for a manufacturing purpose, it must, when no contract to the contrary is proved, be treated as an annual tenancy terminable only after six months notice ending with the period of the tenancy. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SILVA *v.* SHANMUGHAM. **19 Mys.L.J. 226.**

——**S. 106**—*Scope—Notice not in conformity with section—Effect of—If justifies termination of lease or claim for enhanced rent after period fixed.*

A defective notice to quit, that is a notice which does not satisfy the conditions laid down in S. 106 of the T. P. Act, will not justify either the termination of the tenancy or a claim for enhanced rent by the lessor after the date fixed in such defective notice. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SILVA *v.* SHANMUGHAM. **19 Mys.L.J 226.**

——**S. 130**—Applicability to negotiable instruments —Transferee of negotiable instrument by assignment—Right to sue on instrument. *See* MYSORE NEGOTIABLE INSTRUMENTS ACT, S. 48. **19 Mys.L.J 327.**

——**S. 130**—*Deed transferring all movable and immovable properties of transferor including assets of firm—Assets consisting of promissory notes—Latter not specifically mentioned—If also transferred—Deed—Construction.*

Where under a deed of transfer all the movable and immovable properties including the assets of a firm carried on by him, among the assets being included a promissory note, are made over to the transferee or assignee, the deed operates as a transfer of the promissory note as well though that is not specifically mentioned in the deed. General words are always construed so as to give effect to and not so as to destroy, the expressed intention of those who use them. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) BOMMIAH *v.* SAGARMULL. **19 Mys.L.J. 327.**

——**S. 137**—Scope—If restrictive — Negotiable instrument — Transferability by assignment. *See* MYSORE NEGOTIABLE INSTRUMENTS ACT, S. 48. **19 Mys.L.J 327.**

NAGPUR MUNICIPAL COMMITTEE'S TERMINAL TAX RULES, R. 3—*Article imported by rail—Municipal Committee, if can classify goods as they please.*

Where an article is imported by rail, it must fall under the first part of R. 3 of the Terminal Tax Rules and in such a case, the Municipal Committee is bound to accept the classification adopted by the Railway authorities for the levy of the Railway freight upon a consignment. That rule leaves no scope for discretion. The Municipal Committee, could not, to such a consignment apply the third part of R. 3 and levy the terminal tax at the higher rate. (*Niyogi, J.*) NAGPUR ELECTRIC LIGHT AND POWER CO., LTD. *v.* NAGPUR MUNICIPAL COMMITTEE. **I.L.R. (1941) Nag 236 = 195 I.C. 147 = 14 R.N. 39 = 1941 N L.J 137 = A.I.R. 1941 Nag. 137.**

NAMBUDRI ACT (XXI OF 1933).

See MADRAS ACT—NAMBUDRI ACT.

NATURAL RIGHTS. *See* EASEMENTS ACT, S. (*b*).

NAYABAD RULES, Rr. 7 (b) and 21—*Correct entry*—Benab *land—Neither extension nor Nayabad grant.*

A person in possession could only be a *hissedar* with respect to a plot which has been *benab* land either by virtue of extension or by virtue of a Nayabad grant. In a case where no Nayabad grant could be made and there is no extension either, the correct entry should be *hissedar sarkar Qaiser-Hind baqabza.* (*Shirreff, S.M. and Sathe, J.M.*) KAM RUP *v.* MULI RAM.

1941 A.W.R. (Rev.) 795 (2) = 1941 O.A. (Supp.) 706 (2) = 1941 R.D 691.

——**R. 21**—*Applicability—Declaratory suit regarding* benab *land—Failure to prove tenancy of opposite party—Effect.*

Where the plaintiffs' claim is that the opposite party are their tenants in the *benab* land adjoining their proprietary land and should therefore be recorded as tenants in the plots in suit, in which they themselves should be recorded as *hissedars*, but they fail to prove the tenancy of the opposite party, R. 21 of the Nayabad Rules does not apply and the plaintiffs are not entitled to the declaration claimed by them. (*Shirreff, S.M.*) KHARAK SINGH *v.* HIRA MANI.

1941 O.A. (Supp.) 716 (2) = 1941 A.W.R. (Rev.) 805 (2) = 1941 R.D. 693 (1).

NEGOTIABLE INSTRUMENT—*Cheque—Cheque given for price of goods sold—Seller endorsing it in favour of third party—Cheque dishonoured while outstanding in latter's hands—Suit by seller—If lies.*

If a buyer of goods gives a cheque for the price to the seller who endorses it for value to a third party, the original debt cannot be said to be still outstanding and unpaid while the cheque is outstanding in the hands of that third party. Therefore, an action for the price by the seller, or if he has since been adjudicated insolvent, by the transferee of his assets from the Official Assignee, will not lie even after dishonour of the cheque, if at the date of the commencement of the action the cheque is still outstanding in the hands of the third party. (*Lort Williams, J.*) RAM PRASAD LOHIA *v.* M. P. PATEL.

I L.R. (1941) 2 Cal. 103.

——Promissory note — Executed abroad—Suit in British India—Need for affixing and cancellation of stamp. *See* STAMP ACT, S. 19. **(1941) 2 M.L.J. 301**

——Promissory note—Form and contents—Construction—Use of words 'promise to pay on demand'—Payment to be made within 3 years—Nature of document, *See* 1940 Dig., Col. 950. GANPATDAS *v.* HARIVALLABH. **13 R.N. 265 = 192 I.C. 513 = A.I.R. 1941 Nag. 1.**

——Promissory note purporting to be executed jointly by two persons—Execution only by one—Suit on—Liability of person actually executing—Test—Burden of proof. *See* 1940 Dig., Col. 951. SUNDARAM *v.* VENKATAPPADASU. **194 I.C. 846 = 14 R M. 112 = (1940) 2 M.L.J. 384.**

——*Promissory note—Right to sue — Common manager of estate appointed under* S. 301, *Succession Act.*

A common manager of the estate of a deceased person appointed under S 301 of Succession Act represents the estate for all intents and purposes, and he is entitled to file a suit on a promissory note on behalf of the estate. (*Varma, J.*) BAIRAGI CHARAN DAS *v.* SARAT CHANDRA GHOSH **192 I C. 560 = 13 R.P 503 = 7 B.R. 479 = 22 Pat L.T. 569 = A.I.R. 1941 Pat. 403.**

——*Promissory note—Right to sue—Real creditor.*

It is not correct to say that no person who is not named in the note can ever sue. There is no reason why the real owner should not be entitled to sue provided he is in a position to obtain a good discharge for the

NEG. INSTRUMENTS ACT (1881), S. 8.

defendant. The Court must of course always be careful to see that the position of the defendant is fully safeguarded, but if that is done there is no reason for any further difficulty if the 'holder' and the real owner are agreed between themselves. A person not a holder cannot of course claim the privileges of a 'holder' but that does not disentitle him from suing. (*Bose, J.*) BALANNA *v.* KHUDAI NAZAR KHAN. **1941 N.L.J. 263 = A.I.R. 1941 Nag. 207.**

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), Ss. 4 and 5—*Construction of document—Promissory note or bill of exchange—Use of words "hundi" and "accepted"—If conclusive.*

A document containing a promise to pay a certain sum of money to a certain person after a certain date was executed on a paper on which was engraved the form of a stamp. The upper part of the stamp bore the word "hundi". The executant wrote the word "accepted" across the document over his signature.

Held, that the document was a promissory note and not a bill of exchange, and that the words "hundi" and "accepted" in the document did not determine its character, which must be determined by looking to the provisions of the document itself. (*Derbyshire, C.J., Panckridge and Nasim Ali, JJ.*) HARSUKHDAS *v.* DHIRENDRA NATH. **I L.R. (1941) 2 Cal. 107 = 196 I.C. 161 = 14 R.C. 182 = 1941 F.L.J. (H C) 308 = 73 C.L.J. 333 = 45 C.W.N. 609 = A.I.R. 1941 Cal. 498 (F.B.).**

——**S. 4 and Stamp Act, S. 2 (22)**—*Promise to pay on a contingency—Nature of the document—Promissory note—Test—Nature if affected by recital of pre-existing account.*

A document which contains a promise to pay on a contingency will not be treated as a promissory note for the purposes of the Negotiable Instruments Act, but it may be regarded as such for the purposes of the Stamp Act. To determine whether a document is a promissory note or not the main question to be considered is not whether the instrument is negotiable or not though ordinarily negotiability of an instrument is a good test for that purpose, but to consider whether in substance and in primary intention of the parties the document was or was not a promissory note and whether it was intended to record a different kind of transaction altogether. A reference in the promissory note to a pre-existing account between the parties, made with a view to state the consideration for the note, does neither make the liability under the note a contingent one, nor the instrument any the less a promissory note. (*Baipai and Dar, JJ.*) SUSHIL CHANDER CHATURVEDI *v.* WALI ULLAH. **I.L.R. (1941) All. 264 = 195 I.C. 60 = 14 R.A. 12 = 1941 O W.N. 344 = 1941 O.A. (Supp.) 292 = 1941 A L.W. 248 = 1941 A.L.J. 36 = 1941 A.W.R. (H.C.) 46 = A.I.R. 1941 All. 158.**

——**S. 7**—*Certification of cheque by drawee banker—If amounts to acceptance.*

Although in the normal course a cheque is not accepted by the drawee banker, there is nothing in the law that forbids him to accept it in which case he becomes liable to a holder in due course in the same way as any other acceptor. The certification of a cheque by the drawee bank is acceptance of the cheque within the meaning of the Act. The signature of a certifying banker is an acceptance. (*Panckridge, J.*) PUNJAB NATIONAL BANK, LTD. *v.* BANK OF BARODA, LTD. **1941 Comp. C. 242 = A I.R. 1941 Cal. 372.**

——**Ss. 8, 48 and 78**—*Promissory note for debt due to estate of deceased—Common manager appointed for estate under S. 301, Succession Act—Right to sue on note in the absence of endorsement and delivery to him.*

NEG. INSTRUMENTS ACT (1881), S. 9.

Where a common manager is appointed for an estate under S. 301 of the Succession Act by an order of Court, such manager represents the estate for all intents and purposes; and so long as he holds the office of common manager, he is competent to bring a suit on a promissory note in respect of a debt due to the estate although the promissory note has not been endorsed and delivered over to him. Endorsement and delivery cannot be regarded as the only method by which a negotiable instrument can be transferred, on the basis of which a suit can be filed. (*Varma, J.*) CHARAN DAS *v.* SARAT CHANDRA GHOSH. **7 Cut. L.T. 77.**

——Ss. 9 and 50—*Endorsee of overdue promissory note—Liability to allow set-off—Claim against endorser—Conditions of.*

The endorsee of an overdue bill or promissory note does not take it subject to claims arising out of collateral matters such as a set-off, and the endorsement of an overdue bill in order to defeat a prospective claim on a set-off would not amount to a fraud The only circumstance in which the transferee of an overdue bill would be fixed with liability to allow a set-off in respect of a claim due from the transferor is the circumstance which would justify an inference of an agreement to set off by both parties of which the transferee has notice. (*Wadsworth, J.*) RAMAMURTHI *v.* NUKAYYA.

54 L W. 716 = 1941 M.W.N. 775

——S. 20—*Applicability and scope—Hand note—If negotiable instrument—Person receiving stamped and signed paper—Power to convert same into instrument.*

S. 20 of the Negotiable Instruments Act gives general authority to a person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person; it is open to a person who receives a blank inchoate instrument to complete it in favour of any person besides himself. A hand-note is a negotiable instrument, but if it is found as a fact that it was never negotiated, that would alter the position. (*Fazl Ali, J.*) HARI KANT JHA *v.* NATHU CHOUDHURY. **194 I.C. 433 = 13 R.P. 718 = 7 B.R. 774 = 1941 P.W.N. 563 = A.I.R. 1941 Pat. 504.**

——S. 27—*Applicability—Pronote by defendant for benefit by family—Fresh pronote in renewal by elder brother—Suit on against defendant after death of executant.*

Where the original debt was borrowed by the defendant for the benefit of the family and a pronote executed for it and it is renewed by the execution of a fresh pronote by the elder brother of the defendant and a suit is brought on it against the defendant after the death of the executant, S. 27 of the Negotiable Instruments Act can have no application and the defendant would be liable on the new pronote. (*Ghulam Hasan, J.*) SAMPAT SHUKUL *v.* SUBKARAN TEWARI.

196 I.C. 511 = 14 R.O. 187 = 1941 A W.R. (C C.) 319 = 1941 O.L R. 699 = 1941 O.W.N. 1112 = 1941 A L.W 928 = 1941 O A. 827.

——Ss. 27 and 28—*Promissory note—Execution by person as agent—Liability under—Surrounding circumstances—If can be looked at.*

When deciding whether the maker of a promissory note has executed it as the agent or the representative of another, the Court cannot look into the surrounding circumstances. It cannot look beyond what is stated in the instrument. In India, where a person executing an instrument in an Indian language, after giving his own description, adds that he is the agent of another, it means that he is acting as the other's agent in the matter of the execution of the document, and it is sufficient to exclude his personal responsibility. A promissory note in Tamil was executed in favour of *X*, by *S*, son of *V*, the husband and agent under power of-attorney of *P*, reciting that it was "in respect of the debt due by *Sh.*, my wife's junior paternal uncle." *X* sued *S* and *P* on the note claiming that *S* executed the note in his capacity of a power-of-attorney agent of his wife *P* with due authority to execute the suit note.

Held, that the instrument must be held to have been executed by *S* as agent of his wife. (*Leach, C.J., King, Somayya. Patanjali Sastri and Happell JJ.*) SIVAGURUNATHA PILLAI *v.* PADMAVATHI AMMAL.

I.L.R. (1941) Mad. 513 = 195 I.C 561 = 1941 M.W.N. 255 (2) = 53 L.W. 332 = 14 R.M. 204 = A.I.R. 1941 Mad. 417 = (1941) 1 M.L.J. 441 (F.B.).

——S. 28—Temple manager—Promissory note by—Suit on—Liability of temple. *See* TRUST—LIABILITY OF. **(1941) 2 M.L.J. 568.**

——Ss. 43 and 44—*'Parties to the transaction'—Meaning—Maker and payee—Cheque—Failure of consideration—Effect.*

'Parties to the transaction, in S. 43, Negotiable Instruments Act, denotes persons standing in immediate relation to each other within the meaning of S. 44. The maker and payee of a cheque must come under parties to the transaction and if it is so they are certainly under the Act, in immediate relation to each other. When the consideration for a cheque fails, according to S. 43, there is no obligation of payment between the drawer and payee. (*Davies.*) ABDAI ALI *v.* AKBAR ALI ABDUL ALI. **1941 A.M.L.J. 44.**

——Ss. 50 and 117—Scope—Promissory note by manager of Hindu joint family for money borrowed for family business—Endorsement of note without transfer of debt also—Remedy of endorsee—Decree against maker alone in suit based on note—Executability against other members of family. *See* HINDU LAW—JOINT FAMILY—MANAGER. **(1941) 2 M.L.J. 816.**

——Ss. 69 and 76 (d) — *Proper presentment not made to maker of hundi at place specified—Discharge of maker—Drawer and drawee of hundi same.*

S. 69 discharges the maker of a hundi, if a proper presentment is not made to him at the place specified in the hundi unless S. 76 (*d*) comes in to relieve the holder against the effect of S. 69 and if no damage could have occurred by the non-presentment. It is open however to the maker to prove that damage had been caused to him by the non-presentment and that consequently the holder is not entitled to take advantage of the provisions of S. 76 (*d*). Where the drawer and the drawee are one and the same person, no question of damage to the drawer arises on account of the non-presentation on the due date. (*Almond, J.C. and Mir Ahmad, J.*) KALU RAM *v.* FEROZ SHAH. **195 I.C. 185 = 14 R. Pesh 10 = A.I R. 1941 Pesh. 45.**

——S. 79—*Rate of interest different from that specified in note—If can be shown as the agreed rate.*

Where a promissory note mentions specific rate of interest evidence is not admissible to prove an agreement to pay a different rate of interest. S. 79 of the Negotiable Instruments Act provides that when a rate is provided, interest should be calculated at the rate specified. No question of awarding interest by way of damages can arise. (*Clarke, J.*) GOPAL MADHORAO *v.* ACHYUT SADASHEO. **196 I.C 493 - 14 R N. 108 = 1941 N.L J. 388 = A.I.R 1941 Nag. 271.**

——S. 85—*Cheque—Countermand of payment by customer—Payment by Bank thereafter—Liability of Bank.*

NEG. INSTRUMENTS ACT (1881), S. 87.

The duty and authority of a Bank to pay a cheque drawn on it by its customer are determined by countermand of payment. If the Bank negligently pays the amount of the cheque thereafter, it cannot debit the customer's account with that amount. Such payment is not a payment made in due course, so as to discharge the Bank. The Bank is not prote ted by its current account rule which states that "the Bank will register instructions from the drawer regarding cheques lost, stolen, etc., but cannot guarantee constituents against loss in such cases in event of a cheque being paid." The rule is intended, to apply to events happening prior to the time when a cheque reaches the Bank and is presented for payment, not to negligence committed by the Bank after presentation. (*Lort Williams, J.*) SYED MAHOMED YAKUB *v.* IMPERIAL BANK OF INDIA.

I.L.R. (1940) 2 Cal. 578=194 I.C. 330=13 R.C. 498=1941 Comp. C. 215=A.I.R. 1941 Cal. 110.

——**S. 87**—*Applicability—Promissory note—Material alteration by stranger—Holder not guilty of fraud or laches—If affected.*

S. 87 of the Negotiable Instruments Act would only apply to cases of fraudulent alteration by a party and to cases where due to his negligence it becomes possible for a stranger to make the alteration. The holder of a promissory note is not affected by a material alteration in the instrument when it has been made by a meddlesome or maliciously minded stranger and there has been no fraud or laches on the part of the holder (*Leach, C.J. and Krishnaswami Aiyangar, J.*) GOURO-CHANDRA DYANO SUMANTO *v.* KRISHNA CHARANA PADHI. **I.L.R. (1941) Mad. 295=1941 M.W.N. 85=53 L.W. 59=A.I.R. 1941 Mad. 383=(1941) 1 M.L.J. 153.**

——**Ss. 113 and 115**—*Applicability of S. 113 to "drawee in case of need"—Vendor taking bill of exchange to his own order—Property in goods—When passes to purchaser—Purchaser accepting bill but dishonouring it on presentation—Effect—Acceptance by drawee in case of need"—Effect.*

S. 113 does not apply to a "drawee in case of need" in a bill of exchange. Where the vendor takes a bill of exchange to his own order, the property in the goods cannot pass to the purchaser until he accepts the bill and meets it on presentation. But when the purchaser accepts the bill and dishonours it on presentation the contract between him and the vendor comes to an end and thereafter when the bill is accepted and met on presentation by the "drawee in case of need" the property in the goods passes to the "drawee in case of need" unless the purchaser can show some new contract between him and the vendor. (*Roberts, C. J. and Dunkley, J.*) S. M. BHOLAT *v.* YOKOHAMA SPECIE BANK, LTD. **A I.R. 1941 Rang. 270.**

——**S. 118**—Applicability—Suit on debt evidenced by promissory note—Presumption of consideration—If arises. *See* 1940 Dig., Col. 954. JAGJIVAN *v.* DHANJI SAKAR CHAND. **191 I.C. 617=13 R S. 154.**

——**S. 118**—*Denial of execution—Execution and consideration, if should be proved—Presumption under S. 118, if not sufficient.*

It cannot be said that when there is a denial of execution of a promissory note, the plaintiff is bound to prove not only execution but also the consideration. Once the document is proved the presumption provided by S. 118, Negotiable Instruments Act applies. (*Bennett, J.*) RISHI KESH *v.* BRIJ MOHAN LAL. **193 I.C. 863=13 R.O. 508=1941 O.L.R. 359=1941 O.W.N. 613=1941 A.W.R. (C.C.) 157=1941 A.L.W. 457=1941 O.A. 389.**

N. W. F. P. AGRIC. DEBT. REL. ACT (1939), S. 9.

——**S. 118**—*Presumption under—Admission of thumb impression on note—Absence of evidence for defence—Burden of proof.*

Where a defendant to a suit on promissory note admits the thumb-impression on the note but sets up fraud which he does not substantiate and there is no evidence for the defence, the Court is bound under S. 118, Negotiable Instruments Act, to draw a presumption that the note was for consideration. It is wrong to place the burden of proving the passing of consideration on the plaintiff in such a case and he is not bound to produce any such evidence. (*Ghulam Hasan, J.*) RAGHUNATH PRASAD SINGH *v.* NANGHUTTU.

196 I.C. 725=1941 A.L.W. 975=1941 A.W.R. (C.C.) 332=1941 O.L.R. 761=1941 O.A. 877=1941 O.W.N. 1161.

——**S. 120**—*Scope—Suit by indorsee of promissory note—Plea that part consideration represented interest on prior mortgage and therefore liable to be scaled down under Madras Act IV of* 1938—*If barred.*

In a suit on a promissory note by the endorsee thereof, the maker or defendant (debtor) is not barred by S. 120 of the Negotiable Instruments Act from pleading or setting up any defence open to the promisor under Madras Act IV of 1938. The section only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. It does not bar any defence which is independent of a plea that the instrument as originally made or drawn was invalid. (*Wadsworth and Patanjali Sastri, JJ.*) KARUPPA GOUNDAN *v.* T.R. NARAYANASWAMI & CO.

4 F.L.J. (H.C.) 398=54 L.W. 577=(1941) 2 M.L.J. 808.

NORTH-WEST FRONTIER PROVINCE AGRICULTURIST DEBTORS RELIEF ACT (IV OF 1939), S. 2, Proviso (1)—*Interpretation.*

The proviso does not contemplate that in a case of mortgaged property the equity of redemption should not be worth more than Rs. 500. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500. (*Almond, J.C. and Mir Ahmad, J.*) HABIB GUL *v.* GOPI CHAND

193 I.C. 560=13 R.Pesh. 64=A I R. 1941 Pesh. 16.

——**S. 5**—*Applicability,*

The meaning of S. 5 is that if any debt has at any time borne interest at more than 9 per cent. simple interest or compound interest of any sort, then relief must be granted under that section. So that even if the debt were actually bearing simple interest at less than 9 per cent. and there was a stipulation for the payment of interest over 9 per cent. or of compound interest the provisions of S. 5 will apply. (*Almond, J. C. and Soofi, J.*) JHANGI RAM *v.* ABDUL RAHMAN KHAN. **197 I.C. 104=A.I.R. 1941 Pesh. 81.**

——**S. 9**—*Burden of proof.*

The burden of proof in an application under S. 9 is on the judgment debtor. (*Almond, J. C. and Soofi, J.*) JHANGI RAM *v.* ABDUL RAHMAN KHAN.

197 I.C. 104=A.I.R. 1941 Pesh. 81.

——**S. 9**—*Decision under—Appeal.*

Where an application has not been accepted under S. 9 no appeal lies, but where an application under S. 9 has been accepted a new decree is passed which is open to appeal. (*Almond, J.C. and Soofi, J.*) JHANGI RAM *v.* ABDUL RAHMAN KHAN. **197 I C. 104=A.I.R. 1941 Pesh. 81.**

——**S. 9**—*Joint decree against more than one judgment-debtor—Application by one of them—Decree, if can be reopened.*

N. W. F. P. AGRIC. DEBT. REL. ACT (1939) S. 9.

A joint decree against more than one judgment-debtor can be reopened under S. 9 at the instance of any of them who happens to be an agriculturist for the benefit of all the judgment-debtors including those who are not agriculturists. (*Mir Ahmad, J.*) MAHOMED AZIM *v* BHAGAT RAM. **197 I.C. 183=A.I.R. 1941 Pesh. 85.**

——S. 9—*Order declining to interfere on application under—Appealability.*

An order declining to interfere on an application made under S. 9 is not a decision under S. 47, C. P. Code. Hence no appeal lies from such order. (*Almond, J.C.*) PANNA LAL *v.* NARINDAR NATH. **192 I.C. 716= 13 R. Pesh. 43=A.I.R. 1941 Pesh 8.**

NORTH-WEST FRONTIER PROVINCE COURTS REGULATION (I OF 1931), S. 7, Rules under Rr. 1 and 3—Appeal from sentence of death—Additional Judicial Commissioner on leave and Judge appointed in his place disqualified to hear appeal—Appeal, if can be heard by Judicial Commissioner sitting alone. *See* 1940 Dig., Col 955. MIRZA AKBAR *v.* EMPEROR. **67 I.A. 336=I L R. (1940) Lah. 612= I.L.R. (1940) Kar. P.C 302=1941 O.W.N 43= 43 Bom.L.R. 20=45 C.W N. 269= 43 P.L R 69=1941 A.L.W. 48=73 C.L.J. 252= 1941 A.Cr.C 11= 1940) 2 M.L.J. 811 (P.C.).**

——S. 30, proviso—*Scope—Order by Subordinate Judge under S. 476, Cr.P. Code—Appeal under S. 476 B—Forum.*

An appeal under S. 476 B, Cr. P. Code, from an order of the Subordinate Judge lies to the District Judge and not to the Senior Sub-Judge. The proviso to S. 30, N.-W. F. P. Courts Regulation, merely provides special circumstances in which some appeals can be preferred to a Subordinate Judge and even then the Subordinate Judge dealing with them is deemed to be the Court of the District Judge. (*Almond, J.C.*) GHULAM RASUL *v.* HAFIZ MAHOMED. **196 I.C. 760=A I.R. 1941 Pesh. 80.**

——S. 31 (1)(b)—*Redemption suit—Order of remand by first appellate Court—Appeal—C. P. Code, O. 43, R. 1 (u).*

The mortgagor mortgaged his immovable property for Rs. 8 and subsequently sold the equity of redemption for Rs. 25,000. In the suit for redemption by the purchaser,

Held, that a second appeal being competent under S. 31 (1) (*b*) the first appellate Court's order of remand was appealable under O. 43, R. 1 (*u*), C. P. Code. (*Almond, J.C. and Mir Ahmad, J.*) MT. MOTAI *v.* MOHD. AKBAR KHAN. **193 I.C. 871= 13 R. Pesh. 70=A.I.R. 1941 Pesh. 28.**

——S. 34—*Powers of revision—Questions whether petitioners were agriculturists and whether they had made such payments as to entitle them to relief—N.-W. F.P. Agriculturists Debtors' Relief Act.*

Questions whether the petitioners were agriculturists within the meaning of N.-W.F.P. Agriculturists Debtors' Relief Act (IV of 193)and whether they had made such payments as to entitle them to relief under the Act are purely questions of fact which are precluded from consideration by the Judicial Commissioner's Court under the provisions of S. 34, N.-W.F.P. Courts Regulation. (*Almond. J C.*) PANNA LAL *v.* NARINDAR NATH **192 I.C. 716=13 R. Pesh. 43=A.I.R. 1941 Pesh. 8.**

——S. 34—Valuation of suit below Rs. 1 000—Revision—If competent—Government of India Act, S 224. *See* 1940 Dig., Col. 955. GIAN CHAND *v.* MAHOMED YAKUB KHAN. **191 I.C. 658=13 R. Pesh. 34.**

NORTH-WEST FRONTIER PROVINCE LAW AND JUSTICE REGULATION, S. 34—

OATHS ACT.

Further appeal—Combination of value of each portion of suit—Permissibility.

The value for jurisdiction of the land in suit was Rs. 388 2 0 and the like value of the other property was Rs. 1900-8 0.

Held, that the value of each portion of the suit being below the prescribed limit, the two values could not be combined to make the case liable to further appeal under S. 34. (*Almond, J.C. and Mir Ahmad, J.*) MT. ZAMO *v.* HABIB KHAN. **194 I.C. 135= 13 R. Pesh. 74=A.I.R. 1941 Pesh. 33.**

NORTH-WEST FRONTIER PROVINCE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT (VI OF 1935), S. 2—*Sale by widow—Declaratory suit by reversioner—Maintainability.*

In all suits instituted after the passing of the N. W. F. P. Muslim Personal Law (Shariat) Application Act the Court must determine the rights of the parties under Mahomedan law and not according to custom. A reversioner is unknown to Mahomedan law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate. His right under custom is based on a *spes successionis*, which is also unknown to Mahomedan law. Hence, after the passing of the Muslim Personal Law (Shariat) Application Act, the reversioners have no *locus standi* to sue for declaration that alienation made by women holding life estate is not binding on them. A.I.R. 1940 Pesh. 52, Rel. on. (*Almond, J.C. and Mir Ahmad, J.*) AMIR FAHIM *v.* AJUN ISA. **193 I.C 480= 13 R.P. 57=A.I.R. 1941 Pesh. 15.**

——S. 27—*Applicability—Estate opening after Act.*

All questions of succession which come up before the Courts after Act VI of 1935 came into force must be decided according to Mahomedan Law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after. A.I.R. 1940 Pesh. 52, Foll. (*Almond, J C. and Mir Ahmad, J.*) MT ZAMO *v.* HABIB KHAN. **194 I C 135= 13 R. Pesh, 74=A.I.R. 1941 Pesh. 33.**

——S. 27—Applicability—Estate opening before it. *See* 1940 Dig., Col. 955. FAZL HAQ *v.* DAWAR SHAH. **192 I.C. 343=13 R.Pesh 37.**

NORTH WEST FRONTIER PROVINCE RENT ACT (XII OF 1881), Ss. 31, 32 and 33—Relinquishment—Validity—Conditions. *See* 1940 Dig., Col 955. DURGA PRASAD *v.* CHUNNI. **192 I.C. 668= 13 R.A. 354.**

OATHS ACT (X OF 1873), S. 9—"Any party to an judicial proceeding"—If includes party's pleader. *See* 1940 Dig., Col. 956. MATHURA PRASAD *v.* SITA RAM. **15 Luck. 686.**

——S 10—*Offer accepted—Revocation of.*

The offer by a party to a suit as to being bound by a statement on oath of his opponent, on being accepted by the latter, is in the nature of a binding contract. The person who makes the offer cannot, therefore, resile from the contract. (*Bhide, J.*) ALLAH RAKHA *v.* PUNNUN. **196 I C. 122=14 R.L. 128=43 P L R. 38= A.I.R. 1941 Lah. 173.**

——S. 11—Construction—Application under O. 21, R. 100—Special oath taken by applicant—Order allowing application—Appeal by other side—Competency—Oath taken in claim—If conclusive in suit also. *See* 1940 Dig., Col. 956. RANGANATHA AIYAR *v.* JAVAVELU MUDALIAR. **193 I.C. 591=13 R.M. 697= (1940) 1 M.L.J. 685.**

OATHS ACT (AMENDMENT ACT XXXIX OF 1939)—*Boy witness—Oath not administered—Admissibility of evidence.*

OPIUM ACT (1878), S. 15.

It is not necessary to administer oath to a lad of ten years who is incapable of appreciating the significance of oath. It is clear from the provisions of Act XXXIX of 1939 that the evidence of such a boy is admissible in evidence. (*Agarwal and Madeley, JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 O.A. 943 = 1941 A.W.R. (C.C.) 354 = 1941 O.W.N. 1246.**

OPIUM ACT (X OF 1878), S. 15 and Cr. P. Code, Ss. 102 and 103 —*Search under S. 15—Procedure to be followed—Inapplicability of S. 102, Cr. P. Code, to searches of a person under S. 15, Opium Act—Irregularity in searches—Effect of.*

According to the Opium Act, all searches under S. 15 of the Act are to be in accordance with the provisions of the Code of Criminal Procedure. There is, however, no provision in the Code relating to searches of persons, except S. 102 (3) which refers to persons in or about a place liable to search. S. 103 deals only with 'places to be searched' and it has no application to searches under the Opium Act. Irregularity in the search does not necessarily invalidate the proceedings. It always affords a ground for scrutiny, and if, after careful scrutiny, the Court comes to the conclusion that an excisable article was recovered from the possession of the accused, then the conviction is treated as a sound one. (*Mosely, J.*) AUNG KIM SEIN *v.* THE KING.

1941 Rang L.R. 552 = A.I.R. 1941 Rang. 333.

ORDINANCE—*Interpretation of—Constitution of Courts.*

When an ordinance has prescribed without reserve that the Court shall consist of two or more Judges, it seems impossible that a rule should survive which prescribes that in a certain event the Court shall consist of two Judges and a non-Judge, whether Magistrate or Cadi. (*Lord Atkin.*) THE HEIRS OF PRINCE MOHAMED SELIM *v.* THE ATTORNEY GENERAL OF PALESTINE. **197 I.C. 48 = 1941 A.W.R. (Rev.) 747 = 1941 O.A. 709 = A.I.R. 1941 P.C. 99 (P.C.).**

ORISSA MONEY-LENDERS ACT (III OF 1939), S. 14—*Appeal—Order fixing valuation of property—Appeal—C. P. Code, S. 47.*

An order under S. 14 of the Orissa Money-Lenders Act fixing the valuation of a property is not appealable; there is no provision in the Act for an appeal against such an order. Nor is the order open to appeal under S. 47, C. P. Code, as it is not an order which finally determines the rights of the parties. (*Dhavle and Chatterji, JJ.*) BANKA DAS *v.* SRINIVAS PADHI. **7 Cut.L.T. 41 = A.I.R. 1941 Pat. 616.**

——**S. 14**—*Applicability and scope—Rules for estimating value not prescribed under S. 26—Effect of—Duty of Court to estimate value—Execution if to be stayed indefinitely until making of rules.*

S. 14 of the Orissa Money-Lenders Act is mandatory, but the provisions of the section cannot be applied when the rules for estimating the value of the property under that section have not been prescribed under S. 26 of the Act. In the absence of any rules made by the Provincial Government under S. 26, the Court has to estimate the value according to the rules of justice, equity and rood conscience. The Court is not bound to await the framing of the rules and to stay execution indefinitely. (*Dhavle and Chatterji, JJ.*) BANKA DAS *v.* SRINIVAS PADHI. **7 Cut.L.T. 41 = A.I.R. 1941 Pat. 616.**

——**S. 26**—Scope—Rules not made under—Effect—Duty of Court—Execution—If to be stayed indefinitely. *See* ORISSA MONEY-LENDERS ACT, S. 14. **7 Cut.L.T. 41.**

OUDH CIVIL RULES, Ch. VI, R. 279.

ORISSA TENANCY ACT (VI OF 1913), Ss. 18 and 127—*Scope and effect of—Jurisdiction of Revenue Officer—Rent fixed at rate—Terms of agreement ignored—Effect—Settlement of rent—If without jurisdiction and of no effect.*

By S. 118 of the Orissa Tenancy Act the Revenue Officer is enjoined to settle fair and equitable rents for tenants of every class and, therefore, he must record rents even for the re-claimed lands, if any, whether the landlord has moved the Collector to eject the tenants under S. 61 or not. The jurisdiction to assess and determine the rent is an entirely different thing from any error committed in fixing the amount of rent, because the officer who has jurisdiction to decide a matter has jurisdiction to decide it rightly or wrongly. He may take a wrong view of the facts, may misinterpret a kabuliyat, ignore the terms of a compromise arrived at by the parties and fix a rent which he considers to be the proper rent. If the officer makes a mistake, the landlord or the raiyat who is aggrieved thereby has the remedy of a suit in a Civil Court under S. 126 to be instituted within 6 months of the date of the certificate of the final publication of the record-of-rights. If no such suit is instituted, the decision of the Revenue Officer becomes final, and by reason of S. 127, the rent settled and entered in the record-of-rights finally published shall be deemed to have been correctly settled and the landlord cannot claim rent for the lands at a rate higher than what is stated in the record-of rights finally published. It cannot be said that because the Revenue Officer in fixing the rent has ignored the terms of an agreement between the parties, his decision settling the rent is without jurisdiction and therefore can be ignored. (*Harries, C.J. and Manohar Lall, J.*) SAMANTA RADHA PRASANNA DAS *v.* BARENDRA KRISHNA DAS. **20 Pat. 527 = A.I.R. 1941 Pat. 617.**

——**S. 204 (2) and (3)**—Question of title—Rent suit of value below Rs. 100 before Deputy Collector—Transferee impleaded as party defendant—Decision—If involves question of title—Appeal—Jurisdiction—Collector—Revision to High Court from Collector's decision in appeal—Competency. *See* 1940 Dig., Col. 958. BIDYADHAR MISRA *v.* RADHASHYAM PANDA. **196 I.C. 577 = 14 R.P. 211 = 8 B.R. 41 = 22 Pat.L.T. 768 = A.I.R. 1941 Pat. 353.**

OUDH CHIEF COURT RULES, Ch XX, R. 7—Sealing of judgments—Nature of Bench reader's duty—Sealing if creates finality. *See* 1940 Dig. Col. 958. RAJ KUMARI *v.* EMPEROR. **15 Luck. 703.**

OUDH CIVIL RULES, Vol. I, Paras. 53, 54 and 55—*Return of documents—Proper stage.*

Where a document has been filed and duly admitted, it should not be returned before the conclusion of the case. (*Ghulam Hasan, J.*) SHEORAJ *v* GANGA PRASAD. **193 I.C. 675 = 13 R.O. 502 = 1941 A.L.W. 519 = 1941 O.L.R. 361 = 1941 A.W.R. (Rev.) 372 = 1941 O.A. 399 = 1941 R.D. 328 = 1941 A.L.W. 462 = 1941 O.W.N. 618 = A.I.R. 1941 Oudh 395.**

——**Vol. I, Paras. 53 to 55**—*Return of documents—Time for appeal not expired—Legality.*

Where the documents admitted in evidence are returned even before the expiry of the time for filing appeals, the procedure is wholly irregular. (*Ghulam Hasan, J.*) MATA DIN *v.* IMDAD KHAN. **197 I.C. 158 = 1941 O.A. 886 = 1941 A.W.R. (Rev.) 1005 = 1941 O.W.N. 1179.**

——**Ch. VI, R. 279, Sub R. (51)**—Applicability—Claim for return of trust money for liquidator of Bank. *See* 1940 Dig., Col. 959. DINSHAW & CO. *v.* KRISHNA

OUDH CIVIL RULES, Ch. VII, R. 289.

PIARY. 16 Luck. 241 = 1941 Comp C 138 = 191 I.C. 178 = A.I.R. 1941 Oudh 126.

——Ch. VII, R. 289—Allowing of actual costs—Justifying circumstances. *See* 1940 Dig., Col. 959. BANSIDHAR *v.* RAM CHARAN. **16 Luck. 44.**

OUDH COURTS ACT (IV OF 1925). S. 12 (2) — *New point in third appeal—If can be raised.*

In an appeal under S. 12 (2) of the Oudh Courts Act a point not raised before the learned single Judge cannot be allowed to be entertained for the first time. (*Ghulam Hasan and Madeley, JJ.*) MIR MOHAMMAD HUSSAIN *v.* MOHAMMAD HABIB KHAN.

195 I C. 784 = 14 R O. 121 = 1941 A.W R. (Rev.) 661 = 1941 R D 711 = 1941 O.L.R. 618 = 1941 O A. 686 = 1941 O.W.N. 979 = A.I.R. 1941 Oudh 526.

OUDH LAWS ACT (XVIII OF 1876, S 8—'Town'—What is included in—Land outside Abadi—If come under S 8. *See* 1940 Dig., Col. 960 KHADIM ALI *v* JAGANNATH. 16 Luck 230 = 191 I C 166 = A.I.R. 1941 Oudh 77

——**S. 9**—*Shamilat lands—Meaning—Sale of plots in separate patti and in shamilat patti to relative co-sharer in different patti and also in shamilat patti—Right of co-sharer in same patti and also in another patti and shamilat patti to pre empt.*

It cannot be stated as a general proposition that shamilat land only means land which though undivided, pertains to the same patti, or, putting it in another form, that each patti includes a portion of the shamilat land. Where plots in a patti and in shamilat patti are sold to a relative of the vendor who is a co-sharer in a different patti and in the shamilat patti, a co-sharer in the same patti as well as another patti and shamilat patti cannot pre-empt the land sold in the shamilat patti, in as much as the vendee's right therein are superior for the purpose of pre-emption because he was a relative of the vendor and partial pre emption not being permissible, his suit for pre-emption is bound to be dismissed (*Bennett and Madeley, JJ.*) GAURI SHANKER *v.* BASHIR AHMAD. 1941 O.W.N. 1306 = 1941 A W.R. (C.C) 388 = 1941 O A. 996.

——**S. 9**—*Under proprietor*—Pukhtadar, *if one.*

Pukhtadar is a class of under proprietor. (*Bennett, J.*) SHEO DAT TEWARI *v.* BHAGWAT DAS. 1941 O.W.N. 1276 = 1941 A.W R. (C C) 385 = 1941 O.A. 972

——**S. 9 (1)**—'*Sub-division*'—*Construction—Applicability of S 9 (1).*

The word 'sub-division' in Cl. (1) of S. 9 of the Oudh Laws Act should be literally construed so as to include an under proprietary khata which is a unit or component part of an under-proprietary tenure in a mahal. So when the property sold forms part of an under-proprietary khata, and both the pre-emptor and the vendee are co-sharers in that khata, they are co-sharers in a sub-division of the under proprietary tenure under this first clause. (*Bennett, J.*) SHEO DAT TEWARI *v.* BHAGWAT DAS. 1941 O.W.N. 1276 = 1941 A.W.R. (C.C.) 385 = 1941 O.A. 972.

——**S 9, Cl. (4)**—Rights of pre emption—Transfer of proprietary property and under-proprietary tenure. *See* 1940 Dig., Col 961. KHADIM ALI *v.* JAGANNATH 16 Luck. 230 = 191 I.C. 166 = A.I.R. 1941 Oudh 77.

——**S. 9 A**—Sale of several items—Right to pre-empt with reference to one of them—Pre emption on payment of entire price—If can be allowed. *See* 1940 Dig., Col., 961. MAHA PRASAD *v.* DUKH HARAN NATH. A.I.R. 1941 Oudh 18.

OUDH RENT ACT (1886), S. 5.

——**S. 10**—*Liability to pre-emption—Transfer by Court of law in execution of decree for specific performance.*

A sale deed executed by Court, in execution of a decree for specific performance is liable to pre-emption like any other sale, for the deed is only executed by the Court on behalf of the party who is bound to execute it. It falls within the purview of the Oudh Laws Act and is liable to pre-emption. (*Thomas, C.J. and Ghulam Hasan, J.*) RAM AVADH PANDE *v.* GHISA PANDE. 195 I.C. 880 = 14 R O. 128 = 1941 R D. 782 = 1941 A.L.W. 871 = 1941 O.L.R 630 = 1941 A W.R. (Rev.) 760 = 1941 O.A. 725 = 1941 O W.N. 1021 = A.I.R. 1941 Oudh 611.

——**S 13 (c)**—Power of Court to fix market value—When arises—Fictitious price—Vendee, if entitled to conveyance charges or interest. *See* 1940 Dig., Col. 961. JAI KRISHNA *v.* BRIJPAL SINGH. **16 Luck 1.**

OUDH RENT ACT (XXII OF 1886), Ss. 3, 108 (2) and 127—*'Produce', if includes fish—Land in S 127 if includes produce of land—Suit for money due in respect of fishery rights—If lies under either S. 108 (2) or S. 127—Jurisdiction of Civil Courts, if barred.*

It is doubtful whether the word 'produce' in S. 3 of the Oudh Rent Act was not intended to be restricted to vegetable produce only. In case of fishes in a tank it may be possible to say that they are the produce of that tank, assuming that no water flows in from or out to other places where they may be produced. But in the case of a river it is impossible to say that the fishes found in it have been produced in any particular area. The expression 'Land' in S. 127 of the Act cannot include the produce of the land. Hence a suit for money due in respect of fishery rights in a river cannot lie either under S. 108 (2) or S. 127 of the Act. Such a suit in the Civil Court is not barred by S 108 of the Act. (*Bennett and Madeley, JJ.*) THAKUR *v.* JAGDAMBIKA PRATAP NARAIN SINGH. 19 I C. 237 = 14 R.O 141 = 1941 R D. 883 (2) = 1941 O.W N. 1065 = 1941 O A. 757 = 1941 O L.R. 660 = 1941 A.W.R. (Rev.) 823.

——**Ss. 3 (10) and 20**—Muafidar, if a tenant under S. 3 (10)—S. 20 if applies to him. *See* 1940 Dig., Col. 961. PARTAB BAHADUR *v* UMA NATH BUX SINGH. 16 Luck. 145 = A.I R. 1941 Oudh 27.

—— **Ss 5 and 127**—*Transfer of occupancy rights created under S. 5—Rights created by decree—Distinction—Transferor if can eject transferee under S. 127.*

There is a clear cut distinction between a transfer of occupancy rights created under S. 5 of the Rent Act and those created by a decree of Court. Under S. 5 of the Rent Act a transfer of occupancy rights has been declared to be void *ab initio*. In the case of a transfer created either by an agreement or by a decree of a Court a condition against alienation has always been held to be one which is inserted for the benefit of the superior proprietor, who alone has the right to question it, but, as between the transferor and transferee, it is not open to the transferor to raise the question of the invalidity of the transfer. It is open to the landlord to refuse to recognise the transfer and treat the transferee as a trespasser and eject him but the transferor is bound by the transfer and is consequently estopped from maintaining a suit against the transferee treating him as a trespasser liable to ejectment under S. 127 of the Rent Act. (*Ghulam Hasan and Madeley, JJ.*) MIR MOHAMMAD HUSAIN *v.* MOHAMMAD HABIB KHAN. 195 I C 784 = 14 R.O. 121 = 1941 A.W.R. (Rev.) 661 = 1941 R D. 711 = 1941 O.L.R. 618 = 1941 O.A. 686 = 1941 O.W.N. 979 = A.I.R. 1941 Oudh 526.

OUDH RENT ACT (1886), S. 7-A.

——**S. 7-A**—*Auction sale of zamindari house—Subsequent acquisition of ex-proprietary rights by vendor—Effect.*

Where the ownership of a zamindari house has passed by an auction sale, the subsequent acquisition of ex-proprietary rights by the vendor, cannot create a right in him to remain in possession of the house as a tenant. (*Ghulam Hasan, J.*) SHEORAJ *v.* GANGA PRASAD.

193 I.C. 675=13 R.O. 502=1941 O.L.R. 361=1941 A.L.W. 519=1941 A.W.R. Rev.) 372=1941 O.A. 399=1941 R.D. 328=1941 A.L.W. 462=1941 O.W.N. 618=A.I.R. 1941 Oudh 395.

——**Ss. 14 and 15**—Failure to deposit purchase money within time fixed by decree—Appeal contesting amount—Competency. *See* 1940 Dig., Col. 962. JAI KRISHNA *v.* BRIJPAL SINGH. **16 Luck. 1.**

——**Ss. 19 and 19-A**—*Remission of revenue—If entails automatic remission in rent.*

The fact that there is a remission in revenue does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered. (*Agarwal, J.*) DAYA SHANKAR *v.* BADRI PRASAD. **193 I.C. 150=13 R.O. 431=1941 A.W.R. (Rev.) 162=1941 R.D. 97=1941 O.L.R. 256=1941 O.W.N. 262=1941 O.A. 218=A.I.R. 1941 Oudh 257.**

——**S. 32-B**—*If applies to groves.*

S. 32-B of the Oudh Rent Act does not apply to groves. (*Harper, S.M. and Sathe, J.M.*) LAL NARSINGH PRATAP BAHADUR SINGH *v.* JAGESHAR SINGH. **1941 A.W.R. (Rev.) 477=1941 O.A. (Supp.) 436=1941 R.D. 380 (2)=1941 O.W.N. 697.**

——**S. 32-B**—*Suit under—Assertion of under-proprietary rights as plea in defence—Long standing entry in revenue papers inconsistent with the plea—Effect.*

Where in a suit under S. 32-B of the Oudh Rent Act the defendants assert the acquisition of under-proprietary rights as a plea in defence, their mere assertion without any explanation as to how such rights arose, cannot carry any weight, specially when the patwari paper's entries for over 80 years past which had been verified at two settlements are inconsistent with this assertion (*Harper, S.M. and Sathe, J.M.*) LAL NARSINGH PRATAP BAHADUR SINGH *v.* JAGESHAR SINGH. **1941 A.W.R. (Rev.) 477=1941 O.A. (Supp.) 436=1941 R.D. 380 (2)=1941 O.W.N. 697.**

——**S. 32-B**—*Suit under—Limitation—Non-payment of rent—Adverse possession.*

Under S. 32-B, Oudh Rent Act, a suit can be brought at any time during the continuance of the tenancy and even within three years after the tenancy has come to an end. The mere fact that the defendants have not paid any rent for over 80 years past cannot take away the right of the plaintiff to have rent fixed on the plots in question so long as the tenancy continues to exist. Mere non payment of rent by defendants cannot constitute them, persons holding possession adversely to the plaintiff. (*Harper, S.M. and Sathe, J.M.*) LAL NARSINGH PRATAP BAHADUR SINGH *v.* JAGESHAR SINGH. **1941 A.W.R. (Rev.) 477=1941 O.A. (Supp.) 436=1941 R.D. 380 (2)=1941 O.W.N. 697.**

——**S. 61 and C. P. Code, S. 152**—*Consent decree—Clerical mistake—Amendment—Notice—Necessity.*

Where a decree under S. 61 of the Oudh Rent Act is passed on admission by the defendant but owing to a clerical error a lower amount is entered in the decree and aqt judgment-debtor pays only that amount on the last day, and the decree-holder gets the decree amended and executes it by ejectment of the defendant, the latter cannot complain of the absence of notice of amendment of the decree, for no such notice is necessary. Moreover being a consent decree the judgment-debtor could have no cause to show against the amendment. The proceedings in ejectment are quite in order. (*Shirreff, J.M.*) SHEO NARAIN *v.* SUNDER LAL.

OUDH RENT ACT (1886), S. 108.

1941 A.W.R. Rev.) 565 (2)=1941 R.D. 590=1941 O.W.N. 848 (1)=1941 A.L.J. (Supp.) 103=1941 O.A. (Supp.) 496 (2).

——**S. 61**—Decree under—Execution after new Tenancy Act—Proper provision of law. *See* U. P. TENANCY ACT, SS. 296, 181 (1) AND 182 (1) AND OUDH RENT ACT, S. 61,

1941 A.W.R. (Rev.) 575 (1).

——**Ss. 61 and 145**—Decree under S. 61—Execution—Limitation—New Tenancy Act coming into force after decree. *See* U. P. TENANCY ACT, S. 296 AND OUDH RENT ACT, SS. 61 AND 145.

1941 A.W.R. (Rev.) 1063.

——**Ss. 61 and 127**—Ejectment under S. 61—Subsequent decree under S. 127—Tenant if can claim reinstatement under S. 294, U. P. Tenancy Act. *See* U. P. TENANCY ACT, S. 294 AND OUDH RENT ACT, SS. 61 AND 127. **1941 R.D. 607.**

——**S. 61**—Execution proceedings under — New Tenancy Act coming into force—Law applicable. *See* U. P. TENANCY ACT, S. 296 AND OUDH RENT ACT, S. 61. **1941 R.D. 523.**

——**S. 61**—*Payment of arrears of rent—Proper mode—Payment out of Court, if recognizable.*

Under S. 61 of the Oudh Rent Act the arrears have to be paid into Court and payment out of Court cannot be recognized. (*Sathe, J.M.*) AMJAD ALI *v.* MAHESHWAR NATH. **1941 A.W.R (Rev.) 481=1941 O.A. (Supp.) 440=1941 R.D. 429.**

——**S. 61 (2)**—*Court's duty under—Admission by defendant—If relieves Court.*

Under S. 61 (2) the Court cannot specify in the decree anything more than what is permissible according to the precise language of the clause notwithstanding any admission on the part of the defendant tenant (*Harper, S.M and Sathe, J.M.*) CHHATRAPAL SINGH *v.* RAM ADHIN. **1941 A.W.R. (Rev.) 491=1941 R.D. 483=1941 O.A. (Supp.) 450.**

——**S. 61 (3)**—Extension of time—Power of Court—Illiteracy if a ground. *See* 1940 Dig., Col. 964. RAGHUBIR SAHAI *v.* KANCHAN. **1941 A.W.R. (Rev.) 58=1941 O.A. (Supp.) 45.**

——**S. 62 A and U. P. Tenancy Act (1939) Ss. 181, 182**—*Ejectment decree of 1937—If executable under new Tenancy Act.*

Where an ejectment decree under S. 62 A of the Oudh Rent Act read with S. 108 (4) passed in 1937 remained inexecutable owing to appeals and owing to the Stay of Proceedings Act, are capable of being executed under Ss. 181 182 of the new U. P. Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) RAJESWAR BALI *v.* MATA PRASAD. **1941 O.W.N. 715=1941 O.A. (Supp.) 367=1941 A.W.R. (Rev.) 437=1941 R.D 408=1941 A.L.J. (Supp.) 97**

——**S. 108**—*Bar of Civil suit—Declaration as to party being a muafidar.*

There is no provision in the Oudh Rent Act under which a Revenue Court is given exclusive jurisdiction to determine whether a party to a suit is or is not a muafidar, and consequently a suit may be brought in the Civil Court for a declaration on this point where the existence of a rent-free grant is denied. (*Bennett, J.*) AZIZ AHMAD KHAN *v.* INAYAT KHAN.

1941 O.W.N. 1101=1941 A.W.R. (Rev.) 879=

OUDH RENT ACT (1886), S. 108

1941 R.D. 851=1941 O.A. 805=196 I.C. 673=1941 O.L.R. 738.

——**S. 108**—*Scope of—Suit to declare decree for rent not binding—Absence of proper representation—Maintainability.*

S. 108 of the Oudh Rent Act bars the jurisdiction of the Civil Court in respect of some suits. But the jurisdiction of the Civil Court is not barred where a suit is brought to declare a decree for rent not binding on the plaintiffs in as much as they were not properly represented in the Revenue Court. (*Agarwal, J.*) KALE KHAN *v.* MASUD HUSAIN. **192 I.C. 849 = 13 R.O. 414=1941 O.W.N. 112=1941 A.W.R. (Rev.) 304=1941 O.L.R. 236=1941 A.L.W. 96=1941 R.D. 459=1941 O.A. 64=A.I.R. 1941 Oudh 223.**

——**S. 108 (2)**—Suit under—Maintainability—Suit for money due in respect of fishery rights. *See* OUDH RENT ACT, SS. 3, 108 (2) AND 127.

1941 O.W.N. 1065.

——**S. 108 (10) and Civil Procedure Code, O. 21, R. 100**—*Scope and effect of S. 108 (10), Difference between S. 108 (10) and O. 21, R. 100—C. P. Code—Dispossession of third person in ejectment—Remedy under O 21, R. 100, if available.*

S. 108 (10) of the Oudh Rent Act only refers to a suit of a certain description being decided only under the Oudh Rent Act in a Revenue Court. It does not mean that if there is any remedy other than by a suit it cannot be adopted. There is a clear distinction between S. 108 (10) and O. 21, R. 100, C. P. Code The former prescribes a remedy when action has been taken by a landlord to eject a tenant. To justify this remedy there must have been a direct and intentional conflict of interest between the landlord and the tenant. For the purpose of R. 100 of O. 21, C. P. Code, the action taken by the landlord must have been against a third person. Hence where a third party has been dispossessed in execution of an ejectment decree, S. 108 (10) of the Oudh Rent. Act does not bar an application under R. 100 of O. 21, C. P. Code, by the aggrieved party. (*Harper, S. M.*) SYED MAHOHED RAM *v.* ABHILAKH

1941 R.D. 263=1941 A.W.R. (Rev.) 348=1941 O.A. (Supp.) 262=1941 A.L.J. (Supp.) 76.

——**S. 108 (10)**—*Suit under—Facts to be proved by plaintiff.*

Under S. 108 (10) of Oudh Rent Act, it is only a tenant who can sue for recovery of possession of property. Hence it is incumbent on a plaintiff in such a suit not only to prove his previous possession but also that his possession was that of a tenant. (*Harper, S. M.*) BUDH RAM *v.* KUNJ BEHARI PRASAD.

1941 O.A. (Supp.) 343=1941 R.D. 288.

——**S. 108 (15)**—*Suit for profits under—Failure of* lambardar *to produce accounts—Decree on basis of gross rental, if justified.*

There is an obligation cast upon the *lambardar* to do his best to realise the profits of the property. It is equally his duty to keep clear accounts of the collections made by him, and it is not open to him, in a suit for profits brought against him by a co-sharer, to plead, in the absence of any accounts that the suit should be decreed on the basis of actual collections proved by the *patwari*. In such a case, where the *lambardar* has been shown to have been grossly negligent in the matter of collections, a suit for profits by a co-sharer could be decreed on the basis of gross rental. (*Ghulam Hasan, J.*) RAJ BAHADUR SINGH *v.* PIRTHVIPAL SINGH.

1941 O.W.N. 1052=1941 O.A. 749=1941 A.W.R. (Rev.) 815 (2)=1941 R.D. 800.

OUDH RENT ACT (1886). S. 145.

——**S. 116**—*Appeal—Restoration of application to restore suit under S. 61 decreed* ex parte.

Only such orders are appealable under S. 116, Oudh Rent Act, as are covered by S. 104 (1) and O. 43, R. 1 of the C. P. Code. It follows that an order restoring to hearing an application for restoration of a suit under S. 61 of the Oudh Rent Act which has been decreed *ex parte* is not appealable. (*Harper, S.M. and Shirreff, J.M.*) NOKHEY LAL *v.* SHYAM SUNDER NATH KAUL. **1941 R.D. 451=1941 O.A (Supp.) 447=1941 A.W.R. (Rev.) 488.**

——**Ss. 116 and 119 and Civil Procedure Code, S. 104 and O. 43, R. 1**—Right of appeal provided by Ss. 116 and 119—If independent of C. P. Code. *See* 1940 Dig, Col. 965. MULA *v.* RAM DULARI.

16 Luck. 27.

——**S. 119**—Scope and applicability—Order passed by Revenue Court in execution—If appealable. *See* 1940 Dig., Col. 966. MULA *v.* RAM DULARI. **16 Luck. 27.**

——**S. 127**—*Acceptance of rent after suit under—Effect.*

Acceptance of rent after the institution of a suit under S. 127, Oudh Rent Act, would not prejudice the landlord's case. It is clearly not accepted as from a legally admitted tenant, but as from a person who, having been in occupation, was liable to pay it. (*Bennett, J.*) DILASA *v.* SUJAN KUER. **196 I C 704=1941 A.W.R. (Rev.) 999=1941 O.L.R. 758=1941 O.A. 880=1941 O.W.N. 1163.**

——**S. 127**—Applicability—Perpetual lessee continuing in possession after ejectment decree. *See* 1940 Dig., Col. 966. KANIZ BAQAR *v.* LAKHRAJI.

191 I.C. 142=A.I.R. 1941 Oudh 70.

——**S 127**—'Land'—If includes produce of land—Suit for money due in respect of fishery rights—Maintainability. *See* OUDH RENT ACT, SS. 3. 108 (2) AND 127.

1941 O.W.N. 1065.

——**S. 127**—*Liability to ejectment—Grove losing its character as grove—Tenants* bila tasfia

Where the plaintiff is found to be the owner of the plots in dispute and the defendants are found to have lost their right either as groveholders by reason of the plot losing its character as grove or by reason of the fact that they are entered as mere tenants *bila tasfia* the plaintiff is entitled to eject them as trespassers and recover possession of the plots in dispute. (*Ghulam Hasan, J.*) MAHOMED TAQI *v.* EWAZ MAHOMED.

196 I C. 421=14 R.O. 165=1941 R.D. 802=1941 O.L.R. 681=1941 O.A. 753=1941 A.W.R. (Rev.) 819=1941 O.W.N. 1057.

——**S. 127**—*Suit under—Encroachment on and possession of adjoining land for over 12 years—Relief, if could be given.*

Where for over 12 years a tenant encroaches or remains in possession of a plot adjoining his holding, the tenant could not be ejected from it as a trespasser, as the plot had become an integral part of his holding. Though it could be demarcated, there could be no separate rent assessed on it. (*Harper, S.M.*) KARAMRAJ KUER *v.* RAM NARAIN SINGH.

1941 R.D. 336 (2)=1941 O.W.N. 675 (2)=1941 A.W.R. (Rev.) 443=1941 O.A. (Supp.) 373.

——**S. 141 (as amended in 1934)**—Interest falling due prior to amendment—Rate, if affected by amendment. *See* 1940 Dig., Col. 967. LAL CHANDRA MOOL SINGH *v* TEJ BAHADUR SINGH. **16 Luck. 36.**

——**S. 145**—*Applicability—Decree for more than Rs. 500—Apportionment of liability of each of the judgment-debtors in the execution application—None liable for more than Rs. 500—Limitation for execution.*

OUDH RENT ACT (1886), S. 151.

Where a decree obtained against several defendants exceeds Rs. 500 but the decree-holder in his application for execution apportions the liability of each of the judgment-debtors and specifies the amount for which each of them is liable and none of them are liable for more than Rs. 500, it cannot lead to the inference that there were several decrees and each of them was for a sum less than Rs. 500. There is only one decree in the case and that for more than Rs. 500 and hence the first portion of S. 145, Oudh Rent Act, cannot apply to the execution of such a decree and limitation for its execution is as provided by Art. 182, Limitation Act. (*Ghulam Hasan, J.*) HARBANS SINGH *v.* RAMCHANDRA. **197 I.C. 12=1941 O.W.N. 1232=1941 A.W.R. (Rev.) 1057=1941 O.A. 935.**

——S. 151 and United Provinces Tenancy Act (1939), S. 243—*Execution of partially satisfied decree after new Act coming into force—Law applicable.*

The restriction contained in S. 151 of the Oudh Rent Act forbidding the issue of a process of execution against immovable property unless the movable property was exhausted, no longer finds a place in the new Act. It must be held, therefore, that where a decree has not been satisfied in full at the commencement of the new Tenancy Act, the execution of that decree must now be governed by the provisions of the new Tenancy Act which are contained in S. 243 of that Act, namely, that the procedure provided by O.21, C. P. Code, should be resorted to for the execution of the decree free of any restrictions or limitations which were placed by S. 151 of the Oudh Rent Act. (*Ghulam Hasan, J.*) GAJADHAR *v.* BADRI PRASAD.
197 I.C. 85=1941 O.L.R. 817=1941 O.A. 889=1941 A.W.R. (Rev.) 1008=1941 O.W.N. 1177.

——S. 151—*Onus—Objection under—Late stage—Maintainability.*

It is for the decree-holder to show in the first instance under S 151 of the Oudh Rent Act, that satisfaction of the decree cannot be obtained against the movable property, but very title evidence, like the filing of an affidavit would be enough to shift the onus on to the judgment-debtor. A judgment-debtor should not be allowed to escape liability by putting forward for the first time after 3 years after the decree an objection under S. 151 of a vague nature which is not supported by any evidence. (*Bennett, J.*) DEPUTY COMMISSIONER, PARTABGARH *v.* SHAHZAD KOER.
16 Luck. 573=194 I.C. 437=13 R O. 611=1941 R.D. 352=1941 O W.N. 638=1941 O.A. 416=1941 A.W.R. (Rev.) 385=A.I.R. 1941 Oudh 374.

——S. 154—*Suit for under-proprietary rent—Mortgagee of under-proprietor not made party—Superior proprietor purchasing property in execution of rent decree—If can claim priority against mortgagee.*

No doubt under S. 154 of the Oudh Rent Act where an under-proprietor creates any incumbrance and fails to pay to the proprietor all or any part of the rent subsequently accruing in respect of the land subject to the incumbrance, the incumbrancer shall be liable to pay to the proprietor the whole or part of that rent as the case may be. But where the superior proprietor sues the under-proprietor alone for arrears of rent without making the mortgagee a party to the suit, obtains a decree against him and in execution of that decree purchases the property put up for sale, the decretal amount is satisfied and the liability to pay rent by the mortgagee thus comes to an end. Therefore, the auction-purchaser who under S. 152 of the Act acquires the equity of redemption of the judgment-debtor cannot claim priority against the mortgagee who is no longer liable for any payment

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under the provisions of S. 154 of the Act. (*Thomas, C. J.*) KANIZ BAQAR *v.* KANIZ ABID. **194 I C. 22=13 R.O. 552=1941 O L.R. 415=1941 A.W.R. (Rev.) 542=1941 O A. 476=A.I.R. 1941 Oudh 402.**

OUDH SUB-SETTLEMENT ACT, R. 4 AND BOARDS CIRCULAR, 21, Paras. 6 and 7 - *Enhancement—Justification—Nominal readjustment of revenue—No change in proportion between the respective shares of profits.*

Where in the case of sub-settlement holder there has been only a nominal readjustment of revenue in as much as the village is revenue free and the readjustment is not for the payment of revenue but only for the calculation of cesses and there has been no alteration in the proportion between the respective shares of the profits the rent of such a holder is not liable to enhancement. (*Harper, S.M. and Sathe, A.M.*) GUR SAHAI LAL *v.* EMPEROR. **1941 R.D. 863=1941 O.A. (Supp.) 841 (1)=1941 A.WR. (Rev.) 997 (1).**

OUDH TALUQDAR'S RELIEF ACT (1870), Ss. 3 and 4 (3) (a)—Taluqdar under disability—Estate vested in manager—Taluqdar if competent to refer to arbitration, matters connected with the estate. *See* 1940 Dig., Col. 967. RAM BARAN UPADHYA *v.* MADHO PERSHAD SINGH. **192 I.C. 803=13 R.O. 405=1941 O.W.N. 223=A.I.R. 1941 Oudh 49.**

PARDANASHIN LADY—Deed by—Binding character—One of the terms alone not explained to her. *See* 1940 Dig., Col. 969. MOHINI MOHAN *v.* BIR BIKRAM KISHORE MANIKYA. **195 I.C. 151=14 R.C. 55=72 C.L.J. 480=A.I.R. 1941 Cal. 257.**

——*Deed by—Burden of proof—Knowledge of contents.*

In cases of deeds executed by pardanashin ladies, when they are questioned, the burden is always in the first instance on the persons founding on that document to show that the grantors intelligently understood the deed. If they fail to establish that point, then the deeds are not binding on the executants or any one else and is void *ab initio*. It is only when the documents are *prima facie* valid, proof having been given of intelligent execution, that the question of undue influence arises. Where a document purporting to be a lease was not read over to the lady and where the consideration was below the rates generally in force and there was no term fixed in the document it was *held* that the deed was *ab-initio* void. (*Yorke and Ghulam Hasan, JJ.*) HIRDEY NARAIN *v.* BABU RAM. **191 I.C. 885=13 R.O 316=1941 O.L.R. 69=1941 A.W.R. (C.C) 22=1940 O.A. 1251=1940 O.W.N. 1318=A.I.R. 1941 Oudh 172.**

——Deed by—Burden of proof—Undue influence—When relevant. *See* 1940 Dig., Col. 967. BANK OF KHULNA, LTD. *v.* JYOTI PRAKASH MITRA.
67 I.A. 377=1941 P.W.N. 228=I.L.R. (1940) Kar. (P.C.) 341=45 C W.N. 259 (P.C.).

——Deed by—Lady unaware of inclusion of a valuable item of property in a mortgage—Whole deed, if affected. *See* 1940 Dig., Col. 967. *See* BANK OF KHULNA *v.* JYOTI PRAKASH. **67 I.A. 377=1941 P.W.N. 228=I.L.R. (1940) Kar. (P.C.) 341=45 C.W.N. 259 (P.C.),**

——Deed by—Validity—Test — Degree of understanding necessary—Mortgage by pardanashinas trustee of grandson—Deed read over and understood—Lady not understanding that she was incurring personal liability—Effect—If bound by deed. *See* 1940 Dig., Col.

PARDANASHIN LADY.

968. HEM CHANDRA ROY *v.* SURADHANI DEBYA.
67 I.A. 309=I.L.R. (1940) Kar. (P.C.) 271=
72 C.L.J. 298=45 C.W.N 253=1941 P.W.N. 63=
(1940) 2 M.L.J. 505 (P.C.).

——Deed executed by—Precautions to be taken—Duty of Court. *See* 1939 Dig, Col. 914. NATHUSA *v.* MAHOMED SIDDIQUE. I.L.R. (1941) Nag. 418.

——Definition—Women among Sayyads of Jhang District. *See* 1940 Dig., Col. 968. ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH.
192 I.C. 739=13 R.L. 408.

——Disposition of property—Burden of proof. *See* 1940 Dig., Col. 968. ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH. 192 I.C. 739=
13 R.L 408.

PARSI MARRIAGE AND DIVORCE ACT (III OF 1936), S. 1 (2)—*"Parsi subjects of His Majesty"—Meaning of—Change of domicile—Effect of on status and nationality.*

The words "Parsi subjects of His Majesty" in S. 1 (2) of the Parsi Marriage and Divorce Act, refers to the political status of such subjects as opposed to their civil status. The jurisdiction of the Court therefore depends upon the political status of the Parsi subject, *i.e.*, his nationality and allegiance, and not upon his domicil. A mere change of domicile does not in any way change a Parsi's nationality or his political status. (*Wadia, J.*) H. M. PANTHAKY *v.* M. D. PANTHAKY.
196 I.C. 668=43 Bom L.R 569=
A.I.R. 1941 Bom. 330.

——**S. 1 (2)**—*Scope and effect—Act, if applies to Native States.*

The effect of S. 1 (2) of the Parsi Marriage Act is to extend the Act even to Native States in India in its application to Parsis, provided that the Parsis are subjects of His Majesty. (*Wadia, J.*) H. M PANTHAKY *v.* M.D. PANTHAKY. 196 I.C. 668=
43 Bom.L.R. 569=A.I.R. 1941 Bom. 330.

——**S. 29 (3)**—*"Resides"—Meaning of.*

The term "resides" is an elastic term and the meaning to be given to it must depend upon the circumstances of the case. It is not essential for the purpose of residence that a person should have a house of his own. If a person resides permanently at a particular place, there can be no doubt that it is his or her residence. But the residence need not necessarily be permanent. It is enough if it is *bona fide*, with an element of continuity about it, it should not be merely casual or for a temporary or passing purpose. (*Wadia, J.*) H. M. PANTHAKY *v.* M D. PANTHAKY. 196 I.C. 668=43 Bom L.R. 569=
A.I.R. 1941 Bom. 330.

——**Ss. 29 (3) and 47 (b)**—*Wife obtaining leave to sue in the Parsi Chief Matrimonial Court in Madras (High Court)—Application by husband under O. 13, R. 14 (a) of the Original Side Rules for revocation of leave—Remedy by way of appeal under the Act—Inapplicability of Original Side Rules.*

An application under O. 13, R. 14 (*a*) of the Original Side Rules of the Madras High Court for revocation of leave granted to a Parsi wife under S. 29 (3) of the Parsi Marriage and Divorce Act, 1936, to present her proceedings in the Parsi Chief Matrimonial Court in Madras (High Court), would be incompetent as the remedy could be sought only by way of an appeal under S. 47 (*b*) of the Act from the order granting leave. (*Gentle, J.*) K. N. CHINOY *v* N K. CHINOY.
54 L.W. 668=(1941) 2 M.L.J. 935.

PARTITION. *See also* HINDU LAW—PARTITION.

PARTITION ACT (IV OF 1893), S. 4—Applicability—Suit by sharer as plaintiff—Transferee impleaded as defendant—Right of plaintiff to apply under S. 4. *See*

PARTITION ACT (1893), S. 4.

1940 Dig. Col. 970. SHEODHAR PRASAD SINGH *v.* KISHUN PRASAD SINGH. A.I.R. 1941 Pat. 4.

——**S. 4**—Application under—When to be made—Second appeal—Application in—Competency. *See* 1940 Dig. Col. 970. SHEODHAR PRASAD SINGH *v.* KISHUN PRASAD SINGH. A.I.R. 1941 Pat. 4.

——**S. 4**—*Decree—Form.*

In a case under S. 4 of the Partition Act, ordinarily the purchaser should be asked to deposit in Court the purchase money by a time fixed by the Court, the time to be fixed and extended at the discretion of the Court. If the purchaser deposits the said purchase money within the time allowed by the Court a decree should be passed in the suit in favour of the purchaser declaring that all rights of the plaintiff or persons claiming partition in the property in suit have been transferred by a Court sale in favour of the defendant on payment of the said sale price and plaintiff's claim for partition is dismissed. If necessary a sale certificate may also be issued to the purchaser. In case the defendant or the purchaser makes default in payment of purchase money a decree for partition should be made in favour of plaintiff and the partition proceeded with. (*Dar, J.*) MAHOMED SULAIMAN KHAN *v.* AMIR JAN. 195 I.C 504=14 R.A. 42=1941 A.L.J. 284=
1941 A.W.R. (H.C.) 172=1941 O.A. (Supp) 339=
1941 O W.N. 707=1941 R.D. 456=
1941 A.L.W. 553=1941 A.W.R. (Rev.) 379=
A.I R. 1941 All. 281.

——**S. 4**—Dwelling house—Meaning of. *See* 1940 Dig. Col. 971 SHEODHAR PRASAD SINGH *v.* KISHUN PRASAD SINGH. A.I.R. 1941 Pat. 4.

——**Ss. 4 and 8**—*Order rejecting application for sale—Appealability.*

An order rejecting an application for sale under S. 4 of the Partition Act is not a "decree" and is, therefore, not appealable as such. The correctness of that order can, therefore, be questioned in an appeal filed against the final decree. (*Lodge and Sen, JJ.*) BHUBAN MOHAN GUHA *v.* BROJENDRA CHANDRA GHOSE
195 I.C. 84=14 R.C. 45=45 C.W.N. 74=
A.I.R. 1941 Cal. 311.

——**S. 4**—*Purchaser being member of family to which dwelling house originally belonged—Whether relevant.*

Under S. 4 of the Partition Act, the question for consideration is whether the purchaser was a member of the undivided family to which the dwelling house belonged at the time of the sale. The fact that he was a member of the family to which the property originally belonged is quite irrelevant. (*Lodge and Sen, JJ.*) BHUBAN MOHAN GUHA *v.* BROJENDRA CHANDRA GHOSE. 195 I.C. 84=14 R C. 45=
45 C.W N. 74=A.I.R. 1941 Cal. 311.

——**S. 4**—*Purchaser obtaining possession of property—Right to relief—If lost.*

The mere fact that the purchaser has obtained possession of the property is not sufficient to defeat the claim of a member of a family under S. 4 of the Partition Act. Unless it can be shown that the purchaser's possession was such that he could be regarded as having become a member of the family, no possession would serve to defeat the claim. (*Lodge and Sen, JJ.*) BHUBAN MOHAN GUHA *v.* BROJENDRA CHANDRA GHOSE. 195 I.C. 84=14 R C. 45=
45 C.W.N. 74=A.I.R. 1941 Cal. 311.

——**S. 4**—*'Undivided family'—Meaning—Married or unmarried Mahomedan sisters—If could be members of undivided family.*

It cannot be held as a matter of law that two Mahomedan sisters married or unmarried cannot form an un-

PARTITION ACT (1893), S. 4.

divided family within the meaning of S. 4 of the Partition Act. The phrase 'undivided family' in the section is used in a very wide and general sense and two Mahomedan married daughters too may be regarded as members of an undivided family within the meaning of the Act if the house is undivided and if one of them permanently occupies the house and the other though she lives mostly with her husband, has not permanently abandoned all intention of occupying the house should it become necessary to do so. (*Dar, J.*) MAHOMED SULAIMAN KHAN *v.* AMIR JAN.

195 I C 504 = 14 R.A. 42 = 1941 A.L.J. 284 = 1941 R.D. 456 = 1941 A W R (H C) 172 = 1941 O.A. (Supp.) 339 = 1941 O.W.N. 707 = 1941 A.L.W. 553 = 1941 A W R (Rev.) 379 = A.I.R. 1941 All. 281

—— **S. 4** — Undivided family — Meaning of. *See* 1940 Dig. Col. 971 SHEODHAR PRASAD SINGH *v.* KISHUN PRASAD SINGH. **A.I.R. 1941 Pat. 4.**

PARTNERSHIP — *See also* PARTNERSHIP ACT.

—— *Dissolution — Interest on loans to partners and on deposits by them.*

Ordinarily a loan to a partner or by a partner to the firm, does not bear interest. But there may be special agreements to the contrary or practice in particular firms. In such cases, interest will be allowed up to date of suit for dissolution. Once the suit is filed matters pass out of the hands of the parties and enters the jurisdiction of courts and will be dealt with according to general law as distinguished from the particular agreement or practice in particular firms. (*Stone, C. J. and Bose, J.*) KISANLAL HIRALAL *v.* GANESHDAS GULABCHAND. **1941 N.L.J. 657.**

—— *Dissolution — Suit for — Parties — Suit by one partner against another — Other partners not impleaded — Effect*

A suit for dissolution of a partnership by one partner against another, without impleading all the partners of the business is not maintainable and must fail. (*Abdul Ghani and Subramonya Aiyar, JJ.*) BASHETTAPPA *v.* FIRM OF CHANNAVEERAPPA KALYANAPPA.

46 Mys H C R. 234 = 19 Mys. L.J. 351.

—— Isolated adventure — If can amount to partnership. *See* 1940 Dig., Col. 972. BIRDICHAND *v.* HARAKCHAND. **I.L.R. (1941) Nag. 644.**

—— *Liability of partner — If limited to assets of partnership in his hands.*

A decree obtained against a partnership can be executed against a partner not only to the extent of the assets of the partnership in his possession but also against the other properties which he may own, unless the partner is able to prove that for some reasons his liability is limited to the extent of the assets of the firm in his hand (*Rachhpal Singh, C.J. and Wazir, J.*) AMAR NATH *v.* PUNJAB NATIONAL BANK, LTD. **43 P.L.R. J. & K. 153.**

—— *Payment of common debt by one or some of the partners — Suit for contribution against others — Maintainability.*

When one or some of the partners pays off a debt due by the partnership, he is entitled to file a suit to compel contribution from his or their other partners. Such a suit cannot be regarded as one for account of partnership. (*Nijogi, J.*) BHAGWANDAS *v.* HIRALAL. **1941 N L.J. 667.**

—— Relationship — Agency of partners — If created by contract — Deed — One party made agent of another for certain purposes — Inference of partnership — If justified. *See* 1940 Dig., Col. 972. KARNIDAN SARDA *v.* SAILAJA KANTA MITRA. **192 I.C. 187 = 13 R.P. 416 = 7 B.R. 330.**

PARTNERSHIP ACT (1932), S. 4.

—— *Suit for dissolution — Parties — Mortgagee from a partner of partnership property.*

Even an assignee of a partner's rights cannot intervene until after dissolution, still less can a person who claims to be a mortgagee of partnership property form a partner for a non-partnership purpose. Such a person claiming under a title which is a nullity as against the firm and the other partners cannot be joined in a suit for dissolution. (*Stone, C.J. and Bose, J.*) KISANLAL HIRALAL *v.* GANESHDAS GULABCHAND. **1941 N.L.J. 657.**

PARTNERSHIP ACT (IX OF 1932). Ss. 2 (b), 4 and 69 — *Solitary transaction of money-lending by two persons jointly — If make them partners — Necessity for their registration.*

S. 2, Cl (*b*) read with S. 4 is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in S 8 of the Act presumes the existence of a partnership as defined in S. 4 and therefore *a fortiori* the existence of a business mentioned in S. 2, Cl. (*b*). A solitary transaction in which two persons have jointly lent money to another would not make those persons partners in a firm and hence their registration is not necessary under S. 69 of the Act. (*Almond, J.C. and Mir Ahmad, J.*) KARAM DIN *v.* ANANT RAM. **193 I.C. 51 = 13 R. Pesh. 49 = A.I.R. 1941 Pesh. 6.**

—— **Ss. 4 and 69 and Trade Unions Act (1926), S 13** — *Combination of ginning business men to prevent cutting of rates — Conduct of business of the respective constituents not interfered with — If a partnership — S 69, if applies to suit on behalf of such combination — Combination, if a trade union — S. 13 if bars such a suit.*

A combination of ginning businessmen having for its object the prevention of the cutting of rates for ginning cotton and having nothing to do with the conducting of the respective businesses which enter into the combination is not a partnership though each member has to make a contribution to the common pool and get a share out of the general fund. It is simply a case of a combination of various businesses *inter se* to keep up prices and as a consequence to benefit the members. Hence a suit by such a combination which is not registered, against a member for his dues is not affected by S. 69, Partnership Act. Such a combination clearly falls within the definition of 'Trade Union' under Trade Unions Act. S. 13 has no application to such a suit as mentioned above. What S. 13 says is that if a trade union is registered it can sue and be sued and nothing more. Where the suit is by one member against another not in a representative capacity but as a contracting party to the combination it is maintainable. (*Stone, C. J. and Bose, J.*) RADHAKISAN JAIKISAN GINNING AND PRESSING FACTORY *v.* JAMNADAS NURSEY GINNING AND PRESSING CO., LTD **I.L.R. (1941) Nag. 702.**

—— **Ss. 4 and 6** — Partnership — Essence of — Deed styled partnership deed — Provision for running of business and of keeping of accounts by one person — Provision for supervision by other — Party advancing moneys to be paid interest — No provision for sharing of profits — Partnership — If created. *See* 1940 Dig., Col. 973. KARNIDAN SARDA *v.* SAILAJA KANTA MITRA. **192 I.C. 187 = 13 R P. 416 = 7 B.R. 330.**

—— **S. 4** — Partnership — What amounts to — Change if any effected by new Act. *See* 1940 Dig., Col. 973. BIRDICHAND *v.* HARAKCHAND **I.L.R. (1941) Nag. 644**

PARTNERSHIP ACT (1932), S. 4.

——**Ss. 4 and 69**—Single transaction—If amounts to 'business.' *See* 1940 Dig., Col. 973. NATHI LAL *v.* SRI MAL. **193 I.C 772=13 R.A. 460.**

——**S. 9**—*Construction and scope.*

All the sections subsequent to S. 9 of the Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in S 9. (*Davis, C.J. and Lobo, J.*) MULCHAND JAGIOMAL *v.* SHAMDAS JETHANAND.

194 I.C. 380=13 R.S. 271=A.I.R. 1941 Sind 73.

——**S. 19 (2) (c)**—*Partner—Implied authority of—Decree in favour of firm—Assignment by one partner for less than decree amount—Validity.*

A partner in a trading firm has an implied authority to assign a debt due to the firm; but he has no such authority to assign a decree for money obtained by the firm for an amount which is less than the decretal amount. (*Kania, J.*) KRISHNAJI BHARMALJI & CO. *v.* ABDULRAZAK AHMEDBHOY. **43 Bom. L. R. 888.**

——**Ss. 22 and 25**—Surety letter by managing partner—Construction—Liability of other partners. *See* 1939 Dig., Col. 918. SUWALAL *v.* FAZL HUSSAIN.

I L.R. (1941) Nag 415.

——**S. 29**—*Assignment by ex-partner in firm after dissolution—Suit by transferee for accounts of dissolved partnership—Assignors, if necessary parties.*

In a suit by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership for accounts of the dissolved partnership as a whole and not for accounts after the date of the dissolution, only the assignors are necessary parties. Consequently, when they are not joined either as plaintiffs or defendants till more than three years after the dissolution of the partnership the entire suit must stand dismissed. Section 130 (2), T. P. Act, does not obviate the necessity of impleading the assignor in such a suit. (*Davis, C.J. and Lobo, J.*) MULCHAND TAGIOMAL *v.* SHAMDAS JETHANAND. **194 I C. 380= 3 R.S 271= A.I R 1941 Sind 73.**

——**S. 58**—Firm which has been dissolved—If can be registered *See* 1940 Dig., Col. 974. BILASROY *v.* SCINDIA STEAM NAVIGATION CO, LTD.

192 I.C. 283=13 R.R. 71.

——**Ss. 59 and 68**—*Effect of registration—Independent proof of membership—Necessity.*

The registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it; but it is no doubt a rebuttable presumption In the absence of evidence to the contrary, no further proof is necessary as to membership, nor is it necessary to prove that the application for registration bore the signature of the member concerned. (*Bennett and Ghulam Hasan, JJ.*) HET RAM *v.* SUBHAG CHAND. **194 I.C. 168=13 R.O 554= 1941 A.W.R (Rev) 300= 941 R D. 279= 1941 A L.W. 380=1941 O.L.R. 419= 1941 O W N. 527=1941 O.A 331= A.I R. 1941 Oudh 376.**

——**S. 59**—Joint Hindu family firm—Registration in name of some members—Effect of. *See* 1940 Dig., Col. 974. NANDGOPAL OM PARKASH *v.* MEHNGA MAL KISHORI LAL. **192 I.C. 383=13 R.L. 371**

——**S. 68**—Production of certificate—Effect. *See* 1940 Dig., Col. 974. BILASROY *v.* SCINDIA STEAM NAVIGATION CO., LTD. **192 I.C. 283=13 R R. 171.**

——**Ss. 69 and 74**—*Unregistered firm—Debt incurred prior to Partnership Act—Recovery, if barred—Scope and effect of S. 74.*

The provisions of S 74 of the Partnership Act are a complete bar to the application of S. 69 of the Act and the mere fact that a firm is unregistered is no bar to the

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obtaining of a decree for amounts due in respect of a debt incurred prior to Partnership Act. (*Davies.*) KANWALNAIN *v.* SHAIKH AHMAD HUSSAIN.

1940 A.M.L J. 81.

——**S. 69 (1) and Specific Relief Act (1877), S. 55**—*Obligation to register, if implied in a partnership agreement—Suit to enforce such obligation—Maintainability—Proper remedy.*

The Partnership Act does nowhere enjoin registration. It is optional and not obligatory. There is no implied obligation on the partners to concur in effecting registration, in a contract of partnership. Even if there is such an obligation, then the obligation would arise out of the partnership agreement (*i.e.*) out of a contract, and the right, flowing from the obligation, of a partner to compel his co-partners to effect registration would be a "right arising from a contract", and a suit to enforce such a right brought by one partner against the other partners of an unregistered firm is expressly barred by the provisions of S. 69 (1) of the Partnership Act. In such a case the proper and indeed the only available remedy is a suit for dissolution and not a suit for a mandatory injunction. (*Roberts, C.J. and Dunkley, J.*) GHELLABHAI & CO. *v.* CHUNILAL AND HARAKCHAN CO. **1941 Rang.L R. 219=196 I.C. 96= 14 R.R. 66=A.I.R. 1941 Rang. 196.**

——**S. 69 (2)**—*Registered firm dissolved by retirement of partner—Right of firm to sue.*

Where a registered firm has been dissolved by the retirement of one of its partners and notice of the dissolution has been given to the Registrar, the firm so far as registration is concerned is to be deemed to be still registered and can sue. (*Panckridge, J.*) TAPENDRA CHANDRA GOOPTU *v.* JOGENDRA CHANDRA GOOPTU.

I.L.R. (1941) 2 Cal. 289.

——**S. 69 (2)**—*Registration of firm subsequent to filing a suit—If can cure the defect and make suit maintainable.*

S. 69 of the Partnership Act is mandatory. Registration of the firm is a condition precedent to its right to institute a suit. If a firm was not registered at the time a suit was filed by it the subsequent registration of the firm does not entitle the Court to proceed with the suit and the only course open to the Court is to dismiss the suit. (1937) 2 M.L.J. 273, Overruled. (*Lionel Leach, C.J. and Happell, J.*) PONNUCHAMI GOUNDAR *v.* MUTHUSAMI GOUNDAR.

54 L.W. 676=(1941) 2 M.L.J. 968.

——**S. 74**—Scope and effect of. *See* PARTNERSHIP ACT, SS. 69 AND 74. **1940 A.M.L J. 81.**

——**S. 74 (b)**—*Applicability—Pending cases, if contemplated.*

From the opening words 'any legal proceeding or remedy' in sub-S. (*b*) of S. 74 of the Partnership Act it is clear that the sub-section relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been acquired, accrued or incurred before the commencement of the Act. The absence of the words 'pending' and 'taken' indicate that it was not the intention of the legislature to exempt from the operation of S. 69 only proceedings which had been instituted. (*Thom, C.J. and Ganga Nath, J.*) RAM GOPAL *v.* NET RAM. **I L.R (1941) All 311=13 R.A. 499= 194 I.C. 344= 941 R.D. 75=1941 A L W. 72= 1941 A.L J. 107=1941 O W N 106= 1941 O.A. (Supp) 68=1941 A.W R (H C) 54= A.I.R. 1941 All. 178.**

PASSING OFF. *See* (1) TORTS—PASSING OFF.
(2) TRADE MARKS.

PATENTS AND DESIGNS ACT (II OF 1911), Ss. 43, 45 and 46—*Certificate of registration—If conclusive—Suit for infringement—Plea that design is neither new nor original—If open—Burden of proof.*

A certificate of registration, issued by the controller under S 45 (1) of the Patents and Designs Act to the proprietor of a design when registered, is not final and conclusive. There is only a *prima facie* presumption that the person whose name is registered as the proprietor is the proprietor of a new or original design, but the presumption can be rebutted. The certificate is not conclusive, and there is nothing in the Act which prevents the defendant in a suit for damages for infringement of a registered design under S. 53 of the Act from raising in defence the plea that the design was previously published and was neither new nor original. The onus is of course on the defendant who seeks to go behind the certificate of registration to show that the plaintiff is not the proprietor of the registered design in question. (*Wadia, J.*) DWARKADAS DHANJI SHA *v.* CHHOTALAL RAVICARANDAS & CO

195 I.C. 686 = 14 R B 68 = 43 Bom.L R. 280 = A.I.R 1941 Bom. 188.

——**S. 64 (1)**—Right to apply—Assignor of patent. *See* 1940 Dig., Col. 977. HIRALAL BANJARA *v.* BASHI RAM 191 I C. 408 = 13 R.C. 241.

——**S. 64 (3)**—Reference to High Court—Power of controller—Application which cannot be dealt with by him. *See* 1940 Dig,, Col. 977. HIRALAL BANJARA *v.* BRSHI RAM. 191 I.C. 408 = 13 R C. 241.

PATNA HIGH COURT RULES, Ch. III, R. 3—Scope—Compliance with—What amounts to—Criminal Revision Petition—Absence of affidavit in support and of solemn affirmation—Petition merely containing verification at end by petitioner—Sufficiency—Court fee—Ch. XIII, R. 13-A—C. P. Code, O. 6, R. 15. *See* 1940 Dig., Col. 978. RADHAKRISHNA DAS *v.* HARI NAIK.

13 R.P. 590 = 193 I.C. 12 = 7 B.R. 596 = 42 Cr L.J. 399 = A.I.R 1941 Pat. 172.

——**(as amended in 1940) Ch. XIII. R. 13 (3)**—*Applicability—Solemn affirmation under Ch. III, R. 3—If liable to fee prescribed by Ch. XIII, R. 13 (3).*

Rule 13 (3) of Ch. XIII of the Patna High Court Rules applies also to a solemn affirmation attached at the foot of a petition as required by R. 3 of Ch. III of the Rules as amended in 1940. The word affidavit in R. 13 (3) of Ch. XIII is comprehensive enough to include the solemn affirmation required by R. 3 of Ch. III. So far as Ch III, R. 3 is concerned there is no real difference between a *solemn affirmation* and an *affidavit*, and a solemn affirmation in R. 3 of Ch. III must therefore be made before a Commissioner for affidavits on payment of the fee prescribed by R. 13 (3) of Ch. XIII. (*Dhavle and Chatterji, JJ.*) SUBBA RAO *v.* GOPINATH SAHU.

7 Cut.L.T. 80

PATWARI—*Vacancy—Appointment—Old incumbent restored — New appointee, if aggrieved and if can appeal.*

A person who is appointed in a vacancy caused by the removal of an assistant patwari takes the appointment subject to any orders which may be passed on appeal by former incumbent. When the latter succeeds and is restored to his former appointment, the new appointee who is thrown out cannot be said to be aggrieved and he has no right of appeal (*Shirreff, J M. and Sathe, A M.*) PUTTO LAL *v.* RAMCHANDRA. 1941 R D 937 = 1941 O.A. (Supp.) 794 = 1941 A.W.R. (Rev.) 920.

PAYMENT OF WAGES ACT (IV OF 1936), S. 2—"Wages"—Meaning of—If embraces potential wages. *See* 1940 Dig., Col. 978. ARVIND MILLS, LTD. *v.* GADGIL. 13 R.B. 256 = 192 I C. 528 = A I.R. 1941 Bom. 26.

PENAL CODE (1860), S. 34,

——**S, 15**—"*Deduction*" — *Temporary reduction from higher to lower scale of pay.*

The reduction of an employee to a lower grade of pay from a higher grade for a short period is a "deduction" within the meaning of the Payment of Wages Act. If an employer terminates his existing contract with his employee, but offers to re-employ him on a lower rate, there is nothing against it in the Act, and no question of deduction would arise. (*Weston, J.*) MIR MAHOMED *v* DIVISIONAL SUPERINTENDENT, NORTH WESTERN RY., KARACHI. I.L.R. (1941) Kar 394 = A.I.R. 1941 Sind 191.

——**S. 17 (1)**—"*Direction*"—*Order rejecting claim in toto—Appeal.*

The word direction in S. 17 (1) of the Payment of Wages Act must be construed as including a refusal to make a direction. An employed person has a right of appeal if his claim has been rejected *in toto* as also when his claim is allowed in part only. (*Weston, J.*) MIR MAHOMED *v.* DIVISIONAL SUPERINTENDENT, NORTH WESTERN RY., KARACHI.

I.L.R. (1941) Kar. 394 = A.I R. 1941 Sind 191.

——**S. 17 (1) (b)**—*Construction—Right of appeal—Valuation of claim—Value of claim as made or as found by trial Court.*

Under S. 17 (1) (*b*) of the Payment of Wages Act, the right of appeal depends on the monetary value of the claim made by the applicant and not on any finding of the trial Court. The meaning of the clause is clear, and there is no justification for holding otherwise on the ground that the section lends itself to exaggeration of claims for the purpose of making any orders passed thereon appealable. (*Weston, J.*) MIR MAHOMED *v.* DIVISIONAL SUPERINTENDENT, NORTH WESTERN RY., KARACHI. I.L.R. (1941) Kar. 394 = A.I.R. 1941 Sind 191.

PENAL CODE (XLV OF 1860), S. 21—Public Servant—Head clerk of Government Office. *See* DEFENCE OF BURMA RULES, RR. 2 (9) AND 130.

1941 Rang. L.R. 536.

——**S. 21 (10)**—Port trust—Storekeeper and Assistant Superintendent of Machinery—If public servants. *See* CR.P. CODE, S. 197 A.I.R. 1941 Sind 30.

——**Ss. 34 and 302**—*Abetment of murder—Person bringing spear but not using it—Another snatching spear and stabbing deceased causing death—Former—If guilty of abetment of murder.*

Where the only evidence against the accused charged with abetment of murder, is that he brought a spear but did not use it, and another person snatched the spear and stabbed the deceased with it causing death, it cannot be held that the person who brought the spear had the intention of putting an end to the life of the deceased, so as to make him liable to conviction under S. 34 read with S. 302, I.P. Code. (*Burn, Offg. C.J. and Happell, J.*) EMPEROR *v.* VAYANAKUNNU VEDAN.

1941 M.W.N. 872.

——**S. 34**—*Construction—Mere presence—Sufficiency for conviction—Absence of proof of act of commission or omission or of common intention—Effect.*

Under S. 34, I. P. Code, mere presence without proof of any act of omission or commission done to facilitate the offence or at least without proof of the existence of a common intention would not be sufficient to support a conviction. (*Rowland and Shearer, JJ.*) MAHADEO NATH *v.* EMPEROR. 194 I.C. 622 = 14 R.P. 60 = 42 Cr.L.J. 603 = 1941 P.W.N. 339 = 7 B.R. 802 = A.I.R. 1941 Pat 550.

——**S. 34**—Constructive liability under—When arises—Proof required. *See* 1940 Dig., Col. 979. EM-

PENAL CODE (1860), S. 34.

PEROR *v.* MUJJAFAR SHEIKH. 193 I.C. 302 = 13 R.C. 391 = 42 Cr.L.J. 385 = 72 C L.J. 533 = A.I.R. 1941 Cal. 106.

——S. 34—*Conviction under—Legality—Section not mentioned in charge.*

S. 34, I. P. Code, is really nothing more than explanatory and embodies in the Code the ordinary common sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. There is no legal necessity to specify this section in the charge. A conviction for an offence following the provisions of that section is not illegal, although that section has not been specifically mentioned in the charge. (*Young, C.J. and Blacker, J.*) WARYAM SINGH *v.* CROWN.

I.L.R. (1941) Lah. 423 = 195 I.C. 58 = 14 R.L. 28 = 42 Cr.L.J. 660 = 43 P.L.R. 159 = A.I.R. 1941 Lah. 214.

——S. 34—*Conviction under—Legality—Taking active part in commission of offence—If necessary.*

For a conviction under S. 34, I. P. Code, it is not necessary that each of the accused should himself commit the offence or take any active part in it. It is quite enough if he shares the common intention of those committing the criminal act. (*Bartley and Akram, JJ.*) SYED ALI *v.* EMPEROR. 196 I.C. 634 = 73 C.L.J. 299 = A.I.R. 1941 Cal. 608.

——S. 65—Scope—Imprisonment in default of fine—Limit of—Cr.P. Code, S. 33—Effect of—If extends term awardable under S. 65, I. P Code. *See* 1940 Dig., Col. 979. GOKUL CHANDRA NANDI *v.* SRIBODH CHANDRA BANERJI. 1941 P.W.N. 17 = A.I.R. 1941 Pat. 48.

——S. 67—*Construction—Imprisonment in default of fine—Term of—Limits.*

S. 67 of the Penal Code refers to fines actually imposed and not to fines which the Court might have imposed if it had so pleased. (*Horwill, J.*) KARUPPANNAN, *In re.* 197 I.C. 120 = 54 L.W. 326 = (1941) 2 M.L.J. 446.

——S. 70—*Scope—If controlled by S.* 386 (1) (b) *and* (3) *Cr.P. Code—Fine—Warrant under S.* 386 (1) (b)—*Execution under C P. Code—Limitation—Rule—C. P. Code, S.* 48—*Applicability.*

S. 70 of the Penal Code is not controlled by the provisions of S. 386 (1) (*b*) and (3) of the Cr. P. Code. S. 70, I. P. Code, is substantive law as to the payment of fine while S. 386, Cr. P. Code, relates to the procedure for its recovery; and the section deals only with procedure of levying the fine imposed under the substantive law of crimes. It is a general rule relating to the construction of statutes that in the absence of an express provision, an adjective law cannot control the provisions of substantive law The warrant issued under S 386 (1) (*b*) Cr. P Code, has to be deemed to be a decree under S. 386 (3) for certain purposes only and not for all purposes. For the purpose of limitation, therefore, the substantive law contained in S. 70, I. P. Code, is not affected. S. 48, C. P. Code, does not therefore apply to a warrant under S. 386 (1) (*b*) executed according to the C. P. Code and the twelve years rule is not applicable to such a case. The six years rule provided for S. 70, I. P. Code is the rule to be applied. A darkhast presented after the period of six years from the date of the sentence of fine is therefore time barred under S 70, I. P. Code. (*Broomfield and Divatia, JJ.*) COLLECTOR OF BROACH AND PANCH MAHALS *v.* OCHHAVLAL BHIKALAL I.L.R (1941) Bom. 147 = 194 I C. 217 = 13 R.B. 363 = 42 Cr.L J 534 = 43 Bom L.R 122 = A.I.R. 1941 Bom 158

——Ss. 71, 147 and 323—Applicability of S. 71—Offences under Ss. 147 and 323—Separable—Separate sentences—Legality. *See* 1940 Dig., Col. 980. PARMESHWAR *v.* EMPEROR. 16 Luck. 51.

PENAL CODE (1860), S. 75.

——S. 72—Applicability—Charge under Ss. 302 and 201, I. P. Code—Doubt as to the offence committed by accused—Procedure—Sentence. *See* 1940 Dig., Col. 980. NEBTI MANDAL *v.* EMPEROR. 22 Pat.L.T. 98.

——S 75—*Applicability—Person convicted under S.* 379 *read with S.* 114, *pleading guilty to five previous convictions under S* 379—*Liability to be dealt with under Ss.* 75 *and* 565.

S. 114, Penal Code, does not give a Judge or Magistrate any authority for imposing any punishment. That is not a section authorising punishment in any way. It merely provides that the person who comes within its provisions must be treated as if he had committed the act or offence concerned, *i.e.*, if it is an offence which is concerned, he must be treated for the purpose both of conviction and of punishment as if he had committed that offence. The authority for imposing the punishment is to be found in the section which provides punishment for the offence. What the abettor whose abetment is followed by his presence at the commission of the offence within the meaning of S. 114 of the Penal Code will be convicted of will be that offence itself. When a person pleading guilty to five previous convictions under S. 379 of the Penal Code, an offence punishable under Ch. XVI of the Code is again convicted of an offence under S. 379 read with S. 114 of the Penal Code, he clearly comes within the provisions of S. 75 of the Penal Code and S. 565 of the Cr. P. Code and both S. 75 of the Penal Code and S. 565 of the Cr. P. Code can be applied to such a person. (*Reilly, C.J. and Subramanya Aiyar, J.*) GOPAL NAIK *v.* GOVERNMENT OF MYSORE. 46 Mys.H.C.R. 165 = 19 Mys.L.J. 181.

——S. 75—*Applicability—Summary trials—Procedure.*

While the circumstances of a case where S. 75, Penal Code, can be applied, make it desirable that the offence should not be tried in a summary way, and that, in such cases, if the trial has started in a summary way, the provisions of S. 260 (2), Cr. P. Code, should be followed nevertheless a trial in which a charge under S. 75, Penal Code, could be framed is not necessarily bad in law because the offence is tried summarily, although it may almost always be inexpedient in the interests of justice to do so; but S. 75, Penal Code, is an enabling provision and merely applies a principle, and since it does not create a separate offence or an offence at all the questions whether S. 260, Cr.P. Code, applies to offences under S. 75, Penal Code, does not arise. But a trial in a summary way is not an appropriate procedure when S. 75, Penal Code, is to be applied. Nor indeed, would it be appropriate when S. 75 Penal Code, is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under S. 262, Cr. P. Code. Previous convictions however can be taken into account under S. 14, Evidence Act, even when S. 75, Penal Code, is not to be applied. After an accused has been convicted and before sentence is passed, a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of S. 75, Penal Code, apart. (*Davis, C.J. and Tyabji, J.*) EMPEROR *v.* SHIVBUX AMRO I.L.R. (1941) Kar. 305 = 194 I.C. 819 = 14 R.S. 14 = 42 Cr.L J. 627 = A.I.R. 1941 Sind 107.

——S. 75—*Committal on charge under—Principles and procedure—Proof of previous convictions—Conviction slip—Sufficiency for conviction.*

PENAL CODE (1860), S. 75.

The principles which govern the committal of accused persons to the Court of Session on other charges should also apply to the committal on charges under S. 75, I. P. Code. A *prima facie* case should be made out before an accused person can be committed to the Court of Session on a charge under S 75, I. P. Code; there should be evidence on which, if unrebutted, he could be convicted. He cannot properly be convicted on a mere conviction slip or a mere record of his previous crimes kept by the authorities, on a mere history sheet, as it may be called. Such a conviction slip greatly facilitates proof, but is not proof itself of previous convictions, nor can an accused be convicted on this without proof. (*Davis, C. J. and Tyabji, J.*) POKAR CHUHARMAL *v.* EMPEROR. **I.L.R. (1941) Kar. 308 = 197 I.C. 98 = A.I.R. 1941 Sind 173.**

——**S. 75**—"*Previous conviction*"—*Meaning of.*

S. 75 applies in cases of convictions prior to the conviction of the offence for the enhanced punishment of which S. 75 is to be invoked. But it does not provide for enhanced punishment in the case of convictions subsequent to the offence. The theft for which the accused was committed to the Court of Session was committed on 28th October, 1938. The accused had convictions subsequent to the commission of this offence, the dates of these convictions being 26th June, 1939 and 20th July, 1939.

Held, that the previous convictions being subsequent to the commission of the offence for which the accused was committed could not be deemed previous convictions within the meaning of S 75. The accused was in fact committed for an offence which when committed was not a subsequent offence within the meaning of S. 75 and therefore the committal must be quashed. (*Davis, C.J.*) EMPEROR *v.* CHUTTAL IMAMBAKHSH.

I.L.R. (1941) Kar. 450 = 197 I.C. 135 = A.I.R. 1941 Sind 207.

——**S. 75**—Procedure—Charge of previous conviction—Magistrate recording evidence and hearing arguments and then postponing judgment and conviction after proof of previous conviction—Legality of. *See* CR P. CODE. S. 255-A. **19 Mys.L.J. 78.**

——**S 84**—Burden of proof—Plea of insanity—What has to be proved. *See* 1940 Dig., Col. 981. SANKAPPA SHETTY, *in re.* **194 I.C. 332 = 13 R.M. 756 = 42 Cr.L.J. 558 = A.I.R. 1941 Mad. 326.**

——**S. 84**—*Drunkenness—When sufficient defence.*

Where drunkenness results in delirium tremens or insanity, whether temporary or permanent, the offender will be held not guilty. (*Bhide and Ram Lall, JJ.*) SAMMAN SINGH THAKAR SINGH *v.* EMPEROR.

43 P. L.R. 698 = A.I.R. 1941 Lah. 454.

——**S. 84**—Protection under—Person knowing nature of his act but not that it is wrong or contrary to law. *See* 1940 Dig., Col. 982. GERON ALI *v.* EMPEROR **193 I.C. 282 = 13 R.C. 387 = 42 Cr.L.J 379 = A.I.R. 1941 Cal. 129.**

—— **S. 86**—*Intention of drunken man—How to be determined.*

Drunkenness of an accused person at the time he committed the offence should be taken into consideration in cases in which intention on the part of the accused is necessary to constitute the offence charged. The intention which would be ascribed to a sober man in connexion with the act must not necessarily be ascribed to a drunken man. The question of intention must be determined in each individual case according to the facts proved and according to accepted general principles. The omission of an express provision in S. 86 regarding the intention to be attributed to a drunken man doing an act which is an offence when done with a particular knowledge or intent leaves it open to the Courts to deal with the question of intention according to general principles of law. Consequently a voluntary drunkard like every other person is in the first instance presumed to have intended the natural consequences of his act, but this presumption may be rebutted by his showing that at the time he did the act his mind was so affected by the drink he had taken that he was incapable of forming the intention requisite for making his act the offence charged against him. (*Bhide and Ram Lall, JJ.*) SAMMAN SINGH THAKUR SINGH *v.* EMPEROR.

43 P.L.R. 698 = A.I.R. 1941 Lah. 454.

——**S. 97**—*Private defence—Violent attack on party ploughing own land—Accused having no title to land or possession of same—No likelihood of theft or mischief—Plea of private defence—If available.*

Where a person who has a good title to a plot of land, having purchased it under a sale deed from another who purchased it at a Court sale and got delivery of possession through Court, peacefully goes to plough his land, and the accused persons demand that the owner should stop ploughing saying that the land is theirs, but the owner protests saying that he had purchased it, and the accused persons make a violent attack with deadly weapons on the owner and his party causing death, it cannot be held that there is any right of private defence because, the object with which the accused have taken the law into their hands is not to prevent either theft o mischief but to enforce their own right or supposed righ (*Manohar Lall and Rowland, JJ.*) HARIRAM MAHATA *v.* EMPEROR. **8 B.R. 43 = 196 I.C. 587.**

PENAL CODE (1860), S. 99.

——**S. 99**—Applicability — Condition— Act done without jurisdiction. *See* 1940 Dig., Col. 983. JOGRAJ *v.* EMPEROR. **191 I C. 590 = 13 R.P. 358 = 22 Pat.L.T. 80 = 7 B.R. 236 = 42 Cr.L J. 199.**

——**S. 99**—*Applicability—Illegal acts—Constable not having power to arrest trying to arrest—Resistance by third person—Constable—If protected.*

While the protection of S. 99 extends to acts that are not strictly justifiable by law, it does not extend to acts which are *ultra vires* and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned. Hence where a police constable could not have rightly exercised the authority he did in arresting a person unless he had promoted himself to be an officer in charge of a police station or to the rank of a Sub-Inspector, there is no legal basis for his action, and if the constable is met with resistance in the arrest, S. 99 cannot protect his actions. (*Davis, C. J. and Tyabji, J.*) BHAIRO MURID *v.* EMPEROR.

I.L.R. (1941) Kar. 324 = 14 R.S. 1 = 194 I.C. 759 = 42 Cr.L.J. 623 = A.I.R. 1941 Sind 82.

——**S. 99**—"*Not strictly justified by law*"—*Interpretation.*

The words "not strictly justified by law" in S. 99, I. P. Code, apply to cases in which there is an excess of jurisdiction as distinct from a complete absence of jurisdiction. (*Shearer, J.*) SUKAR SAO *v.* EMPEROR.

7 B.R. 945 = 195 I.C. 593 = 14 R.P. 150 = 1941 P.W.N. 620 = 42 Cr.L.J. 753 = A.I.R. 1941 Pat. 560.

——**S. 99, Expl. 1**—*Resistance to arrest by constables not in uniform—Right of private defence—Desirability of wearing uniform when on duty.*

Where certain constables not wearing their police uniform suddenly rush upon a person who has no reason to know his assailants to be constables and arrest him, the latter's right of private defence is not taken away by S. 99, I. P. Code. It is not only proper and advisable but really necessary that when police officers act in the

PENAL CODE (1860), S. 100.

discharge of their official duty they should be clothed in their official uniform so that the public may know them to be public servants acting in the discharge of their duty. In emergent cases when they have to act when not in uniform, it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. (*Ismail and Mulla, JJ.*) EMPEROR *v.* ABDUL HAKIM.

1941 A.W.R. (H.C.) 353 = 1941 A.L.W. 999 = 1941 A.Cr.C. 263.

——**S 100**—Accused in possession of land—Attack by deceased's party—Right of private defence. *See* 1940 Dig., Col. 983. SAKALDIP RAI *v.* EMPEROR.

1941 P.W.N. 18 = A.I.R. 1941 Pat. 32

——**S. 100**—Deceased chasing away accused who trespassed--Accused killing them one after another—If can claim right of private defence. *See* 1940 Dig., Col. 983. MAHOMED KHAN *v.* EMPEROR.

193 I.C. 198 = 13 R.L. 444 = 42 Cr.L.J. 357 = A.I.R. 1941 Lah. 81.

——**S. 100**--Private defence—Circumstances justifying reliance upon. *See* PENAL CODE, SS. 300 AND 100.

A.I.R. 1941 Rang. 175.

——**S. 100**—Private defence—Right of—Accused going armed prepared for eventuality. *See* 1940 Dig., Col. 983. MAHOMED KHAN *v.* EMPEROR.

193 I.C. 198 = 13 R.L. 444 = 42 Cr.L.J. 357 = A.I.R. 1941 Lah. 81

——**S. 102**—*Right of private defence—Accused disarming deceased and then stabbing him to death.*

During an altercation between the accused and the deceased who was armed with hatchet, the accused first wrested the hatchet from the hands of the deceased and then, while the other accused held the deceased stabbed him to death.

Held that once the weapon had been seized from the deceased the apprehension of danger did not continue; and when, thereafter other accused held the deceased and the first accused repeatedly stabbed him in the abdomen, they were not acting in the exercise of the right of private defence but committing murder (*Young, C.J. and Sale, J.*) EMPEROR *v* ASHRAFUDDIN.

193 I.C. 594 = 13 R L. 478 = 42 Cr.L.J. 450 = A.I.R. 1941 Lah. 45.

——**S. 109**—*Abetment of offence—Failure to prevent commission of offence—If amounts to.*

Mere failure to prevent the commission of an offence is not by itself an abetment of that offence. (*Bartley and Akram, JJ.*) UPENDRA CHANDRA *v.* EMPEROR

195 I.C. 850 = 14 R.C. 168 = 42 Cr L.J. 796 = 45 C.W N. 633 = A.I R 1941 Cal. 456.

——**S. 114**—Scope and effect of—Conviction under S. 379 read with S. 114—Punishment—Enhanced sentence under S. 114 and order under S. 565, Cr. P. Code—If justified. *See* MYSORE PENAL CODE, S 75.

19 Mys.L.J. 181.

——**S. 117**—Offence under—If involves necessarily offence under S. 143, I. P. Code. *See* CR. P. CODE, S. 345.

I.L R. (1941) Kar. 352.

——**S. 120 B**—Essentials of offence—Conspiracy to cause murder by witchcraft—Offence. *See* 1940 Dig., Col., 985. EMPEROR *v.* SHANKARAVA GURUSHIDDAYYA.

191 I.C. 272 = 13 R.B. 162 = 42 Cr L.J. 111.

——**Ss. 124-A and 153-A**—Applicability—Attack on Government, landlords and money-lenders—Landlords and money-lenders accused of oppressing tenants and Government accused of being behind landlords and money-lenders—Offence—"Classes"—Meaning of. *See* 1940 Dig., Col. 986. EMPEROR *v.* NARAYAN VASUDEV.

191 I.C. 212 = 13 R.B. 159 = 42 Cr L J. 121.

PENAL CODE (1860), S. 147.

——**S. 124-A**—*Offence under—Criticism of subordinate officials.*

No general rule can be laid down that criticism of the subordinate officials of the Government and not of the Government itself is not sedition. To say that a British officer of high rank "played Holi with the blood of Indians" does bring Government into hatred and contempt. (*Skemp, J.*) SAT PARKASH *v.* CROWN.

195 I.C. 136 = 14 R.L. 35 = 42 Cr.L J. 682 = 43 P.L.R. 53 = A.I.R. 1941 Lah. 165.

——**S. 124 A**—*Scope and applicability.*

The provisions of S 124-A of the Penal Code are very wide and in strict law they would cover everything that amounts to defamation of the Government if one excludes from the meaning of that term any criticism in good faith of any particular measures or acts of administration. Its terms are so wide that much that may generally be regarded as justifiable speech would come within its terms. (*Allsop, J.*) PARMANAND *v* EMPEROR.

193 I.C. 710 = 13 R A. 443 = 42 Cr.L J. 463 = 1941 A.L.R. 93 = 1941 A.Cr C. 86 = 1941 A.W.R. (H.C.) 44 = 1941 A.L.J. 26 = A.I.R. 1941 All 156.

——**S. 124 A**—Sedition case—Duty of Court—Relevant factors. *See* 1940 Dig., Col. 987 VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. **42 Cr.L.J. 40 = A.I.R. 1941 Oudh 33.**

——**S. 124-A**—Sedition—Notes of speeches—Admissibility. *See* 1940 Dig., Col. 987. VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. **42 Cr.L.J 40 = A.I.R. 1941 Oudh 33.**

——**S. 124-A**—Sedition—Sentence—Principle. *See* 1940 Dig., Col. 987. KING *v.* U. DATTHANA

192 I.C. 542 = 13 R.R. 193 = 42 Cr L J. 307 = A.I.R. 1941 Rang. 62.

——**S. 124-A**—Sedition—What does and what does not constitute—Question of intention. *See* 1940 Dig., Col 987. VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. **42 Cr.L.J. 40 = A.I.R. 1941 Oudh 33.**

——**Ss. 141 and 105**—"Enforcing any right"—Meaning of—Right of private defence of property. *See* 1940 Dig., Col. 987. EMPEROR *v.* MEHDI.

I.L.R. (1941) Lah 267 = 192 I C. 323 = 13 R.L. 382 = 42 Cr.L.J. 281.

——**Ss. 147, 148 and 149**—*Applicability and scope—Rioting by several persons—Some armed with deadly weapons—Murder caused to one victim and severe hurt and simple hurt to others—Offence.*

The only offence that S. 148, I. P. Code, describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. S. 149 is intended to lay upon all members of an unlawful assembly responsibility for any offence, other than the offence of rioting committed by any member of the unlawful assembly in prosecution of the common object. S. 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting. There was a disturbance at a place in the course of which one *V* was fatally wounded, another was very seriously injured, a police constable was slightly injured and a 4th was severely wounded in the foot. On these facts eight persons were put up for trial on charges of rioting. All of them were charged by the Sessions Judge under S. 148 read with S. 149, I. P. Code; the 2nd and 3rd accused were separately charged with the murder of *V*. The 1st accused was separately charged with voluntarily causing grievous hurt with a deadly weapon to the person who was seriously injured and the 3rd accused was

PENAL CODE (1860), S. 147.

charged with causing hurt to the police constable under S. 332, I. P. Code. Accused 5, 6, 7 and 8 were charged with causing simple hurt to the 4th man who was seriously wounded in the foot and the accused 2 and 3 were charged with causing simple hurt with a dangerous weapon to the 2nd man who was seriously injured. The Sessions Judge found all the accused guilty of all the offences charged, and sentenced the 2nd and 3rd accused to death for murder; he sentenced the 1st accused to 5 years' rigorous imprisonment under S. 326, I. P. Code, and all the accused to 2 years for rioting armed with deadly weapons; he also sentenced the 3rd accused to 2 years under S. 332, I. P. Code, the 2nd and 3rd to 2 years under S. 324, I. P. Code, and accused 5, 6, 7 and 8 to 6 months for causing simple hurt. The evidence was clear that the first three accused were armed with spears and the other five with sticks, but there was no evidence to show that the sticks were dangerous weapons.

Held, that the charges should have been under S. 147 against accused 4 5, 6, 7 and 8, and under S. 148 against accused 1, 2 and 3 only and they should have been convicted accordingly. The other convictions were justified.

Held, further (*obiter*) that it would have been appropriate to charge all the other accused excepting the 2nd and 3rd with liability for the murder of *V* under S. 149, I. P. Code. (*Burn and Meckett, JJ.*) SUBBA RAO, *In re*. **I L.R. (1941) Mad 592 = 196 I.C. 119 = 14 R M. 278 = 42 Cr.L.J. 821 = 1941 M.W.N. 91 = 53 L.W. 175 = A.I.R. 1941 Mad 489 = (1941) 1 M.L J. 236.**

——**Ss. 147, 380 and 457**—Applicability—Factious village—One faction breaking into temple and removing idol by force for conducting festival. *See* 1940 Dig., Col. 988. PERUMAL KONAN, *In re*. **192 I.C 256 = 13 R.M. 552 (2) = 42 Cr L.J. 263 (2) = A.I.R. 1941 Mad. 71 (2)**

——**Ss. 147 and 323**—Charge under S 147—Conviction under S. 323—Legality—When could be justified. *See* 1940 Dig., Col. 988 BALWANT AMBADAS *v.* EMPEROR. **I.L.R. (1941) Nag. 139 = 13 R.N 215 = 191 I.C 593 = 42 Cr.L.J 203 = A.I R. 1941 Nag. 10.**

——**Ss. 147 and 379**—*Conviction—Sustainability—Unlawful assembly and rioting with common object of cutting crops and theft—Accused claiming right to crops and land—Prosecution—If justified—Duty of prosecution to allege and prove specific acts against undivided accused.*

Where a charge is brought against several persons of rioting with the common object of cutting away the crops of the complainant and of theft under Ss. 147 and 379, I. P. Code, it cannot always be said that the case is in the nature of a civil dispute and not a fit subject for a criminal trial because some of the accused plead that they are entitled to the land and that they have raised the crops. The real test in such a case is to find out which of the parties had grown the crops. If it is found that the crops were grown by the complainant's party, whoever among the accused party removed the crops would be guilty of theft under S. 379, and if they formed members of an unlawful assembly they would also be guilty under S 147, I. P. Code. It must, however, be proved before any one can be convicted that he not only ranged himself on the side of the accused but took part in the occurrence without any reasonable doubt. It is essential that the case of each individual accused person should be considered, and it is necessary to find what specific acts are proved by the prosecution which brings the individual accused within the mischief of S. 379. In a rioting case, alleging theft also, evidence of a general nature that all the accused

PENAL CODE (1860), S. 161.

were there at the scene of occurrence without anything specific against the accused is insufficient for a conviction. (*Varma, J.*) KAILASH SINGH *v.* EMPEROR. **22 Pat.L.T. 765 = 1941 P.W.N. 601 = A.I.R. 1941 Pat 613.**

——**Ss. 149 and 302**—*Constructive liability—Scope and extent of.*

All things done in furtherance of the common object of an unlawful assembly are chargeable against every individual member thereof and the liability of every such member extends not only to the acts intended by all to be done, but also to those offences which are likely to be committed in achieving the common object. Where in the achieving of the common unlawful object of attacking two persons, both were attacked but one of them was killed, it was *held*, that all the members of the unlawful assembly were guilty under S. 302, I. P. Code, read with S. 149. (*Bennett and Ghulam Hasan, JJ.*) PARMESHWAR DIN *v.* EMPEROR. **195 I.C. 630 = 1941 O.A. 689 = 1941 O.L R. 609 = 1941 A.W.R. (C.C.) 265 = 1941 A.L.W. 856 = 14 R.O. 110 = 42 Cr L.J. 758 = 1941 A.Cr.C 1[illegible]8 = 1941 O.W.N. 981 = A.I.R. 1941 Oudh 517**

——**Ss. 149 and 436**—*Unlawful assembly—Common object to get house vacated—Subsequent burning down of house—Offence.*

Where the common object of an unlawful assembly was to get a particular house vacated by its occupant and in pursuance of it the members proceed to the spot and there is brick batting and after that was over the house in question is set fire to, in such a case whatever the original common object may have been, all the members of the unlawful assembly are guilty of the offence of arson except those who prove that they did not take part in committing the offence. (*Agarwal, J.*) QAMRUL HASAN *v* EMPEROR. **197 I.C. 121 = 1941 A.W.R. (C.C.) 322 = 1941 A Cr.C 247 = 1941 O.A. 843 = 1941 O.W N. 1166.**

——**S. 153-A**—*Offence under—Intention of writer of book concerned—Test—Reference to preface—Value—Collection of portions of objectionable matter from Mahomedan scriptures.*

Where a writer of a book is accused of an offence under S. 153-A, I. P. Code, the preface can be no guide with regard to the intention of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce. Where the accused gave in his book a collection of only portions of objectionable matter from the Mahomedan scriptures and did not give the full passages concerned, it was *held* that his intention was to ridicule the prophet and his religion and to promote feelings of enmity between Hindus and Mahomedans and that he was guilty of an offence under S. 153-A, I. P. Code. (*Thomas, C. J.*) SHIB SHARMA *v.* EMPEROR. **16 Luck. 674 = 193 I.C. 516 = 13 R.O. 479 = 1941 A.Cr.C. 99 = 42 Cr.L J. 429 = 1941 O L.R. 290 = 1941 A.L.W. 390 = 1941 O.A. 297 = 1941 A.W.R. (C C) 118 = 1941 O.W.N. 480 = A.I.R. 1941 Oudh 310**

—— **S 153-A**—Speeches constituting offence—How Court should construe—Accused's intention—Relevancy. *See* 1940 Dig., Col. 989. VISHAMBAR DAYAL TRIPATH *v.* EMPEROR. **42 Cr L.J. 40 = A.I.R. 1941 Oudh 33.**

——**Ss. 161 and 116**—*Offer of bribe to public servant—Public servant not in a position to do required favour—Abetment of offence.*

PENAL CODE (1860), S. 161.

All that is necessary for the application of S. 161, I. P. Code, is that the gratification should have been offered as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show favour or disfavour to any person, or for rendering or forbearing to render any service or disservice to any person. The section does not require that the public servant must in fact be in a position to do the official act, favour or service at the time. If, therefore, a person offers a bribe to a public servant, his act would be punishable as "abetment" of the offence under S. 161 read with S 116, I. P. Code, although the public servant does not happen to possess the necessary power to do the required favour or service. (*Bhide and Ram Lall, JJ.*) EMPEROR *v.* PHUL SINGH. **195 I C. 229 = 14 R.L. 39 = 42 Cr.L J. 636 = 43 P.L.R. 273 = A I.R 1941 Lah. 276.**

——**S. 161**—*Scope—Public servant requested to render service with another public servant.*

S. 161, I. P. Code, is not limited to official acts. It applies even if a public servant is requested to render any service with another public servant. (*Bhide and Ram Lall, JJ.*) EMPEROR *v.* PHUL SINGH.

195 I.C. 229 = 14 R L. 39 = 42 Cr.L.J. 636 = 43 P L.R. 273 = A.I.R. 1941 Lah. 276.

——**S. 167**—*Applicability—Conditions—Elements of offence.*

The requirements of S. 167, I. P. Code, are satisfied if it is shown that the document has been prepared by a public servant charged with its preparation in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause injury to any person; and if after such preparation he submits the document with intent thereby to cause injury to another, the offence is complete. For the section to apply, the preparing and framing must be complete and final so far as the author is concerned, and it is not possible to exclude anything that would be permissible to the accused to do to the document until the time comes for his signing it and delivering it to the proper authority (*Dhavle, J.*) BRIJBEHARI *v.* EMPEROR. **194 I.C 108 = 13 R.P. 657 = 42 Cr.L.J. 508 = 7 B R. 690 = 22 Pat.L T. 443 = 1941 P.W N. 248 = A I.R. 1941 Pat. 539.**

——**S. 167**—*"Charged"—Meaning of.*

The word "charged" in S. 167, I. P. Code, should not be very narrowly construed. No express order of appointment is necessary. (*Dhavle, J.*) BRIJBEHARI *v.* EMPEROR. **13 R.P. 657 = 42 Cr.L J. 508 = 194 I.C. 108 = 7 B.R. 690 = 22 Pat.L.T. 443 = 1941 P.W.N. 248 = A.I.R. 1941 Pat. 539.**

——**S. 170**—*Applicability — Obtaining services by posing as Government Officer.*

Where a person poses as a C.I.D. Officer and obtains the services of a *Kundar Mahar*, he is guilty of an offence under S. 170, I.P. Code, for he did the act under the colour of the office which he assumed. (*Grille, J.*) BASHIRULLA KHAN *v.* EMPEROR. **196 I C. 759 = 1941 N.L.J. 222 = A.I.R. 1941 Nag. 321.**

——**Ss. 182 and 500**—*Applicability—Complaint in respect of defamatory allegations against officer in memorial to superior—Offence.*

A forest ranger filed a complaint against certain forest licensees in respect of certain allegations made by them in a memorial submitted by them to the complainant's superior officer, alleging that the allegations were highly defamatory and lowered him in the estimate of his friends and the public. The Magistrate took the complaint on file under S. 182, I. P. Code.

Held, that the complaint was under S. 500, I. P. Code, and the order taking it on file under S. 182 was unsustainable and must be set aside. (*Lakshmana Rao, J.*) MONAPPA *v.* VENKATASAMI NAIDU. **1941 M.W.N. 676 = A.I.R 1941 Mad. 805 (1).**

PENAL CODE (1860), S. 188.

——**Ss. 182 and 211**—*False complaint against unknown persons—Offence.*

The offence constituted by a false complaint against unknown persons is not one under S. 211 but one under S. 182. It is therefore within the competence of the police authorities concerned to complain of that offence and within the competence of the Magistrate, on receiving that complaint, to issue summons under S. 182. (*Bartley and Lodge, JJ.*) RAM RENU *v.* EMPEROR. **194 I.C. 799 = 14 R.C. 54 = 42 Cr.L.J. 624 = A.I.R. 1941 Cal. 288**

——**S. 182**—Scope and applicability. *See* 1940 Dig., Col. 990. EMPEROR *v.* THAKURI. **15 Luck. 55.**

——**S. 186**—Applicability—Assessor panch—Execution of warrant to collect arrears of chowkidari tax—Warrant not dated or signed in proper place—Effect—Omission to name person authorised to execute warrant—If makes warrant illegal—Resistance to execution—Offence—Assessor panch—If public servant. *See* 1940 Dig., Col 991. GOPAL MAHTON *v.* EMPEROR. **1941 P.W N. 437 = A.I.R. 1941 Pat. 161.**

——**S. 186**—Attachment of crops by Civil Court peon—Judgment-debtor cutting and removing in spite of protest by peon—Obstruction to peon—Offence. *See* C. P. CODE, O. 21, R. 45 (2) AND (3). **(1940) P.W.N. 980.**

——**S. 186**—Obstruction to improper procedure in attachment—If an offence. *See* U. P. DISTRICT BOARDS ACT, S. 138 (4) AND PENAL CODE, S. 186. **1941 A.L.J. 419 = A.I.R. 1941 All. 344.**

——**S. 188**—*Offence under—Duty of trial Court.*

In the case of an offence under S. 188, I. P. Code, it is only necessary for the trial Court to be satisfied that *prima facie* the order is a legal one and that a reasonable necessity existed that emergent steps should be taken to prevent an apprehended breach of peace. It is not its duty to carefully weigh opinions for and against the urgency of the matter which is at the foundation of the District Magistrate's order. (*Davies.*) KRISHNA GOPAL *v.* CROWN. **1940 A.M.L J. 96.**

——**S. 188 and Cr. P. Code, S. 144 (3)**—*Prosecution for disobedience of order under S. 144 (3), Cr. P. Code—Plea of absence of notice—Onus.*

In the case of a prosecution for disobedience of an order promulgated under S. 144 (3), Cr. P. Code, all that can reasonably be demanded of the prosecution is proof of circumstances from which it may be inferred that the accused had knowledge of the order. If such proof is forthcoming, the onus is on the accused to prove ignorance of the order despite publication. (*Thom, C.J., Ganga Nath and Braund, JJ.*) EMPEROR *v.* AFAQ HUSAIN JAUHAR. **I.L.R. (1941) All. 186 = 192 I.C. 466 = 13 R.A. 337 = 42 Cr.L J. 298 = 1941 O.A. (Supp.) 4 = 1940 A.W R. (H.C.) 642 = 1940 A.L.J. 885 = A.I.R. 1941 All. 70 (F.B.).**

——**S. 188 (2)**—*Applicability—Raising of crops on land—Subsequent proceedings under S. 145, Cr. P. Code—Final order declaring possession in party other that the one raising crops—Subsequent harvesting of crops by party raising before restoration of possession to his opponent—Offence.*

Where before proceedings are commenced under S. 145, Cr. P. Code, a person raises crops on land, and subsequently a preliminary order and a final order are passed, the final order declaring his opponent to be in possession, if the former harvests the crops after the final order but before possession is restored to his

PENAL CODE (1860), S. 193.

opponent, there is no disobedience by him of the order prohibiting him from interfering with the possession of his opponent. He cannot therefore be convicted under S. 188 (2), Penal Code. (*Lakshmana Rao J.*) NARASIMHAPPADU *v.* EMPEROR. **1941 M.W.N. 1030.**

——**Ss. 193 and 465**—*Attesting forged document purporting to discharge decree debt—Offence.*

The accused attested a document which was forged. He admitted that he was an attestor, though he was suspicious of the document, and the evidence showed clearly that he was sufficiently nearly related to the parties and interested in bringing such a document in existence in the interest of some of them. The document purported to be a discharge of a decree debt.

Held, that the accused was guilty of forgery and of fabricating a false document under Ss. 465 and 193, I. P. Code. (*Horwill, J.*) RAMA NAIDU, *In re.* **1941 M.W.N. 1036 = (1941) 2 M L.J. 746.**

——**S. 193**—*Conviction under—Legality—Statement of witness not read over to him.*

Obiter: A conviction under S. 193, I.P. Code, for giving false evidence can be maintained, although the statements on which the charges were based were not read over to the accused. (*Bartley and Lodge, JJ.*) F. KARIM *v.* EMPEROR. **45 C.W.N. 1131.**

——**S. 193**—*Offence under—Contradictory statements not relating to questions in issue.*

Where the contradictory statements made by a witness had no relevancy to the questions which were in issue before the Court where the evidence was given, they cannot properly be held to have been intentionally false as they might equally have been the result of a mistake. Evidence of this character will not justify a Court in holding that an offence under S. 193, I. P. Code, has been committed. (*Bartley and Lodge, JJ.*) F. KARIM *v.* EMPEROR. **45 C.W.N. 1131.**

——**S. 193**—Offence under—Inadmissible document. *See* 1940 Dig., Col. 992. MAHESH CHANDRA DHUPI *v.* EMPEROR. **191 I.C. 165 = 13 R.C. 220 = 42 Cr.L.J. 93.**

——**S. 195**—*Applicability—Execution of Civil Court decree—Attachment—Attached properties left with sureties—Removal by judgment-debtor—Complaint under S. 379, I. P. Code—Complaint by Court—Necessity.*

Where in execution of a decree of a Civil Court against the accused certain properties are attached by the amin and left with sureties, and the accused removes the properties from the possession of the sureties, a complaint by the Civil Court under S. 195, Cr P. Code, is not necessary for the prosecution of the accused under S. 379, I. P. Code. (*Lakshmana Rao, J.*) PONNUSAMI PADAYACHI *v.* EMPEROR. **54 L.W. 248 = 1941 M.W.N 675.**

——**S. 201**—*Construction—"Any person"—If includes offender also—Same person committing crime and causing disappearance of evidence—Liability of.*

Rowland, J.—Where four persons commit a murder and cause evidence of its commission to disappear with the intention of screening themselves and each other from legal punishment, the case falls under S. 201, I. P. Code. There is no law preventing the main offenders being convicted under Ss. 201 to 203, I. P. Code, but in practice no Court will convict an accused both of the main offence and under those sections. Even if the words of S. 201 are held to require that a man should screen an offender other than himself, where it is found that the intention of each of the accused was to screen his companions as well as himself from legal punishment, all of them can be convicted under S. 201 also.

Shearer, J.—A person who, having committed an offence, subsequently causes evidence of the commission

PENAL CODE (1860), S. 211.

of that offence to disappear, does not in so doing commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment. The words "any person" in the section (201, I. P. Code) must be construed as excluding the offender himself. (*Rowland and Shearer, JJ.*) MAHADEO NATH *v.* EMPEROR. **194 I.C 622 = 14 R.P. 60 = 42 Cr.L.J. 603 = 1941 P.W.N. 339 = 7 B R. 802 = A.I.R. 1941 Pat. 550.**

——**S. 201**—*Offence under—Essence of.*

The essence of an offence under S. 201, I. P. Code, is the causing of evidence of the commission of an offence to disappear. The offence would not be complete as soon as the accused dragged away the body of a person who was speared to death, quite apart from the final disposal of the body. (*Bartley and Akram, JJ.*) UPENDRA CHANDRA *v.* EMPEROR. **195 I C. 850 = 14 R.C. 168 = 42 Cr.L.J. 796 = 45 C W N. 633 = A.I.R. 1941 Cal. 456.**

——**S. 205**—"Suit"—Proceeding under Succession Act. *See* 1940 Dig., Col. 992. OUDH BEHARI LAL *v.* EMPEROR. **192 I.C. 339 = 13 R.L. 392 = 42 Cr.L.J. 295.**

——**S. 206**—*Essentials of offence—Fraudulent removal or concealment—Forcible removal in spite of remonstrance—Conviction—Sustainability.*

The essence of the offence under S. 206, I. P. Code, is the fraudulent removal or concealment of any property. But where the removal is alleged to be forcible in spite of remonstrance on the part of the complainant, there is no trace of any fraudulent removal or concealment, and a conviction under S. 206, I. P. Code, for such forcible removal is clearly unsustainable. (*Dhavle, J.*) MAHABIR SAH *v.* EMPEROR. **192 I.C. 177 = 13 R.P. 447 = 42 Cr.L.J. 251 = 22 Pat.L.T. 662 = 7 B.R. 326 = 1940 P.W.N. 980 = A.I.R. 1941 Pat. 136**

——**S. 211**—*Accused under—Opportunity to impugn false report—Notice to accused—Necessity.*

The law does not require that an opportunity should be given to a person accused under S. 211, I. P. Code, on the basis of a false report to impugn that report, nor is there any general principle of natural justice which requires the issue of a notice to the accused in such a case. (*Ghulam Hasan, J.*) BALAK RAM *v.* EMPEROR. **196 I.C. 262 = 14 R.O 161 = 1941 O.W.N. 1072 = 1941 A.Cr C. 224 = 1941 O L.R. 665 = 1941 A.W.R. (C.C) 298 = 42 Cr L.J. 833 = 1941 O.A. 776.**

——**S. 211**—*Case taken on file after investigation—Discharge of accused—Complaint and prosecution under S. 211, I. P. Code—Legality.*

Where a case is taken on file after investigation by the Police under S. 202, Cr. P Code, the subsequent discharge of the accused does not justify the prosecution of the complainant under S. 211, I. P. Code. The making of a complaint under S. 211, I. P Code, in such a case, is not justified. (*Lakshmana Rao, J.*) SESHADRI IYENGAR *v.* EMPEROR. **196 I.C. 557 = 1941 M.W.N 463 (1).**

——**S. 211**—*Construction—False charge—'Instituted"—Meaning of—Giving information to police—If amounts to institution of criminal proceedings.*

In order to bring a case within the second part of S. 211, I. P Code criminal proceedings must be instituted in a Court on a false charge; although the criminal law may be set in motion by giving information to the police of a cognizable offence, unless proceedings are instituted in a Court of law, it is not correct to say that criminal proceedings have been instituted. A mere charge, however serious, which gets no further than a

PENAL CODE (1860), S. 211.

police inquiry, cannot give rise to a case triable only by a Court of Session. If the case, therefore, gets no further than a police inquiry, it falls within the first part of S. 211 I P. Code, and a First Class Magistrate can try the case. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v* KARSAN JESANG.

43 Bom L R. 858 = A.I R. 1941 Bom. 414.

——**S. 211**—*Dismissal of complaint for failure of complainant to prove case—Prosecution for false case—Expediency of.*

The failure of a complainant to prove his case may result in the dismissal of his complaint, or in the discharge or acquittal of the accused; but that would not by itself warrant his prosecution under S. 211, I. P. Code, for bringing a false case. (*Dhavle, J.*) JINILAL MANDAL *v.* CHANDERDEO PROSAD. **192 I C. 836 = 13 R.P. 531 = 1941 P.W N. 312 = 7 B.R. 420 = 42 Cr.L J. 332 = A I.R. 1941 Pat. 419.**

——**S. 211**—*Institution of criminal proceedings—Meaning.*

A person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, Penal Code. (*Ghulam Hasan, J.*) BALAK RAM *v.* EMPEROR. **196 I C 262 = 14 R O. 161 = 1941 O.W.N. 1072 = 1941 A Cr C. 225 = 1941 O L.R 665 = 1941 A.W.R. (C.C.) 298 = 42 Cr-L.J. 833 = 1941 O.A. 776.**

——**Ss. 215, 379 and 511**—*Alternative charge under Ss. 379 and 215—Conviction for either offence—Legality—Difference between an offence under S. 215 and an attempt to commit such offence.*

An accused could be charged alternatively under S. 379 and S. 215, I. P Code, and the trial Court could convict him of either offence. In the substantive offence under S. 215 there is a giver and a taker in an attempt to commit the offence there is merely a proposal or an attempt to enter into an agreement to take from a person who is being induced to give. Where a person who actually stole a bullock was charged along with others who attempted to get an illegal gratification from the owner, it was held that the former should be convicted of theft and the rest under S. 215 read with S. 511 I.P Code. (*Mosely, J.*) THE KING *v.* MAUNG HI A PE. **1941 Rang L.R. 395 = 196 I C. 714 = A I R. 1941 Rang 295.**

——**Ss. 215 and 379**—*Applicability of S. 215—Double conviction under Ss. 215 and 379 of thief—Legality.*

It is not correct to say that S. 215, Penal Code, does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished unless he uses all means in his power to bring the accused thief to justice. No doubt the wording of the section makes it apply in the majority of the cases to offenders other than the actual thief. There is nothing illegal in the double conviction of the actual thief who also takes a gratification under Ss. 215 and 379, but it is only in exceptional cases that a more severe sentence should be passed for both offences than would have been inflicted for theft alone. (*Mosely, J.*) THE KING *v* PO NYEIN. **1941 Rang L.R 582 = A.I.R. 1941 Rang. 340.**

——**S. 215**—Proof of offence. *See* 1940 Dig., Col. 994. RADHA MOHAN AHIR *v.* EMPEROR.

1941 P.W.N. 9 (2) = A.I.R. 1941 Pat. 138.

——**S. 220**—*Applicability—"Corruptly or maliciously"—If cover confinement for extortion under S. 347—Police Sub-Inspector wrongfully confining complainants on charge of gambling in futures and extorting money from them by putting them in fear of being challaned for offences—Offence.*

The words "corruptly and maliciously" in S. 220 are wide enough to cover confinement for the purpose of extortion under S. 347. Where a police Sub-Inspector wrongfully confines certain persons on charges of gambling in futures and extorts money from them by putting them in fear of being challaned in Court upon offences which he knew to be fictitious, the offence falls under S. 220 and not S. 347 or S. 342 and is triable only by a Court of Session. (*Davies, C.J.*) MANSHARAM GIANCHAND *v.* EMPEROR. **193 I.C. 454 = 13 R.S. 231 = 42 Cr.L J. 460 = A.I.R. 1941 Sind 36.**

——**S 243**—Ingredients of offence—Knowledge or time of knowledge—Burden of proof—Duty of prosecution—Onus if shifts on to accused—Evidence Act, Ss. 105 and 106—Effect of. *See* 1940 Dig., Col. 996. KOSHO BANIA *v.* EMPEROR. **192 I.C. 471 = 42 Cr. L.J. 301 = 13 R.P. 504 = 7 B.R. 432 = A.I.R. 1941 Pat 26.**

——**S. 268**—Applicability — Embankment on one side of river by riparian owner to protect land from flood—Injury caused to lands on the other side—Offence—If public nuisance—Nature of rights of parties. *See* 1940 Dig., Col. 996. JOY KISHNA MAHANTY *v.* EMPEROR. **7 B R. 139 = 42 Cr.L J. 72.**

——**S 294-A, second part**—*Applicability—Lottery tickets found in accused's shop—On certain tickets accused's name entered in counterfoils in space for name of seller of ticket to ultimate purchaser—Printed document headed by accused's name in large capitals containing proposal to purchasers to buy shares in lots also found—Offence.*

On certain of the large number of lottery tickets found in the accused's shop the name of the accused had been entered in the counterfoils, in the space provided by the persons issuing the tickets for the name not of the purchaser of the ticket but for the seller of the ticket to the ultimate purchaser. A printed document headed by the name of the accused in large capitals containing a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and reciting that the holder of the document was entitled to 1/73rd share of any prize won by any one of the twelve tickets was also found.

Held, that proposal and sale had been established within meaning of S. 294-A.

Held further, that publication was established by the very fact that the proposal forms had been printed in a press. (1920) 89 L.J K.B. 1166, Rel. on. (*Davis, C.J. and Weston, J.*) LILOMAL MANUMAL *v.* EMPEROR. **194 I.C. 704 = 14 R.S. 3 = 42 Cr.L.J 613 = A.I R. 1941 Sind 91.**

——**S 295**—Offence under—Brahmins breaking sacred thread of Ahirs. *See* 1940 Dig., Col 997. SHEO SHANKAR *v.* EMPEROR. **15 Luck. 696.**

——**S. 295**—*Offence under—Hut on agricultural holding used as mosque—Destruction of such hut by landlords and others.*

The use of a hut on an agricultural holding as a public mosque with the *azam* or public call to prayers is entirely unwarranted, and the hut is clearly not "a place of worship" under the law. To allow any sacred character to the hut would be to enable the tenant under the guise of religion to vest the shed as a public mosque in the religious body for whose observance it is to be used to the detriment of the landlords, who had only settled the land with him for agricultural purposes. Consequently the destruction of such a hut by the landlords and others does not constitute an offence under

PENAL CODE (1860), S. 295-A.

S. 295, I. P. Code, although it may amount to mischief as defined in S. 425, I. P. Code. (*Dhavle, J.*) BECHAN JHA *v.* EMPEROR. **7 B.R 785 = 194 I.C. 476 = 14 R.P. 1 = 1941 P.W.N. 462 = 42 Cr.L.J. 579 = A.I.R. 1941 Pat. 492.**

——**S. 295-A**—*If retrospective.*

S. 295-A, I. P. Code, has no retrospective effect (*Thomas, C.J.*) SHIB SHARMA *v.* EMPEROR. **16 Luck. 674 = 193 I.C. 516 = 13 R.O. 479 = 42 Cr.L.J. 429 = 1941 A Cr.C. 99 = 1941 O L R. 290 = 1941 A.L.W. 390 = 1941 O.A. 297 = 1941 A.W.R. (C C.) 118 = 1941 O.W.N. 480 = A.I.R. 1941 Oudh 310.**

——**S. 297**—*Scope—If limited to religious feelings—Intention—Wounding feelings—Offence.*

S. 297 fully deals with offences to which it refers and is self-contained and requires no interpretation by reference to S. 441. The word "trespass" in S. 297 means any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. S. 297 does not refer to "religious feelings" though the kind of feelings which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. That S. 297 is not limited to feelings of a religious nature is clear by the fact that in S. 298 which follows it "religious feelings" are expressly referred to. S. 297 does not refer only to "intention" but also to trespass which is likely to wound the feelings. The complainant on the death of his married daughter and two children erected stones in their memory over their ashes in the cremation ground. The accused who was the complainant's son-in-law eleven years after the death of his wife as a result of a dispute about money matters with the complainant went to the cremation ground and deleted the complainant's name from all the stones on the ground that they were erected out of money provided by him.

Held, that on the evidence and the circumstances of the case the accused's trespass was committed with something more than knowledge; it was committed in a spirit of spite and vindictiveness with intent to wound the feelings of the complainant and that the feelings which were wounded were not merely worldly feelings of vanity and pride. The fact that the stones were erected out of the money provided by the accused did not give him the right to enter the cremation ground and delete the name of the complainant therefrom. (*Davis, C. J.*) SANOO MANAJI *v.* EMPEROR. **I.L.R. (1941) Kar. 316 = 193 I.C. 616 = 13 R.S. 234 = 42 Cr.L.J. 454 = A.I.R. 1941 Sind 33.**

——**S. 299**—'Intention and knowledge'—Distinction. *See* 1940 Dig., Col. 997. EMPEROR *v.* DHIRAJIA. **I L.R. (1940) All. 647 = 191 I.C. 328 = 13 R.A. 253 = 42 Cr.L.J. 146.**

——**Ss. 299 and 300**—Relative scope and applicability. *See* 1940 Dig., Col. 998. KING *v.* AUNG NYUN. **191 I.C. 306 = 13 R.R. 126 = 42 Cr. L.J. 124.**

—— **S 300**—Act resulting in death, when murder. *See* 1940 Dig., Col. 998. EMPEROR *v.* DHIRAJIA. **I.L.R. (1940) All. 647 = 191 I.C. 328 = 13 R.A. 253 = 42 Cr L.J. 146.**

——**Ss. 300 and 299**—*Murder—Intention—Injury on vital spot—Plea of absence of intention to injure fatally—If available.*

In order to constitute the offence of murder not only must bodily injury be intended to be inflicted, but it must be intended that such bodily injury should be sufficient in the ordinary course of nature to cause death. Where a man inflicts a wound in a vital spot such as on the head causing the substance of the brain to protrude from the head and death ensues it is no defence to a charge of murder for the accused to say that he did not intend the injury to be fatal. (*Roberts, C.J. and Dunkley, J.*) NGA KHWET *v.* THE KING. **A.I.R. 1941 Rang. 319.**

PENAL CODE (1860), S. 302.

—— **Ss. 300 and 100**—*Private defence—Circumstances justifying reliance on.*

The deceased who had two das in his possession, threw one at the accused and advanced to attack with the other whereupon the accused becoming alarmed and finding that the only way in which it was possible to defend himself was to ward off, struck at him (deceased) with his spear and inflicted the wound which ultimately became fatal.

Held, that the accused acted under the right of private defence of body. (*Roberts, C.J. and Dunkley, J.*) NGA THEIN *v.* THE KING. **195 I C. 71 = 14 R.R 20 = 42 Cr L.J. 661 = A.I.R. 1941 Rang 175.**

——**S. 300, Exceptions**—*Applicability—Evidence showing that murderer i entitled to benefit of exception—Falsity of defence or mistake of Court—If bar to benefit of exception.*

If upon the evidence it appears that the murderer is entitled to the benefit of any one of the Exceptions of the Code neither the ignorance of the accused nor the falsity of his defence nor any mistake or omission of the lower Courts or advocates should deprive him of the benefit of it. (*Davis, C.J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR. **195 I.C 833 = 14 R.S. 47 = 42 Cr.L.J. 786 = A.I R. 1941 Sind 117.**

——**S. 300, first exception**—*Applicability—"Grave and sudden provocation"—Accused stabbing deceased with spear causing death being provoked by insulting language—Offence—Sentence.*

Where the accused snatching a spear brought by another stabs the deceased who used insulting language, causing instantaneous death, he must be held guilty of murder under S. 302, I. P. Code, where it does not appear that though the language used by the accused was insulting, the accused was provoked thereby so as to lose his self-control. The first exception to S. 300, I.P. Code, will not therefore apply. But the case would not call for a sentence of death, as the language used by the accused must be taken to be a mitigating circumstance justifying the lesser sentence of transportation for life. (*Burn, Offg. C.J. and Happell, J.*) EMPEROR *v.* VAYANAKUNNU VEDAN. **1941 M W.N. 872.**

——**S. 300, Excep. 1**—Applicability—Grave and sudden provocation—What amounts to—Question of fact—Accused pulled by the hand and dragged by unarmed man for making him go to a place against his will—Stabbing resulting in death—Offence. *See* 1940 Dig., Col. 999. ANDI THEVAN, *In re.* **195 I.C. 64 = 14 R.M. 121 = 42 Cr L J. 668 = A.I.R. 1941 Mad. 251.**

——**S. 300, Excep 1**—Grave and sudden provocation—Accused stabbing deceased when running—Deceased closing in with accused and trying to wrest knife and throwing him against wall—Accused stabbing twice—Death caused—Offence. *See* 1940 Dig., Col. 999. ANDI THEVAN, *In re.* **195 I.C. 64 = 14 R.M. 121 = 42 Cr.L J. 668 = A.I.R. 1941 Mad. 251.**

——**S. 300, Illus. (c)**—*Applicability—Revolver.*

Illustration (*c*) to S. 300 applies as much to a revolver as to a sword or club. (*Davis, C.J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR. **195 I C 833 = 14 R S. 47 = 42 Cr.L.J. 786 = A.I.R. 1941 Sind 117.**

——**S. 302**—Accused running with knife after having stabbed from person—Attempt by deceased to take

PENAL CODE (1860), S. 302.

knife or stop accused—Accused stabbing deceased in vital part and causing death—Offence. *See* 1940 Dig., Col. 1000. ANDI THEVAN, *In re.* **195 I C. 64 = 14 R M. 121 = 42 Cr.L J. 668 = A I R 1941 Mad 251.**

——**S. 302**—*Applicability—Accused administering dhatura—Death aused by pneumonia developed consequent upon exposure occasioned by unconsciousness produced by dhatura—Offence—Conviction for murder—Sustainability.*

Where in a trial on a charge of murder by administering dhatura poison, it is found that the death of the victim was not due to dhatura poison found to have been administered by the accused, but to *pneumonia* consequent upon exposure occasioned by coma or unconsciousness produced by the poison, and in fact it is found that the victim died of pneumonia after recovering from the dhatura poisoning, the accused ought not to be convicted for murder under S. 302 I. P. Code, but must be convicted only of an offence under S. 328, I. P. Code. (*Burn J.*) VENKATACHALAM CHETTY, *In re.* **1941 M W.N. 1038 = (1941) 2 M L.J. 661.**

——**Ss 302 and 34**—Applicability—Accused member of shooting party—His companions firing and killing deceased—Sentence. *See* 1940 Dig., Col. 1000. SHER KHAN *v.* EMPEROR. **191 I.C. 125 = 13 R L. 273 = 42 Cr.L J. 82.**

——**Ss. 302 and 304**—*Applicability—Blow on head of old woman with heavy stick with ferrule at end—Death resulting—Offence—Sentence—Public Prosecutor representing only lesser offence committed—Effect.*

To give an old woman on her head a blow with a heavy stick, three inches in diameter, with a ferrule at the end, is to do an act with the intention of causing such bodily injury as would be sufficient in the ordinary course of nature to cause death, within the meaning of Cl. 3 of S. 300, I. P. Code The person dealing such a blow which results in death is therefore liable to conviction for murder under S. 302, I P. Code. But when the Public Prosecutor represents to the Court that such an offence was not committed and only an offence under S 304, Part II was committed, it is not the policy of the Crown to press for a conviction for the more serious offence of murder. (*Horwill J.*) KANDASAMI SOLAGAR *v* EMPEROR. **1941 M W N 1028.**

——**S. 302**—*Applicability—Blow with heavy stick—Severe injury sufficient to cause death inflicted—Death—Offence—Intention—Death if should be necessary consequence—S.* 304.

A person can be held to be guilty of the offence of murder even though death is not a necessary consequence of a blow given by him to the deceased. If he gives a very heavy blow with a heavy stick which causes a severe injury sufficient in the ordinary course of nature to cause death, he must be presumed to have intended the probable consequence of such a blow and therefore he must be held to be guilty of murder and convicted under S. 302, Penal Code. The fact that the Public Prosecutor states wrongly that the offence committed was not murder but only an offence under S. 304, Para. 2, I. P. Code, is no ground for the Court not convicting the accused under S. 302, I. P. Code. (*Horwill, J.*) KARUPPAYYA THEVAR *v.* EMPEROR **1941 M.W N. 1025 = (1941) 2 M.L.J. 999.**

——**S. 302 read with S. 34**—*Common intention to kill—Inference—Evidence requisite*

Where a person is killed by stabs inflicted by a person with a knife hidden with him, others who have come with him with the common intention of merely throwing stones at the victim and injuring him cannot be convicted of the offence of murder under S. 302, read with S. 34, I. P. Code, when there is no evidence to show that they knew that the other accused was carrying a knife or that they facilitated the attack on the deceased. (*Horwill, J.*) SUBRAMANYA GOUNDAN *v.* EMPEROR. **1941 M.W.N. 815.**

——**Ss. 302 and 149**—Concerted action—Accused separating into two gangs—One killing deceased and another abducting his wife—Liability of all for murder. *See* 1940 Dig., Col. 1001. EMPEROR *v.* RAMJI LAL. **193 I.C. 666 = 13 R.L. 494 = 42 Cr.L.J. 475 = A.I.R. 1941 Lah. 117.**

——**Ss. 302, 304 and 324**—*Injury not likely to cause death—Subsequent death—Injury, only remotely connected with the actual cause of death—Offence.*

The injury inflicted by the accused on deceased's head was not such as to entail any serious consequences to a person in normal health. The wound had healed up at the end of seven days in the hospital but the deceased had temperature and on this account was advised to remain in hospital until temperature had subsided. Contrary to medical advice the deceased left hospital. Subsequently as a result of the formation of an abscess on the brain the deceased died. But no death would have resulted if he had not insisted on leaving the hospital against medical advice. His death really ensued because of his weak physical condition due to his suffering from chronic malaria and because his powers of resistance to infection had been much lowered by that disease. No abscess would have formed on the brain if the deceased had been in normal state of health and he died from abscess and not from the injury which had only a remote connexion with the abscess. The immediate cause of the deceased's death was his debilitated condition for which the injury was in no way responsible.

Held, that the accused was guilty of causing simple hurt with a weapon for cutting, punishable under S. 324.

Held, further, that though the use of a dangerous weapon was a matter to be taken into account in deciding questions of intention, still having regard to the medical evidence as to the wound itself, it was impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not therefore amount even to culpable homicide. (*Roberts, C.J. and Dunkley, J.*) NGA MOE *v.* KING. **1941 Rang.L R. 138 = 194 I.C. 547 = 14 R.R. 4 = 42 Cr L.J. 591 = A.I.R. 1941 Rang. 141.**

——**S. 302**—*Offence—Attack by two persons armed with deadly weapons with intention to kill—Victim receiving one fatal and one non fatal injury—Death—Conviction of both—If justified.*

If two men armed with deadly weapons, such as aruvals, attack another and both of them wound him, and he is afterwards found to have received a fatal wound and another wound which is not fatal, it is not possible to allow either or both of the assassins to escape merely because the non-fatal wound might have been inflicted by either of them, especially where it is clear that both of them who attack him with dangerous weapons intended to kill him. (*Burn and Mockett, JJ.*) EMPEROR *v.* MARUTHIAH THEVAR. **1941 M.W.N. 953.**

——**S. 302**—Proof of offence—Dying declarations *See* 1940 Dig., Col. 1001. MIANJI KHAN *v.* EMPEROR. **192 I.C. 179 = 13 R. Pesh. 35 = 42 Cr.L J. 254.**

——**S. 302**—Provocation—Plea as to—Purpose for which it can be relied upon. *See* 1940 Dig., Col. 1000. BHAROSA RAMDAYAL *v.* EMPEROR. **193 I C. 6 = 13 R.N. 318 = 42 Cr.L.J. 390 = A.I.R. 1941 Nag. 86.**

PENAL CODE (1860), S. 302.

——S 302—Sentence—Accused absconding and not arrested for several years after crime—Delay in trial—If ground for lesser sentence. *See* 1940 Dig., Col. 1001. PACHAYANNA GOUNDAN, *In re.*
I.L.R. (1941) Mad. 172=192 I.C. 299=13 R M. 551=42 Cr L J. 265=A.I.R. 1941 Mad 258=(1940) 2 M L J. 767.

——S. 302—Sentence—Brutal and deliberate murder by young woman—Accused having young baby—If ground for lesser sentence. *See* 1940 Dig., Col. 1001. THITHACHUMMA, *In re.* **192 I.C. 216=13 R.M. 550=45 Cr.L.J. 257=A.I.R. 1941 Mad. 27=(1940) 2 M.L J. 551.**

——S. 302—Sentence—Co-accused's sentence of death commuted by executive Government. *See* 1940 Dig., Col. 1002. AMAR SINGH *v.* EMPEROR.
191 I.C. 376=13 R.L. 314=42 Cr.L.J. 156.

——S. 302—Sentence—Common intention to murder—No proof as to which accused struck fatal blow. *See* 1940 Dig., Col. 1002. EMPEROR *v.* RAMJI LAL.
193 I C. 666=13 R.L. 494=42 Cr L.J. 475=A.I.R. 1941 Lah 117.

——S. 302—*Sentence — Considerations — Lesser penalty.*

Although youth by itself is not such an extenuating circumstance as to justify the imposition of the lesser penalty, regard may be had to the fact that persons of immature age are sometimes more easily provoked and behave in a less responsible manner than their elders. The accused, a cowherd aged 17 years, who was searching for a missing cow bell, which he had good reason to suspect was in the possession of the deceased was virtually met with a blank refusal by the deceased, a boy two years younger than himself ; and, in those circumstances, he lost his temper and committed a terrible assault with a dah which resulted in a serious injury on the head of the deceased and subsequent death of the deceased.

Held, that in all the circumstances of the case the sentence of transportation for life was proper and that the case was a fit one to be dealt with under S. 29, Prevention of Crime (Young Offenders) Act. (*Roberts, C.J. and Dunkley, J.*) NGA KHWET *v.* THE KING.
A.I R. 1941 Rang. 319.

——S. 302—*Sentence—Drunkenness of accused—If justifies lesser penalty.*

The law gives a discretion to Courts to impose the lesser penalty of transportation for the offence of murder, and the discretion must be exercised with due regard to the circumstances of each case. The discretion of Courts cannot be fettered by any hard and fast rule. The mere fact that a man was drunk is of course no justification whatever for not imposing the capital sentence. But all the circumstances of the case must be taken into consideration. (*Bhide and Ram Lall, JJ.*) SAMMAN SINGH THAKAR SINGH *v.* EMPEROR.
43 P.L.R. 698=A.I R. 1941 Lah 454.

——S. 302—Sentence—Existence of extenuating circumstances—Sentence of death—Propriety. *See* 1940 Dig., Col. 1002. KARUPPAL, *In re.* **192 I.C 278=13 R M. 553 (1)=42 Cr. L.J. 270=A I R. 1941 Mad. 50=(1940) 2 M.L.J. 492.**

——S. 302—*Sentence—Existence of mitigating circumstances—Power of Sessions Judge to impose lesser penalty—Judge—If bound to pass death sentence and to make recommendation for committing it.*

Where on a conviction for murder, there are circumstances which afford sufficient ground for mitigating the punishment and justify the imposition of the lesser penalty, the Sessions Judge can himself impose the lesser penalty. It is not necessary for him to impose a death sentence and to make a recommendation to the Government to commute the death penalty. (*Burn, O.C.J. and Happell, J.*) SORIMUTHU PILLAI. *In re.*
196 I.C. 687=1941 M.W.N. 847=54 L W. 312=A.I.R. 1941 Mad. 894=(1941) 2 M.L.J. 399.

PENAL CODE (1860), S. 304.

——S 302—*Sentence—Mitigating circumstance—Rest of the accused acting under the influence of the one responsible for the murder—Lesser penalty.*

Where one of the accused was mainly responsible for the murderous assault which resulted in the murder and the others who were his relatives joined him under his influence, it was *held* that the ends of justice would be met by their being awarded the lesser penalty of transportation for life. (*Agarwal and Madeley JJ.*) SHEO PRASAD *v.* EMPEROR. **1941 O.A. 943=1941 A W.R. (C.C.) 354=1941 O.W.N. 1246.**

——S. 302—Sentence—Mitigation of. *See* 1940 Dig., Col. 1002. PERUMAL KUDUMBAN *v.* EMPEROR.
191 I.C 37=13 R.M. 481=42 Cr.L J 64.

——S. 302—*Sentence—Murder of unarmed person by man armed with deadly weapon—Proper sentence.*

In a case of murder by a bully, a man armed with a deadly weapon against a man who was unarmed, death sentence is proper. (*Davis, C.J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR. **195 I C. 833=14 R.S. 47=42 Cr.L.J. 786=A.I R. 1941 Sind 117.**

——S 302—*Sentence of death—Separate sentence of imprisonment under S.* 201—*Propriety of.*

Where a person who has deliberately committed a murder and deliberately attempted at concealment of the murder, is convicted under S. 302 and S. 201, I. P. Code, and sentenced to death under S. 302, and to a separate sentence of seven years' rigorous imprisonment under S. 201, the procedure is not one that should be followed. Though as a strict question of law it may not be wrong, it is highly unusual and undesirable especially when there is no suggestion that the murder was committed by any body else. (*Burn and Mockett, JJ.*) EMPEROR *v.* RAMA GOUNDAN.
1941 M.W N. 874=54 L.W. 561 (2).

——S. 302—Sentence—Offence proved by circumstantial evidence only—Award of lesser sentence—Legality—Enhancement of sentence—Power of High Court in revision. *See* 1940 Dig., Col. 1003. SESHAYYA. *In re.* **I.L.R. (1941) Mad 340=195 I.C 679=14 R.M. 233=42 Cr.L.J. 770=A.I.R. 1941 Mad. 120=(1940) 2 M.L.J 895.**

——S. 302—Sentence—Rule, if any, governing—Age of accused—Relevancy. *See* 1940 Dig., Col. 1003. NATHU *v.* EMPEROR. **191 I.C. 303=13 R.A. 231=42 Cr.L.J. 115.**

——S. 302—*Sentence—Youth of* 17.

It is only in a very exceptional case that a youth of 17 or below will be sentenced to death for murder. The normal sentence for such a youth will be transportation for life. When such a youth commits a murder in company with an elder relative that is another excellent reason for giving only transportation for life. (*Young, C.J. and Blacker, J.*) MAGHAR SINGH *v.* EMPEROR.
I.L.R. (1941) Lah. 366=194 I.C. 719=14 R.L 11=42 Cr.L.J 614=43 P.L R. 95=A.I.R. 1941 Lah. 220.

——S. 304—*Intention to attack with lathi—Death caused—Offence made out.*

Any person who joins a body of men who are going to use lathis to attack others must know that it is likely that death may be caused and consequently, if death is caused, they are all liable and are guilty of offences of culpable homicide not amounting to murder. (*Allsop, J.*) SUMER SINGH *v* EMPEROR. **1941 O.W.N. 791=1941 A.Cr.C. 136=1941 A.W.R. (H.C.) 232=**

PENAL CODE (1860), S. 304.

1941 A.L.J. 348 = 1941 A.L.W. 606 = 1941 O A (Supp.) 527.

——**Ss 304 and 300, Exc. 1**—*Killing under grave and sudden provocation—Sentence—Relevancy of number of injuries.*

When it is once found that the accused killed the deceased under a grave and sudden provocation, the number and nature of the blows given ought not to count in assessing what punishment should be given. The number of wounds point really to nothing but his lack of self control. (*Braund, J.*) EMPEROR *v.* MEHDI ALI. **195 I C. 599 = 14 R.A 77 = 1941 A Cr.C. 146 = 42 Cr L.J. 755 = 1941 O A. (Supp.) 564 = 1941 A.L.J 395 = 1941 A.L.W. 660 = 1941 A W.R (H.C.) 238 = A.I.R. 1941 All. 310.**

——**Ss. 304 (1) and 325**—*No intention to cause death—Death actually caused—Common intention to cause grievous hurt—Offence made out.*

Where there was no proof of a common intention to cause injury known to be likely to cause death, but the offender or offenders knew that he or they was or were likely to cause not only hurt but grievous hurt and the combined effect of the injuries actually caused death, it was held that the accused were guilty of an offence under S. 325 and not S. 304 (1), I. P. Code. (*Mosely, J.*) SULAIMAN *v.* THE KING. **1941 Rang. L.R. 258 = 197 I.C. 131 = A.I.R. 1941 Rang. 301.**

——**Ss. 304 (2) and 323**—*Applicability—Deceased held by tuft by accused and assaulted by her daughters with stones—Death due to congestion of brain due to beating with stones—Offence.*

The accused who was not friendly with the deceased, her father-in-law, held him by the tuft, and the accused's daughters aged about 10 and 8 years, assaulted him with stones. The deceased died the next day and it was found that death was due to congestion of the brain as the result of beating with stones. It was not known who caused the fatal injury; nor was any common intention to cause death or grievous hurt suggested.

Held, the accused was guilty under S. 323, I. P. Code, and could not be convicted under S. 304 (2), I. P. Code, of the offence of causing death. (*Lakshmana Rao, J.*) NACHAL *v.* EMPEROR. **195 I.C. 231 = 14 R.M. 163 = 54 L.W 62 = 42 Cr.L.J. 638 = 1941 M.W.N. 528 = A.I.R. 1941 Mad. 746**

——**S 304 (2)**—Applicability—Kicking on abdomen—Death due to shock—Offence—Absence of mark or injury—Intention to cause death—If exists. *See* PENAL CODE, SS. 323 AND 304 (2). **(1941) 1 M L.J. 364**

——**S. 304 para. 2**—Applicability—Blow on head of old woman with heavy stick—Offence. *See* PENAL CODE, SS 302 AND 307, PARA. II. **1941 M W.N. 1028.**

——**S. 304, para. 2**—Applicability—Heavy blow with stick causing severe injury—Injury sufficient to cause death—Offence. *See* PENAL CODE, S. 302. **1941 M.W.N. 1025 = (1941) 2 M.L.J. 999.**

——**Ss. 304-A, 304 and 302**—*Accused driving lorry at high speed and causing death—Offence committed.*

Where the accused who was a lorry driver drove his lorry at a speed between 50 and 55 miles an hour and caused the death of a child who ran across the road,

Held, that it was possible that the driving of a vehicle at high speed in a crowded place like a city might result in a charge under S. 304, or even under S. 302, I. P. Code, but that in the circumstances of the case the offence committed fell under S. 304-A, I. P. Code. (*Young, C. J. and Sale, J.*) GURDEV SINGH *v.* EMPEROR. **A.I.R. 1941 Lah. 459.**

PENAL CODE (1860), S. 307.

——**S. 304-A**—*Applicability—Accused keeping poison in farm-house—Farm servants drinking same taking it to be arrack—Death caused—Offence.*

The accused kept a bottle of "Atlas tree-killer" (poison) in his farm-shed and two of his farm servants drank the stuff thinking it to be arrack and died.

Held, that this did not warrant a prosecution of the accused under S. 304-A. I. P. Code, and the charge must be quashed. (*Lakshmana Rao, J.*) AGASTHYALINGA GOUNDAN *v.* EMPEROR. **197 I C. 16 = 1941 M.W.N. 684 = A.I.R. 1941 Mad. 766.**

——**S. 304-A**—*Rash and negligent act—Driving car in cloud of dust raised by heavy traffic.*

When there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust when a car passes which goes in the *kacha* part of the road, it is the duty of all motorists under these conditions to stop their cars. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood. The position is aggravated when the motorist gets on the wrong side of the road and collides with another car. He is in such circumstances guilty of a rash and negligent act. (*Young, C.J. and Abdul Rashid, J.*) EMPEROR *v.* ABDUL QAYYUM. **I.L.R (1940) Lah. 646 = 193 I C. 766 = 13 R L 497 = 42 Cr.L J. 465 = A.I.R. 1941 Lah. 113**

——**Ss. 307 and 326**—*Applicability—Causing hurt with intent to put life of victim in danger—Offence.*

If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. The charge should be one for attempt to murder and not under S. 326, I. P. Code. (*Burn and Mockett, JJ.*) SUBBA RAO. *In re.* **I L.R. (1941) Mad. 592 = 196 I.C 119 = 14 R.M. 278 = 42 Cr.L.J 821 = 1941 M W.N 91 = 53 L.W. 175 = A.I.R. 1941 Mad 489 = (1941) 1 M.L J. 326.**

——**S. 307**—Applicability—Essentials of offence—Test to decide—Number of blows on neck of person unable to defend himself—Offence. *See* 1940 Dig., Col. 1004. BHARAT DUBE *v.* EMPEROR. **192 I.C. 523 = 22 Pat.L.T. 419 = 13 R.P. 513 = 42 Cr.L.J. 303 = A.I.R. 1941 Pat. 51.**

——**S. 307**—*Applicability—Tests—Administration of powdered glass mixed with food—If an offence under S. 307.*

In order to bring the case under S. 307, I. P. Code, the act must be capable of causing death in the natural and ordinary course of things or in other words that death might be caused if the act took effect. The degree of probability should not enter the question. It would be a very uncertain criterion to apply. It would be sufficient if death was a possible result and if the intention was to cause death. It was *held* that both these factors were present in a case where powdered glass was administered mixed in food and that the accused were guilty under S. 307, I. P. Code. (*Pollock and Gruer, JJ.*) EMPEROR *v.* GANGOO. **196 I.C. 652 = 1941 N.L.J. 365 = A.I.R. 1941 Nag. 302.**

——**S. 307**—Attempt to murder—Causing hurt intending to endanger life of victim—Offence. *See* PENAL CODE, SS. 307 AND 326. **(1941) 1 M.L.J. 236.**

——**S 307**—Sentence — Mitigation—Grounds—Accused under great mental strain—If ground for light sentence. *See* 1940 Dig., Col. 1004. BHARAT DUBE *v.* EMPEROR. **192 I.C. 523 = 22 Pat. L.T. 419 = 42 Cr.L J. 303 = 13 R P. 513 = A.I.R. 1941 Pat. 51.**

PENAL CODE (1860), S. 323.

——**S. 323**—Applicability—Accused holding deceased by tuft—Deceased assaulted by accused's daughters with stones—Death due to congestion of brain due to beating with stones—Conviction under S. 304 (2)—Sustainability—Offence. *See* PENAL CODE. SS. 304 (2) AND 323. **1941 M.W.N. 528.**

——**S. 323**—*Applicability— Alleged use of false weights—Arrest by constable without warrant—Release from custody of chowkidar on the way to the* thana—*Slight hurt -Conviction for hurt—Sustainability—Cr. P. Code, S.* 54—*Applicability.*

One *B* was selling fish to *J*, when a dispute arose regarding the weight of the fish. *B's* scales were tested and were found to be faulty. A constable who witnessed the dispute directed the two chowkidars to take *B* and another who supported *B* to the *thana*. On the way to the *thana* the party had to pass the house of the petitioner who asked his men to seize the constables. There was an altercation, the constables insisting that they would take *B* and his friend to the *thana*. Some slight hurt was caused to the chowkidars and the petitioner was prosecuted and convicted under S. 323, I. P. Code.

Held, (1) that the offence alleged to have been committed was non-cognizable and hence S. 54, Cr.P. Code, did not apply, and the petitioner was consequently not exceeding his legal right in insisting upon the release of the arrested persons; (2) that the original arrest and the taking of the men to the *thana* were not justified and the petitioner did not exceed his right in the action which he took, and he must therefore be acquitted, especially when the injury was very slight. (*Agarwala, J.*) VIJOY NARAIN SINGH *v.* EMPEROR.

22 Pat.L.T. 29 = 1941 P.W.N. 245.

——**Ss. 323 and 304 (2)**—*Applicability—Kicking on abdomen—Death due to shock—Absence of injury—Offence.*

The deceased owed one anna to the accused and the latter demanded repayment. The deceased promised to pay later and the accused thereupon kicked him twice on the abdomen remarking "how long am I to wait." The deceased collapsed and died soon after, the cause of death being shock due to the kicking. There was, however, no mark of injury, external or internal.

Held, that it could not be said that the appellant intended or knew that by kicking on the abdomen he was likely to endanger life and he was therefore not liable to conviction under S. 304 (2), I. P. Code, but only under S. 323, I. P. Code. (*Lakshmana Rao, J.*) MARANA GOUNDAN, *In re*. **195 I.C. 171 = 14 R.M. 168 = 42 Cr.L.J. 707 = 53 L.W. 363 = 1941 M.W.N. 220 (2) = A.I.R. 1941 Mad. 560 = (1941) 1 M.L.J. 364.**

——**Ss. 323 and 325**—Assault on one single person —Conviction under Ss. 323 and 325—Legality. *See* 1940 Dig., Col. 1005. PARMESHWAR *v.* EMPEROR. **16 Luck. 51.**

——**Ss. 326 and 304-A**—*Hurt by accident in affray —Criminal liability—Nature and extent—Intervener in fight between others, killed by accident by spear—Offence.*

Where a man strikes at another with a spear he is committing a criminal offence independently altogether of any element of rashness which may be involved in his striking by chance another person who might come to intervene. Reading S. 321 of I. P. Code, with S. 322, I. P. Code, it is clear the guilt of an accused remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person he actually causes the intended hurt to that person or to some other. Where in a fight between two sets of people the deceased intervened to separate them and was killed by the spear of the accused by accident it was held, that the accused was guilty of an offence under S. 326, I. P. Code, and not under S. 304-A, I. P. Code. (*Ganga Nath, J.*) CHHALLU *v.* EMPEROR.

I.L.R. (1941) All. 441 = 194 I.C. 794 = 1941 A.L.W. 524 = 14 R.A. 9 = 42 Cr.L.J. 621 = 1941 A.W.R. (H.C.) 184 = 1941 O.A. (Supp.) 390 = 1941 A.Cr.C. 125 = 1941 A.L.J. 326 = A.I.R. 1941 All. 288.

PENAL CODE (1860), S. 341.

——**S. 328**—Applicability— Accused administering dhatura—Victim developing pneumonia due to exposure occasioned by unconsciousness produced by dhatura—Death caused—Offence. *See* PENAL CODE, S. 302. **(1941) 2 M.L.J. 661.**

——**S. 330**—Assault to extort confession—Policeman standing by—Offence. *See* 1940 Dig., Col. 1005. PARMANAND *v.* EMPEROR **I.L.R. (1941) Nag. 110 = 42 Cr.L.J. 17.**

——**S. 332**—*Offence under—Assault on* patwari *to force him to make wrong entries.*

Where a *patwari* is assaulted and beaten with a view to force him to make wrong entries in the revenue papers, by such action the accused intended to prevent or deter the *patwari* from discharging his duties as a public servant and thereby is guilty of an offence under S. 332, I. P. Code. (*Bennett, J.*) GAYA PRASAD *v.* EMPEROR. **192 I.C. 774 = 1941 O.L.R. 232 = 1941 A.W.R (C.C.) 69 = 42 Cr.L.J. 321 = 13 R.O. 420 = 1941 O.A. 141 = 1941 A.Cr.C. 83 = 1941 O.W.N. 82 = A.I.R. 1941 Oudh 267.**

——**S. 332**—*Offence under—Facts to be proved to constitute.*

S. 332, I. P. Code, requires that the public servant must be acting in the discharge of his duty as such public servant and in the particular matter discharging a duty imposed on him as such public servant. Where a constable was entrusted with serving of notices on certain witnesses and had nothing to do with the arrest of a particular person, nor had a warrant for his arrest, if he is assaulted when attempting to arrest that particular person, no offence would be committed under S. 332. (*Ghulam Hasan, J.*) RAGHUBAR *v.* EMPEROR. **193 I.C. 887 = 1941 O.L.R. 367 = 13 R.O. 541 = 42 Cr.L.J. 501 = 1941 A.Cr.C. 113 = 1941 O.W.N. 602 = 1941 A.W.R. (C.C.) 151 = 1941 A.L.W. 446 = 1941 O.A. 382 = A.I.R. 1941 Oudh 385.**

——**Ss. 337 and 338**—Rash and negligent act——Driving car in cloud of dust raised by heavy traffic. *See* PENAL CODE, S. 304-A. **I.L.R. (1940) Lah. 646.**

——**S. 338**—Essentials of offence—Forcible taking of thumb impression of person on blank paper—Offence. *See* 1940 Dig., Col. 1009. JADUNANDAN SINGH *v.* EMPEROR. **193 I.C. 241 = 42 Cr.L.J. 361 = 13 R.P. 572 = 7 B.R. 514 = A.I.R. 1941 Pat. 129.**

——**S. 341**—*Applicability—Complainant proceeding on road on* tumtum—*Accused stopping and obstructing* tumtum *and preventing complainant from going on his way—Offence.*

The complainant was proceeding on road on *tumtum*, and the accused appeared, stopped and obstructed the *tumtum* and thereby prevented the complainant from proceeding on his way.

Held, that the acts of the accused constituted the offence of wrongful restraint under S. 341, I. P. Code, and rendered the accused liable to conviction. (*Agarwala, J.*) MANGAL SINGH *v.* EMPEROR.

194 I.C. 30 = 13 R.P. 673 = 42 Cr.L.J. 526 = 7 B.R. 696 = 1941 P.W.N. 419 = A.I.R. 1941 Pat. 384

PENAL CODE (1860), S. 341.

——**S. 341**—*Offence—If included in offence of unlawful assembly—Separate sentence of fine—Propriety.*

The offence under S. 341, I. P. Code, is involved in the offence of unlawful assembly, and a separate sentence of fine under S. 341, I. P. Code, is not called for. (*Lakshmana Rao, J.*) CHANDRIAH, *In re.*

1941 M W.N. 221 (1)=53 L.W. 532=
A.I R. 1941 Mad. 445=(1941) 1 M L.J. 362.

——**S.** 342—Applicability—Wrongful confinement by Police Officer to extort money by putting person in fear of prosecution—Offence. *See* PENAL CODE, S. 220.

A.I.R. 1941 Sind 36.

——**S. 342**—*If included in S.* 347.

The offence under S. 342 is included in the offence under S. 347. (*Davis, C.J.*) MANSHARAM GIANCHAND *v.* EMPEROR. **193 I.C. 454=13 R.S. 231=**
42 Cr.L.J. 460=A I R. 1941 Sind 36.

——**S.** 347—Applicability—Wrongful confinement by Police Officer and extortion by putting person in fear of prosecution—Offence. *See* PENAL CODE, S. 220.

A.I.R. 1941 Sind 36.

——**S. 347**—Scope—If includes offence under S. 342. *See* PENAL CODE, S. 342. **A.I.R. 1941 Sind 36.**

——**S.** 353—*Assault in resisting time expired warrant of attachment—If an offence.*

Persons who assault a Qurq amin and his peons in resisting the execution of time expired warrant of attachment, are not guilty of an offence under S. 353, I. P. Code. They can be said to be acting in the exercise of their right of private defence of property and not committing any offence. (*Agarwal, J.*) RAGHUBIR *v.* EMPEROR. **196 I C. 731=1941 O.W.N. 1175=**
1941 A.W.R. (C.C.) 334=1941 O L.R. 762=
1941 A.Cr.C. 256=1941 O.A. 876.

——**S.** 361—*Minor voluntarily leaving guardian's house—Effect.*

Where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian. (*Ghulam Hasan, J.*) ISRAR HUSAIN *v.* EMPEROR. **195 I.C. 371=**
1941 O.W.N. 874=14 R.O. 88=1941 O.L.R. 574=
1941 A.W.R (C.C.) 260=42 Cr.L.J. 728=
1941 A.Cr.C. 175=1941 O.A. 573=
A I.R 1941 Oudh 567.

——**S. 361, Explanation**—"Lawfully entrusted"—Interpretation—Entrustment—If may be presumed. *See* 1940 Dig., Col. 1006. NATHU SINGH *v.* EMPEROR

A.I.R. 1941 Nag. 66.

——**S.** 364—Offence under—Intention at time of abduction—Need for proof. *See* 1940 Dig., Col. 1007. UPENDRA NATH GHOSE *v.* EMPEROR.

192 I C. 352=13 R.C. 329=42 Cr.L.J. 285.

——**Ss. 364 and 302**—Abducted person murdered by abductor—Proper charge. *See* 1940 Dig., Col. 1007. UPENDRA NATH GHOSE *v.* EMPEROR.

192 I.C. 352=13 R C. 329=42 Cr.L.J. 285.

——**Ss. 372 and 373**—*Relative scope—If correlative, of each other.*

It cannot be held that Ss. 372 and 373, I. P. Code, are correlative of each other and that S. 373 is a mere counter part of S. 372. The fact that the language corresponds to some extent does not justify such a conclusion. S. 373 in terms deals with obtaining possession and not merely with obtaining possession from a third person. To say that because an offence under S. 372, which is aimed at disposing of a girl, necessarily involves two parties to the transaction therefore S. 373 which is aimed at obtaining possession, must involve two parties, is a fallacy. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GORDHAN KALIDAS.

43 Bom.L.R. 847.

PENAL CODE (1860), S. 379.

——**S. 373**—*Applicability—Girl of 17½ years voluntarily going with accused—Accused exercising no control over the girl and not preventing her from doing what she liked—Offence.*

"Obtaining possession" of a girl involves exercising some sort of control over the person of the girl. Where a girl of seventeen and a half years goes with the accused voluntarily, it being found that he was living in the same house as the girl and was a relative and that both go away with mutual consent, and there is nothing whatever to show that the accused exercised any control over the girl or prevented her from going anywhere she liked or from communicating with her friends, it cannot be said that the accused obtained possession of the girl within the meaning of S. 373, I. P. Code, and he cannot be convicted under S. 373, I. P. Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GORDHAN KALIDAS.

43 Bom L R. 847.

——**S. 376**—*Conviction on victim's evidence alone—If justified*

In a case of rape a conviction should not be based on the evidence of the victim alone. (*Lobo and Weston, JJ.*) MOUJALI *v.* EMPEROR. **195 I C. 267=**
14 R.S. 20=42 Cr.L.J. 715=A.I.R 1941 Sind 121.

——**S. 379**—*Applicability—Attachment in execution of decree—Claim to attached property allowed—Conviction of decree holder—Sustainability.*

The accused who held a decree against the complainant's brother-in-law applied for execution of the decree. He accompanied the amin who had a warrant of attachment in execution of which he attached some goats from the house of the complainant in spite of his protests. The complainant preferred a claim which was allowed and the goats were released as belonging to the complainant. On a complaint by the latter the accused was convicted under S. 379, I. P. Code.

Held, that the property having been attached by the amin in execution of a decree, the fact that the complainant's claim was allowed did not warrant the conviction of the accused, at whose instance the attachment was effected, under S. 379 read with S. 114, I. P. Code. (*Lakshmana Rao, J.*) SHEKU SAHIB *v.* VENKATARAMANAYYA. **1941 M.W.N 671 (2)=**
A.I.R. 1941 Mad. 799 (1).

——**S. 379**—Applicability—Attachment of crops—Judgment-debtor cutting and removing—Offence. *See* C. P. CODE, O. 21, R. 45 (2) AND (3).

1940 P.W.N. 980.

——**S. 379**—Applicability—Charge of rioting and theft of crops—Proof of specific acts constituting offence of theft against individual accused beyond reasonable doubt—Duty of prosecution to adduce. *See* PENAL CODE, SS. 147 AND 379. **22 Pat.L.T. 765.**

——**Ss 379 and 448**—*Applicability—Property of deceased person removed by son and servants—Complaint by concubine—Conviction of son and servants—Sustainability.*

One *D* died and after his death his son removed cattle belonging to the deceased through his servants. On a complaint by the concubine of the deceased, the son and the servants were convicted, the former under S. 379 and the latter under S. 448, I. P. Code.

Held, that no offence was committed by any of the accused and the conviction must therefore be set aside. (*Lakshmana Rao, J.*) NATARAJA MUDALIAR *v.* DEVANAI AMMAL. **196 I.C. 541=42 Cr.L.J. 896=**
1941 M.W.N. 463 (2)=A.I.R 1941 Mad. 674.

——**S. 379**—*Applicability—Removal of property under* bona fide *claim of right—Absence of dishonest*

PENAL CODE (1860), S. 379.

intention—Sale of holding under rent decree—Possession delivered to purchaser—Suit in Civil Court to set aside sale—Removal of crops by tenant pending suit—Offence.

The complainant instituted a number of rent suits against a number of his tenants, and obtained rent decrees on 17—11—1938. He put the holdings of the tenants to sale, and purchased them himself on 26—9—1939, and obtained delivery of possession through Court on 30—12—1939. In the meantime on 9—9—1939, the tenants instituted a number of civil suits to have the rent decrees obtained by the complainant set aside On 17—3—1940, pending the suits the ousted tenants with their adherents and companions removed the crops from the fields in the holdings. They were thereupon prosecuted and convicted for theft under S. 379 I. P. Code. The civil suits ultimately ended in decrees by which the sales were set aside.

Held, that the tenants could not be said to have any dishonest intention when they removed the crops while they were contending that the rent decree, and sales were not binding on them. They must be held to be under a *bona fide* belief that the crops removed by them belonged to themselves, and not to the complainants. They were therefore not guilty of theft and the conviction was unsustainable.

Held, further, that the adherents and companions could not be convicted for helping the tenants in removing the crops, when the principal accused could not be convicted for theft. (*Manohar Lall J.*) JHUMAK RAI *v.* EMPEROR. **192 I.C. 780 = 7 B R. 489 = 1941 P.W.N. 261 = 42 Cr L J. 339 = 13 R P 562 = 22 Pat.L T. 214 = A.I R. 1941 Pat. 369.**

——**S. 379**—*Ingredients of offence—"Dishonest intention"—Taking property of another under mistake of fact and in ignorance of law—Offence.*

Where a person takes another's property, believing under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft, there being no dishonest intention, even though he may cause wrongful loss to that other within the meaning of the Penal Code. Where the accused thinks that he could take away the property without committing an offence, he has no dishonest intention and is not guilty of theft. (*Dhavle, J.*) JAY MAHTO *v.* EMPEROR. **192 I.C. 403 = 7 B R. 384 = 42 Cr.L J. 293 = 13 R.P. 507 = 1941 P.W.N. 586 = 22 Pat.L T. 694 = A.I R. 1941 Pat. 383.**

——**S. 379**—Offence—Dishonest intention—Court sale of land—Raising of crop by judgment debtor's tenant—Delivery of land alone—Removal of crop by judgment debtor—Offence. *See* 1940 Dig., Col 1008. VENKATASUBBARAYUDU, *In re.* **192 I.C. 407 = 13 R.M. 573 = 42 Cr L J. 294 = A.I R. 1941 Mad. 41**

——**S 379**—*Offence under—Owner recovering back property wrongly taken under colour of office.*

A person who recovers back his property wrongly taken by some one acting under colour of Government office, is not guilty of an offence under S. 379, I. P. Code, as he has no intention of causing wrongful gain or wrongful loss. (*Skemp J.*) JAHANA *v.* EMPEROR. **194 I.C. 564 = 14 R.L. 7 = 1941 A.Cr.C. 108 = 42 Cr.L J. 601 = 43 P.L.R. 162 = A.I.R 1941 Lah 217**

——**S. 379**—*Offence under—Tirni contractor seizing animal to compel payment—Law in England and India.*

If a contractor for payment of *tirni* or grazing dues seizes an animal in order to compel payment of the *tirni*, he is not guilty of larceny under the law of England but is guilty of theft under S. 379, I. P. Code. Whereas the law of England proceeds with reference to an intention permanently to deprive the owner of the property, the law of India proceeds by reference to an intention to cause wrongful loss to him. (*Skemp, J.*) ABDUL KHALIQ KHAN *v.* EMPEROR. **194 I C. 800 = 42 Cr.L.J. 625 = 14 R.L. 36 = 43 P L.R. 179 = A.I.R. 1941 Lah. 221.**

PENAL CODE (1860), S. 395

——**S. 379**—*Sentence—Railway employee stealing fouling sleeper.*

If a railway employee steals a fouling sleeper which acts as a kind of precautionary signal, the least sentence of imprisonment which will be adequate will be one of six months. By the removal of the fouling sleeper, a danger is created of collision between trains of which the consequences may be very serious. (*Bhide, J.*) EMPEROR *v.* ALI BAKHSH. **196 I.C. 230 = 14 R.L. 151 = 42 Cr.L.J. 823 = 43 P.L.R. 420 = A.I.R. 1941 Lah. 312**

——**Ss. 383 and 385**—*Relative scope.*

Extortion as defined in S. 383 includes putting any person in fear of injury and covers S. 385 which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under S. 384 (*Davis, C.J.*) MANSHARAM GIANCHAND *v* EMPEROR. **193 I.C. 454 = 13 R.S. 231 = 42 Cr.L.J. 460 = A.I.R. 1941 Sind 36.**

——**Ss. 390 and 394**—*"For that end"—Meaning—Accused assaulting complainant during quarrel and then committing theft—If guilty of offence.*

The words "for that end" used in S. 390, I. P. Code, clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. If the accused first assaults the complainant as a result of a quarrel and hen commits theft of his cash, the assault has no relation whatever to the commission of the theft, although the theft is committed at the same time or immediately afterwards. He is, therefore, not guilty of an offence under S. 394, I. P. Code. (*Ghulam Hasan, J.*) BISHAMBHAR NATH *v.* EMPEROR. **194 I.C. 222 = 13 R O. 576 = 1941 O.L.R. 435 = 42 Cr L J. 530 = 1941 O A. 958 = 1941 A.W.R. (C.C.) 367 = A.I.R. 1941 Oudh 476.**

——**S. 395**—*Motive—Relevancy—Evidence of past conduct of accused in guise of evidence of motive—Conviction based on—Sustainability.*

In cases of dacoity and cognate offences where substantial property is alleged to have been stolen, it is unnecessary to consider motive at all. The taking of the booty itself provides a sufficient motive in such cases; where the prosecution, in the guise of evidence of motive has led a mass of evidence relating to the conduct of the accused in the past, likely to prejudice the jury, the conviction cannot be sustained. (*Agarwala and Meredith, JJ.*) ARJUN PANDA *v.* EMPEROR. **7 Cut.L.T. 82.**

——**Ss. 395 and 397**—*Offences—Sentences—Principle.*

According to the provisions of S. 395, I. P. Code, a person who commits dacoity shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years. If the dacoity is a very serious one it naturally follows that the maximum sentence or something approaching the maximum sentence, should be passed upon the persons concerned. It is true S. 397 imposes a minimum sentence of seven

PENAL CODE (1860), S. 395.

years where a dacoit has used a deadly weapon or has caused grievous hurt, but that does not mean that sentence of less than seven years should be passed on person against whom it is impossible to prove that they used dangerous weapons themselves or caused grievous hurt. (*Allsop and Verma, JJ.*) BANSI *v.* EMPEROR.
197 I.C 19 = 1941 A.L.W. 863 = 1941 A Cr.C. 208 = 1941 A.W.R. (H.C.) 263 = 1941 A.L.J. 490 = A.I.R. 1941 All. 359.

——**S. 395** —*Sentence—Offence on highway between sunset and sun rise—If aggravation of offence.*

In the case of a dacoity if the offence is committed on a highway between sunset and sunrise, it has to be taken as an aggravation of the offence. A sentence of seven ears' rigorous imprisonment is not at all excessive. (*Rowland and Shearer, JJ.*) ADHIK LAL PATHAK *v.* EMPEROR. **1941 P.W.N. 653.**

——**S 396** —*Sentence.*

Though according to S. 367 (3), Cr. P. Code, reasons have to be given for not passing the death sentence on a person convicted of an offence contrary to S. 396, I. P. Code; that does not mean that the death penalty is the normal sentence. Where persons take part in armed dacoities and are of mature age and there is no special circumstance of mitigation, the normal sentence is one of seven years. (*Roberts, C.J. and Dunkley, J.*) HLA SAN *v.* THE KING. **1941 Rang.L.R. 595.**

——**S. 397 (as amended by Burma Act IV of 1940)** —*Amendment if operates retrospectively.*

The provisions of Burma Act IV of 1940 have no application to offences which were committed before 16th March, 1940. Consequently, S 397, Penal Code, as it existed prior to its amendment must be applied in a case where the accused committed the offence before 16th March, 1940, but was convicted after that date, inasmuch as it is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a Criminal Court. The trial, ending in a conviction, is merely the means whereby a Court of Criminal Justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. This is made clear by S. 5, General Clauses Act. (*Dunkley and Blagden, JJ.*) SHWE HLA U *v.* EMPEROR. **1941 Rang.L R. 58 = 194 I.C 720 = 14 R.R. 9 = 42 Cr L J. 615 = A.I.R. 1941 Rang. 149.**

——**S. 397**—*Scope—"User"—If to be against person robbed.*

S. 397, I. P. Code, does not require the user to be against the person robbed. Where the accused while committing robbery uses a knife or other deadly weapon to frighten others who are in the company of person robbed and who would otherwise go to the latter's rescue, his guilt under S. 392 read with S. 397, I. P. Code, admits of no doubt. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* NAGAPPAN SERVAI.
196 I.C. 437 = 14 R.M. 302 = 53 L.W. 718 = 42 Cr.L.J. 868 = 1941 M W N. 382 = A.I.R. 1941 Mad 718 = (1941) 1 M L J. 695.

——**S. 403** - Essentials of offence—Retention by clerk of moneys received—Entry in accounts some days later—Conviction—Sustainability. *See* 1940 Dig., Col. 1009. RAGHAVA MENON, *In re.* **192 I.C. 404 = 13 R.M. 575 (1) = 42 Cr.L.J. 296 (1) = 1941 O.A. (Supp.) 585 (1) = 1941 A.Cr.C. 126 (2) = A.I.R 1941 Mad. 250 = (1940) 2 M.L J. 748.**

——**Ss. 403 and 405**—*Partner—Liability to be convicted under.*

A partner is liable to be tried and convicted for criminal misappropriation of property or criminal breach of trust of property under the law as laid down in Ss. 403 and 405 of the I. P. Code. (*Mosely, J.*) V.V. REDDY *v.* K. C. REDDY. **1941 Rang.L.R. 547 = A I R. 1941 Rang. 342.**

PENAL CODE (1860), S. 409.

——**Ss. 405 and 408**—*Advance by company to its broker against paddy already purchased for it—Broker undertaking to utilise advance only for such payment—Failure to supply paddy—Broker if guilty of offence under S. 405 or S. 408.*

Where a company advanced a certain sum to its broker against paddy represented to have been already bought and the broker undertook in writing to utilise the funds only for the payment of the paddy so bought and for no other purpose and the broker failed to supply the paddy, it was held that a broker was not necessarily a servant of the company and that the advance money had become the broker's money and was no longer the company's money and that hence there could be no trust in respect of how it should be used for the benefit of the company and that the undertaking given by the broker to use the advance for the express purpose of payment for paddy represented to have been bought by him, and for no other purpose, did not make him a trustee of the money and that hence, his dealing with it did not constitute an offence either under S. 405 or S. 408, I. P. Code. (*Shaw, J.*) MAUNG CHAN SEIN *v.* THE KING. **1941 Rang L R 193 = 195 I C. 703 = 14 R.R. 62 = 42 Cr L.J. 776 = A.I.R 1941 Rang. 189.**

——**S. 407**—*Essentials of offence—Dishonest intention—Necessity to prove—Act done in anticipation of law which would later make it offence—If offence.*

Before a person can be convicted under S. 407, I. P. Code, it must be shown that he acted dishonestly, that is to say, he intended to cause wrongful loss or wrongful gain to any person. It is not an offence to do an act in anticipation of a statute or enactment which would make that act an offence. The accused, a German director of a German company, on the eve of the declaration of war between Britain and Germany, realised cash by sale of his stock and handed over the cash to his wife. In a prosecution under S. 407, I. P. Code, in respect of this act,

Held, that the act of the accused which was done merely to screen the money from the Government of India or the custodian of enemy property, was not an offence as he had no intention to cause wrongful loss or gain to any other person or persons. (*Horwill, J.*) BARON VON DINCKLACE, *In re.*
54 L.W. 521 = (1941) 2 M.L.J. 748.

——**S. 408 and Cr. P. Code (1898), S. 222**—*Charge in respect of offence under S. 408, I. P. Code—Item and time, if should be given.*

In respect of an offence under S. 408, I. P. Code, it is not necessary that the charge should mention item and time when the items are lumped together and given as a whole and the period is given as between two dates. (*Thomas, C.J.*) WAZIR SINGH *v.* EMPEROR.
1941 A.W.R. (C C) 343 = 1941 O.A. 918 = 1941 O.W.N. 1208 = 1941 A Cr.C. 257.

——**S. 408**—*Offence under—Manager receiving employee's money and failing to account—Nature of liability.*

Where the manager of an estate receives money belonging to the estate and fails to account for it when asked for, he is civilly as well as criminally liable. (*Thomas, C.J.*) WAZIR SINGH *v.* EMPEROR.
1941 O A. 918 = 1941 A W.R (C.C.) 343 = 1941 O.W.N. 1208 = 1941 A.Cr.C. 257.

——**S. 409**—*Applicability—Pledge of jewels—Agent of pledgee disposing of same contrary to terms of contract—Offence.*

PENAL CODE (1860), S. 409.

Where it is alleged that an agent of a money-lender with whom certain jewels were pledged by the complainant as security for a loan, have been disposed of in violation of the terms of the contract between the parties, the facts do not constitute an offence under S. 409, I. P. Code. (*Lakshmana Rao. J.*) PANNALAL MARWARI *v.* KRISHNASWAMI PILLAI. **1941 M.W.N. 677 = 54 L W. 391 (2) = A.I.R. 1941 Mad. 804.**

——**S. 409**—*Applicability—Village Munsif retaining revenue collections for short time before remitting same to the treasury—Offence.*

A Village Munsif made a revenue collection of Rs. 2 7 0 on 15th March 1937 and of Re. 1 on 17th April, 1937. These amounts were remitted to the treasury on 21st May, 1937, and 24th April, 1937, respectively before any complaint was received. He was convicted under S. 409. I P. Code.

Held, that the retention of the amounts in the interval would not by itself justify a conviction under S. 409, I. P. Code. (*Lakshmana Rao, J.*) MUTHUSWAMI UDAYAN *v.* EMPEROR. **1941 M.W.N. 667 = 54 L.W. 235 = A I.R. 1941 Mad 761.**

——**S. 409**—*Banker failing to repay money paid into current account—If guilty of offence—Banker and customer—Nature of relationship.*

The legal relationship of banker and customer on a current account is that of a debtor and creditor. Money paid into the bank becomes to all intents and purposes the money of the banker, subject to his liability to return to the customer an equal sum on demand. The money cannot be said to have been entrusted with the banker in the sense in which the word "entrust" is used in Ss. 405 and 409, I. P. Code. If, therefore, the banker fails to repay the amount on demand, he is not guilty of criminal breach of trust under S. 409, I. P. Code. (*Derbyshire, C.J. and Bartley, J.*) S. PAKRASHI *v.* EMPEROR. **45 C.W.N. 1071 = A I.R 1941 Cal. 713.**

——**Ss. 411 and 412**—*Applicability—Property concerned in docoity found in possession of accused—Presumption—Conviction—If can be under S. 412—Conditions to be proved.*

Where a person is found in possession of property taken in a dacoity, and is unable to give any reasonable explanation for its being with him, it may be presumed that he knew the property to have been stolen, but not that he knew or had reason to believe that it was the proceeds of a dacoity rather than of a burglary or a theft. To justify his conviction on the more serious charge under S. 412, I.P. Code, there must be evidence, circumstantial or oral, to show that he knew or had reason to believe that a dacoity had been committed and the property had been taken in it, or that the person from whom he obtained it belonged to a gang of dacoits and the property was stolen property concerned in a dacoity. In the absence of such evidence, he can only be convicted under S. 411 I. P. Code.. (*Varma and Shearer, JJ.*) DWARIKA LOHAR *v.* EMPEROR.
192 I.C. 253 = 13 R.P. 470 = 1941 P W.N. 421 = 42 Cr.L J 258 = 7 B.R. 361 = A.I.R. 1941 Pat. 223.

——**S 411**—*Conviction—Basis of—Person in possession of stolen property not asked to explain possession—Doubt as to prosecution case about possession—Conviction—Sustainability.*

Where a man is found to be in possession of property recently stolen, the Court may, no doubt, presume that he is the thief or that he is in possession of the property knowing it to be stolen. If, however, he gives a reasonable explanation of his possession the Court should not find him guilty of the offence of receiving stolen property knowing it to be stolen, even though it is not affirmatively satisfied that his explanation is true. When he is not asked to explain his possession or even any specific question about the matter, he cannot be convicted under S. 411, I. P. Code. When there is a grave element of doubt as to the prosecution case about his possession there can be no conviction. (*Harries, C.J.*) BAIDYANATH MOHANTY *v.* EMPEROR **7 Cut.L.T. 78.**

PENAL CODE (1860), S. 412.

——**S. 411**—*Conviction—Sustainability—Essentials to be proved.*

In order to sustain a conviction under S. 411, I. P. Code, the exclusive and continuous possession of the stolen articles must be brought home to the accused. The mere fact that some stolen articles are found in an unused part of the building in which the accused lives are found at a search in the absence of the accused would not justify his conviction. (*Varma, J.*) UDHO SINGH *v.* EMPEROR. **196 I.C. 79 = 14 R P. 180 = 42 Cr.L J. 810 = 7 B.R 996 (2) = A.I.R. 1941 Pat. 614.**

——**S. 411**—Offence under—Burden of proof. *See* CR. P. CODE, S. 297—MISDIRECTION.
46 C.W.N. 54.

——**S. 411**—*Offence—Wife of accused producing stolen articles from house—Conviction—Sustainability.*

The mere fact that the wife of the accused produced stolen properties from the house where both were living would not warrant his conviction under S. 411, I. P. Code. (*Lakshmana Rao, J.*) MARIMUTHU KAVANDAN *v.* EMPEROR. **195 I.C. 432 = 14 R M 220 = 42 Cr.L.J. 738 = 1941 M.W N. 479 (2) = A.I.R. 1941 Mad 694.**

——**S. 411**—*Possession of stolen property—Proof—Stolen article found in house occupied by accused in common with others—Sufficiency for conviction.*

The mere fact that a stolen article is found in a house occupied by a person in common with others is no proof that he was in possession of it. To bring it home to him so as to render him liable to conviction under S. 411, I. P. Code, some additional circumstances have to be established. (*Dhavle, J.*) JAY MAHTO *v.* EMPEROR. **192 I.C 403 = 13 R.P. 507 = 42 Cr.L.J. 293 = 22 Pat L.T. 694 = 1941 P.W.N. 586 = 7 B R. 384 = A.I.R. 1941 Pat. 383.**

——**S. 411**—*Sentence—One accused member of criminal tribe—If ground for heavier sentence than that imposed on other.*

Where two persons are convicted under S. 411, I. P. Code, the fact that one of them is a member of a criminal tribe is no ground for awarding him a heavier sentence than that imposed on the other. (*Lakshmana Rao, J.*) SOMANNA *v.* EMPEROR. **196 I C. 227 = 14 R.M. 277 = 54 L.W. 479 = 42 Cr.L J. 824 = 1941 M.W.N. 480 = A.I.R 1941 Mad. 708 = (1941) 2 M.L.J. 253.**

——**S. 412**—*Applicability—Article concerned in dacoity recovered from house occupied by father and son—Son found taking part in dacoity—Father—If accountable—Conviction of father under S. 412—If justified—Presumption.*

Where a father and his son are residing together in the same house, and the son has taken part in a dacoity and subsequently the articles looted at the dacoity is found in the house occupied by both, in the absence of anything to suggest that the father had used that article or appropriated it to his own use, the presumption which would naturally be drawn is that the article remained in the possession of the son. The father cannot be made, in any way, accountable for it, merely because it was in the house which his son and himself occupy. The father cannot therefore be convicted under

PENAL CODE (1860), S. 415.

S. 412 of the Penal Code. (*Varma and Shearer, JJ.*) DWARIKA LOHAR *v.* EMPEROR. **192 I.C. 253 = 13 R.P. 470 = 1941 P W.N. 421 = 42 Cr.L.J. 258 = 7 B.R. 361 = A.I.R. 1941 Pat 223.**

——**Ss. 415, 419 and 420**—*Offence under—Causing false entry to be made in mutation register by practising deception on mutation officer.*

One *A* went to a patwari and told him that *B* had sold him some land. He produced *M* who represented himself to be the alleged vendor *B*. The patwari made an entry to this effect in the mutation register. The mutation was placed before the Naib-Tahsildar and the same representation was repeated before him.

Held, that the case did not fall within the purview of S. 415 and that *A* and *M* could not be convicted under S. 419. They also could not be convicted under S. 420 as the statement of *M* before the Naib-Tahsildar could not be regarded as a valuable security. (*Bhide and Abdul Rashid, JJ.*) MUHAMMAD BAKHSH *v.* EMPEROR. **I.L.R (1941) Lah. 718 = A.I.R. 1941 Lah. 460.**

——**S. 419**—*Proof of offence.*

Where the charge against the accused is that he obtained an appointment by cheating by personation, it is the duty of the prosecution to establish beyond doubt that the appointment of the accused was made as a result of the deception and nothing else. (*Varma, J.*) THAKUR MANDAL *v.* EMPEROR. **196 I.C. 748.**

——**Ss. 420 and 511**—Attempt to cheat—No cheating in fact Offence, if made out. *See* 1940 Dig , Col. 1011. EMPEROR *v.* REGHUNATH. **16 Luck. 194 = A.I.R. 1941 Oudh 3.**

——**S. 441**—*Land in possession of tenant—Trespass on, with a claim thereto—Offence, if made out.*

Where trespass on land in the possession of a tenant, is committed with a claim to the land, the intention is to cause annoyance to the proprietor who is in possession of the land through his tenant and an offence under S. 441 is thereby committed. (*Agarwal, J.*) BANSIDHAR *v.* EMPEROR. **1941 O.W.N. 1300 = 1941 A.W.R. (C.C.) 393 = 1941 O.A. 999.**

——**S 447**—Applicability—Raiyat evicted under process of Civil Court by landholder—Trespass on land and raising of crops in spite of objection by landholder—Offence. *See* MADRAS ESTATES LAND ACT, S. 212 (*d*) AND (*e*). **1941 M.W.N 666.**

——**S. 456**—*Offence under—Entry to commit clandestine adultery with unmarried woman by invitation.*

Where a man enters the house of another person with intent to commit clandestine adultery with an unmarried woman by invitation and actually commits adultery, not only does he not intend to insult or annoy any other person in the house but he desires above all things that his presence should not be known to the other occupants, and consequently he cannot be held to be guilty under S. 456. (*Almond, J C. and Mir Ahmad, J.*) EMPEROR *v.* TAKBIRULLAH. **196 I.C. 870 = A.I.R. 1941 Pesh. 79**

——**S 465**—Attesting forged document purporting to discharge decree-debt—Offence. *See* PENAL CODE. SS. 193 AND 465. **(1941) 2 M.L.J. 746.**

——**Ss. 467 and 471**—Fabrication of false document—When criminal—Question of intention. *See* 1940 Dig., Col. 1013. CHANDULAL *v.* EMPEROR. **192 I.C. 130 = 13 R.A. 302 = 42 Cr.L J. 247.**

——**S. 476**—Expediency of prosecution—Case taken on file after police investigation—Discharge of accused—Order for prosecution under S. 211, I. P. Code—If justified. *See* PENAL CODE, S. 211. **1941 M.W.N. 463 (1).**

PENAL CODE (1860), S. 494.

——**S. 482**—*Offence under—Facts to be proved.*

In the case of a prosecution for an offence under S. 482, I. P. Code, it must be proved that the trade mark on the accused's goods is likely to deceive a purchaser who is acquainted with the complainant's 'get up' but who trusts to memory. Mere differences in detail do not prevent the two designs being essentially the same. The degree of resemblance necessary is a matter incapable of definition *a priori*. Where every effort had been made by the accused to make his brand of soap resemble that of the complainant and the general colour scheme of his wrapper was the same as that of the complainant, it was *held* that though the similarity in marks may not amount to counterfeit it was a colourable imitation of the other and that the accused can be convicted under S. 482, I. P. Code. (*Ismail, J.*) ROSHAN SINGH *v.* EMPEROR. **I.L.R. (1940) All. 751 = 193 I.C. 189 = 13 R.A. 395 = 42 Cr.L.J. 352 = 1940 A.W.R. (H.C.) 645 = 1940 A L.J. 878 = A.I.R. 1941 All. 87.**

——**Ss. 482 and 486**—*Distinction between—Conviction under both—Legality.*

The distinction between false trade mark and counterfeit trade mark is somewhat subtle. It depends on the degree of resemblance between the false and genuine trade marks The offence under S. 482, I P. Code, will be complete as soon as a false trade mark has been used, but under S. 486 it will be necessary that the goods should be sold or possessed or exposed for sale. Hence it is perfectly legal to convict a person under both sections provided it is found that the mark on the goods of the accused was a false trade mark and also that it was a counterfeit trade mark. (*Ismail, J.*) ROSHAN SINGH *v.* EMPEROR. **I.L.R. (1940) All. 751 = 193 I.C. 189 = 13 R.A. 395 = 42 Cr.L.J. 352 = 1940 A.W R. (H C) 645 = 1940 A L.J. 878 = A.I.R. 1941 All. 87.**

——**S. 486**—*Offence under—Requisites.*

Though the imitation need not be exact, there should be close resemblance to constitute an offence under S. 486, I P. Code. Where accused's soap though similar in get up and other details to that of the complainant, contained 'No. 301' and 'India' in the place of 'No. 501' and 'Tomco' contained in the soap of the complainant, the accused cannot be convicted under S 486 for it is impossible to say that either the No. 301 is a counterfeit of 'No. 501' or that 'India' is a counterfeit of 'Tomco.' (*Ismail, J.*) ROSHAN SIN H *v.* EMPEROR. **I.L R. (1940) All 751 = 193 I.C. 189 = 13 R.A. 395 = 42 Cr.L.J. 352 = 1940 A.W.R. (H.C.) 645 = 1940 A.L.J. 878 = A.I R 1941 All. 87.**

——**S. 486**—"Possession" — What amounts to—Parcel of goods consigned by rail—Wrapper containing counterfeit trade mark—Forwarding note containing signature of accused—Accused—If in "possession"—Liability to conviction. *See* 1940 Dig., Col. **1015.** SUBRAMANIAM *v.* EMPEROR. **42 Cr.L.J. 28.**

——**Ss. 494/109**—*Abetment of bigamy—Proof required.*

In order to convict for the abetment of an offence under S. 494, I. P. Code, it must be found on the facts that the accused person intentionally aided the woman in the commission of that offence in other words, that he knew that she was previously married. (*Bartley and Roxburgh, JJ.*) TALEP ALI CHOUDHURY *v.* SARDAR KHAN. **45 C.W.N. 84.**

——**S. 494**—*Proof of marriage—Admission by accused.*

An alleged admission by the accused that he married the woman and a statement of a single witness to the

PENAL CODE (1860) S. 497.

effect that he was present at the marriage, are entirely insufficient to establish that the accused went through a formal marriage with the woman (*Bartley and Roxburgh, JJ.*) TALEP ALI CHOUDHURY *v.* SARDAR KHAN. **45 C.W.N. 84.**

——**S. 497**—*Offence under—If a continuing one—Successive prosecutions—Undesirability.*

It is difficult to see anything in the definition of the offence of adultery contained in S. 497, I. P. Code, which suggests that the offence is a continuing one. It is undesirable that there should be successive prosecutions in cases of this sort, and Courts should do nothing to encourage successive prosecutions. (*Pollock, J.*) REWA *v.* EMPEROR. **1941 N.L.J. 606.**

——**S. 498**—*Factum of marriage—Proof of—Duty of prosecution.*

In a case under S. 498, I. P. Code, it is necessary for the prosecution to prove the factum of marriage strictly. (*Shearer, J.*) RAMDHANI GOPE *v.* JAGESHER MAHTO. **7 B.R. 890=195 I.C. 126=14 R.P. 90=42 Cr.L.J. 653=A.I.R. 1941 Pat. 526.**

——**S. 499**—Essentials of offence—Mere publication of imputation in answer to question by Police in confidential inquiry—Conviction—Sustainability. *See* 1940 Dig., Col. 1016. JAINARAIN SINGH *v.* EMPEROR. **A.I.R. 1941 Pat. 9.**

——**S. 499, Exceptions**—*Burden of proof.*

A person who relies upon an exception to the general rule must prove his case and must bring it within the relevant section. It does not help his case to change from one exception to another and finally to throw upon the Court the burden, which by law is his, of placing the case for him under the exception which it thought appropriate. (*Davis, C.J.*) ABBASI *v.* EMPEROR. **I.L.R. (1941) Kar. 336=195 I.C. 159=14 R.S. 6=42 Cr.L.J. 684=A.I.R. 1941 Sind 92.**

——**S. 499, Exception 1**—*Applicability—Publication of matter concerning particular caste or community only—If falls under exception.*

Where the matter complained of concerns a particular caste or community, and not the public, it cannot be said that a publication or imputation which is substantially true is for the public good. Exception to S. 499, I. P. Code, would not apply to such a case. (*Broomfield and Divatia, JJ.*) VINAYAK ATMARAM *v.* SHANTARAM JANARDAN. **43 Bom.L.R. 737=A.I.R. 1941 Bom. 410.**

——**S. 499, Exceptions 3 and 9**—"*Good faith*"—*Meaning of—If same in both.*

There is no difference in principle on the question of "good faith" between Exception 3 and Exception 9. Exception 3 cannot be used so as to justify a writer repeating in any circumstances with impunity the highly defamatory mis-statements of another based upon mis-statements of facts. (*Davis, C. J.*) ABBASI *v.* EMPEROR. **I.L.R. (1941) Kar. 336=195 I.C. 159=14 R.S. 6=42 Cr.L.J 684=A.I.R. 1941 Sind 92.**

——**S. 499. Exceptions 9 and 10**—*Applicability—Excessive publication—Effect of.*

Where a publication of an imputation, though in good faith, amounts to excessive publication, such excessive publication would take the case out of the privilege conferred by Exceptions 9 and 10. (*Broomfield and Divatia, JJ.*) VINAYAK ATMARAM *v.* SHANTARAM JANARDHAN. **43 Bom.L.R. 737=A.I.R. 1941 Bom. 410.**

——**S. 500**—Applicability—Memorial to superior officer against subordinate officer—Allegations in memorial highly defamatory—Offence. *See* PENAL CODE, SS. 182 AND 500. **1941 M.W.N. 676.**

——**S 500 and Cr. P. Code (V of 1898) Ss. 198, 247 and 259**—*Death of complainant in defamation case*

PENSIONS ACT (1871), S. 4.

—Proceedings, if abate—Relative scope of Ss. 247 and 259, Cr.P. Code—S. 198, Cr. P. Code, if affects question—S. 306, Succession Act, if applies.

Where the complainant in a case of a defamation dies during the course of trial, the magistrate can exercise the discretion vested in him by S. 259, Cr. P. Code and not discharge the accused and continue the trial. It is contemplated in S. 247, Cr. P. Code, that the general procedure will be to acquit where the complainant is absent. But in S. 259 which applies to the case of defamation, the converse is the case. Where a complainant is absent and the offence is compoundable or non-cognizable, the magistrate *may* discharge the accused or he may decide to proceed with the trial. S. 198, Cr. P. Code, only limits the power of the Court to initial cognizance of the offence. Once the Court has seizin of the case there is nothing to prevent the Court proceeding with it. S. 306 of the Indian Succession Act has no application to a criminal prosecution. (*Mosely, J.*) U TIN MAUNG *v.* THE KING. **196 I.C. 54=14 R.R. 68=42 Cr.L.J. 801=1941 Rang.L.R. 224=A.I.R. 1941 Rang. 202.**

——**S. 504**—Applicability—Bill collector going to collect money and calling debtor "Shameless fellow. I will shoe you", during discussion—Offence. *See* 1940 Dig., Col. 1017. PITCHAI PILLAI *v* RAMASWAMI AIYANGAR. **42 Cr.L.J. 48=(1940) 1 M.L.J. 655 (1).**

——**S. 504**—*Applicability—Ryots meeting—Speaker abusing zamindarini and agents—Latter not present at meeting—Offence—Conviction—Sustainability.*

Petitioner, the organising secretary of a ryot's association, addressed a meeting of ryots and in the course of his speech on inam legislation he abused a zamindarini and her agents, but neither the zamindarini nor the agents were present at the meeting. He was charged and convicted under S. 504, I. P. Code.

Held, that his conviction under S. 504, I. P. Code, was unsustainable and must be set aside. (*Lakshmana Rao, J.*) SIVALINGA PRASAD, *In re*. **196 I.C. 171=14 R.M. 288=42 Cr.L.J. 827=1941 M.W.N. 373=53 L.W. 566=A.I.R. 1941 Mad. 683=(1941) 1 M.L.J. 610.**

——**S. 511**—Applicability. *See* 1940 Dig., Col. 1017. EMPEROR *v.* RAGHUNATH. **16 Luck. 194=A.I.R. 1941 Oudh 3.**

PENSIONS ACT (XXIII OF 1871)—*Punjab Pension and Revenue Assignment Rules, 1937, R. 12—Order in proceeding relating to succession of jagir—Second appeal—Revision.*

No second appeal lies to the Financial Commission from an order of the Commissioner passed on appeal from an order of the Deputy Commissioner in a proceeding relating to the succession of a jagir. Under R. 12 of the Pension and Revenue Assignment Rules, 1937, the provisions of Chap. II of the Land Revenue Act apply to proceedings of Revenue Officers under the rules, and therefore the Financial Commissioner has wide powers of revision conferred by S. 16 of the Land Revenue Act. The Financial Commissioner must exercise his powers of revision in dealing with cases under these rules rather more freely than is the case in regard to mutation proceedings, for instance, which concern disputes which must eventually be decided in the Civil Courts. (*Mitchell, F. C.*) GURNAM KAUR *v.* GURMUKH SINGH. **20 Lah.L.T. 102.**

——**Ss. 4, 5 and 6**—*Claims relating to grants of land revenue—Methods of obtaining adjudication—Jurisdiction of Revenue and Civil Courts—Parties acquiescing in obtaining adjudication in Revenue Court—If can be granted certificate under S. 6.*

PENSIONS ACT (1871), S. 6.

The Pensions Act provides two methods of settling claims relating to grants of land revenue as to which the jurisdiction of Civil Courts is barred by S. 4 of that Act Under S. 5 of the Act such claims may be disposed of by the revenue authorities and under S. 6 a Civil Court may take cognisance of disputes between rival claimants to the enjoyment of a grant of land revenue only if a certificate is granted by the revenue authorities that the case is one which it is appropriate that a Civil Court should try. Under R. 11 of the Punjab Pension and Revenue Assignment Rules the power of granting such a certificate is vested in the Financial Commissioner only and not in any subordinate revenue authority. It is clear, therefore, that any person who has a claim relating to any grant of land revenue other than a claim against Government direct may proceed in one of two separate ways. He may apply to the Deputy Commissioner under S. 5 of the Act for the adjudication of his claim or he may apply to the Deputy Commissioner under S. 6 or to the Financial Commissioner direct asking that the Financial Commissioner should grant a certificate that the dispute is one that may be tried by the Civil Courts. These two ways of obtaining adjudication on a claim must be regarded as alternative and it is open to a claimant to choose which of the two methods he will follow. But if both parties have acquiesced in obtaining adjudication on the merits of the case by the revenue authorities, it is inappropriate to grant a certificate which would permit the matter to be reagitated *de novo* in a different forum. (*Mitchell, F. C.*) SADHU RAM *v.* ABID BEG. **20 Lah.L T. 94.**

——**S. 6**—*Application for certificate rejected by Collector—Proper procedure.*

If an application for grant of a certificate under S. 6 of the Pensions Act is rejected by the Collector, the proper procedure is to apply to the Commissioner for reversal of the Collector's order. But as the rules prescribe that a certificate can only be granted by the Financial Commissioner, it is not unreasonable to make an application direct to his Court. (*Mitchell, F.C.*) SADHU RAM *v.* ABID BEG. **20 Lah.L.T. 94.**

——**S. 6**—*Application for grant of certificate—If may be made after adjudication by Revenue Court.*

If a party to a dispute under the Pensions Act wishes the exceptional procedure of S. 6 to be followed, he must apply for the grant of a certificate under that section before and not after the matter has been the subject of final adjudication by the highest revenue authorities under S. 5 of the Act. In such cases, the jurisdiction of the Civil Courts is entirely barred by S. 4 of the Act, and the regular procedure for adjudication of disputes is that prescribed by S. 5. The revival of the jurisdiction of the Civil Courts provided by S. 6 on a certificate from the revenue authorities is clearly intended to be an exceptional alternative to the adjudication prescribed in S. 5, and after the parties have fought out their respective claims in the revenue forum up to the highest revenue authority it would not be correct to permit the whole matter to be reopened in the alternative forum of the Civil Courts. (*Mitchell, F.C.*) RAHMAT BANO *v.* AMAR SINGH. **20 Lah.L.T. 99.**

——**S. 11**—Applicability — Commuted portion of pension—If "money due or to become due on account of pension"—Liability to attachment by creditors. *See* 1940 Dig., Col. 1018. GOPALACHARIAR *v.* DEEPCHAND SOWCAR. **I.L.R. (1941) Mad. 393 = 195 I.C. 290 = 14 R.M. 167 = A.I.R. 1941 Mad. 207 = (1940) 2 M.L.J. 782.**

——**S. 11**—"Pension"—Jagir. *See* 1940 Dig., Col. 1018. DHANWANT SINGH *v.* SANT LAL. **I.L.R. (1941) Lah. 564 = 192 I.C. 288 = 13 R.L. 369.**

POLICE ACT (1861), S. 29.

——**S. 14**—*Rules framed under—R. 34—Appointment of Dastaki—Competition between daughter and a collateral of a different branch.*

The words 'branch' and 'family' used in R. 34 of the rules framed under S. 14 of the Pensions Act, which governs the appointment of Dastakis, cannot have a different meaning from that given to them in Proviso (1) to R 33. R. 34 (1) only permits the daughters of a Dastaki to be appointed in succession to him on the failure of (*a*) male members in the branch of the family to which the first Dastaki belonged, (*b*) the widow or mother of last male Dastaki in certain circumstances, or (*c*) a male member descended from divided brothers or collaterals of the first Dastaki. (*Burton, F.C.*) RAMABAI *v.* RAMRAO. **1941 N.L.J. 154.**

PERMANENT SETTLEMENT. *See* LAND TENURES—PERMANENT SETTLEMENT.

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PLEDGE—Validity—Essentials — Deposit of share certificates—If creates valid pledge. *See* CONTRACT ACT, SS. 172 AND 178. **(1941) 1 M.L.J. 178.**

POLICE ACT (V OF 1861), S. 15—*Levy of cost of punitive police—Suit to recover against Secretary of State—Maintainability.*

A suit for the recovery of the costs of punitive police alleged to have been illegally levied from plaintiff is maintainable against the Secretary of State. (*Agarwal, J.*) JANKI PRASAD *v.* GOVERNMENT OF THE UNITED PROVINCES. **16 Luck. 421 = 192 I.C. 545 = 13 R.O. 367 = 1941 A.Cr.C. 16 = 1941 A.W.R. (C.C.) 82 = 1941 O.L.R. 185 = 4 F.L.J. (H.C.) 75 = 1941 O A. 31 = 1941 O.W.N. 63 = A.I.R. 1941 Oudh 355.**

——**S. 15-A (2)**—*'After such inquiry'—If satisfied by inquiry by subordinate of District Magistrate.*

Where the inquiry was made by the subordinate of District Magistrate, but under his supervision and he sanctioned the assessment, it was held that there was a sufficient inquiry of the District Magistrate. (*Agarwal, J.*) JANKI PRASAD *v.* GOVERNMENT OF THE UNITED PROVINCES. **16 Luck. 421 = 192 I.C. 545 = 13 R.O. 367 = 1941 A.Cr.C. 16 = 1941 A.W.R. (C.C.) 82 = 1941 O.L.R. 185 = 4 F.L.J. (H.C.) 75 = 1941 O.A. 31 = 1941 O W.N. 63 = A.I.R 1941 Oudh 355.**

——**S. 15-A (4)**—*Suit to recover amount realised on account of compensation—Maintainability.*

S 15-A, Cl. (4) of the Police Act provides that every declaration or assessment made or orders passed by a Magistrate under sub-S. (2) shall be subject to revision by Commissioner of the Division or the Local Government but save as aforesaid shall be final. When a statute provides a particular remedy a general remedy in the Civil Court becomes barred. Hence a suit to recover amount realised on account of compensation paid to the Mahomedans is not maintainable in the Civil Court. Even, if it is maintainable it is maintainable only on the ground of material irregularity in the proceedings of the Magistrate. (*Agarwal, J.*) JANKI PRASAD *v.* GOVERNMENT OF THE UNITED PROVINCES. **16 Luck 421 = 192 I.C. 545 = 13 R.O. 367 = 1941 A.C.rC. 16 = 1941 A.W.R. (C C.) 82 = 1941O.L R.185 = 4F.L.J.(H.C.)75 = 1941O.W.N 63 = 1941 O A. 31 = A.I.R. 1941 Oudh 355.**

——**S. 29**—*Offence under—Tampering with police records.*

Where a police official makes wrong entries in the police diary and conceals certain bail bonds instead of producing them in Court, he is guilty of an offence under S. 29 of the Police Act. (*Thomas. C.J.*) JAGDISH NARAIN *v.* EMPEROR. **1941 O.W.N. 1255 = 1941 A.W.R. (C.C.) 358 = 1941 O.A. 947.**

POLICE ACT (1861), S. 30.

——**S. 30**—*Conditions of licence—Duty of licensee to explain to processionists.*

Per *Bhide, J.*—The object of the licence is to secure observance of certain conditions by every member of the procession and not merely by the licensee. The licence is granted to the directors or promoters of the procession as a matter of convenience as it will not be practicable to require every potential member of a procession to take out a licence. The directors or promoters of a procession who take out a licence in such a case therefore become responsible for the conduct of the processionists. It will obviously be the duty of the licensee in such a case to explain the conditions of the licence to all who wish to take part in the procession. (*Dalip Singh, Bhide and Ram Lall, JJ.*) EMPEROR *v.* BHAGAWAT SINGH RAM SINGH.

A.I.R. 1941 Lah. 372 (F.B.).

——**Ss. 30 and 32**—*Licence, if required for every procession—Joining unlicensed procession—If offence.*

Per *Bhide, J.*—It cannot be said that a licence under S. 30 is required for every procession. A licence is required to be taken under S. 30 only when a breach of the peace is apprehended by the authorities concerned. It is therefore no offence to join a procession merely because no licence has been taken for it under S. 30. Even when a general or a special notice is issued under S. 30, requiring persons "directing or promoting" a procession to apply for a licence but no licence is obtained and yet a procession is taken out, it is only those persons who are "directors" or promoters of the procession who can be convicted under S. 32 for disobedience of the order and not ordinary members of the procession. (*Dalip Singh, Bhide and Ram Lall, JJ.*) EMPEROR *v.* BHAGAWAT SINGH RAM SINGH.

A.I.R. 1941 Lah. 372 (F.B.).

——**S. 30-A**—*Procession ordered to disperse—Disobedience of order by processionists—Offence—Penal Code, S. 143.*

Per *Ram Lall, J.*—Where a procession has been ordered to disperse under powers given by S. 30-A, Police Act, because the conditions of a licence have been violated, any person who omits to obey the order to disperse is liable, whether he was aware of the conditions of the licence or not. The liability in such a case would be that a person who neglects or refuses to disperse would be deemed to be a member of an unlawful assembly and punishable under S. 143, Penal Code. This would be an independent offence committed by a processionist. (*Dalip Singh, Bhide and Ram Lall, JJ.*) EMPEROR *v.* BHAGAWAT SINGH RAM SINGH.

A.I.R. 1941 Lah. 372 (F.B.).

——**S. 32**—Applicability—Licence under S. 30 (2) for procession—Condition for stopping music at specified place—Violation — Offence—Liability of persons other than licensee. *See* 1940 Dig., Col. 1019. ARUNACHALA MUDALI, *In re* **192 I.C. 311 = 13 R.M. 557 = 42 Cr.L.J. 272 (2) = A.I.R. 1941 Mad. 99 (2) = (1940) 2 M.L.J. 819.**

——**S. 32**—*Applicability—Processionist—Onus of proof.*

Per *Full Bench.*—It cannot be said that S. 32 applies only to the licensee and only the licensee can violate the conditions of a licence. Any member of the procession with knowledge of the terms of the licence may be proved to have violated the terms of the licence and consequently may come within the purview of S. 32.

Per *Ram Lall, J.*—In such cases it is always for the prosecution to prove that a processionist charged with having violated the conditions of a licence was aware of the existence of conditions which are alleged to have been violated, before he can be held liable. The mere

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fact that a person joined a procession or even continued to remain in the procession will not be sufficient to prove this knowledge or shift from the prosecution the onus of proving this knowledge.

Per *Bhide, J.*—Where the conditions of the licence make the licensee responsible for certain things and there are no conditions binding on the members of the procession as such, the licensee alone could be held liable for breach of conditions of the licence, for owing to the very nature of the conditions none except the licensee could violate them. (*Dalip Singh, Bhide and Ram Lall, JJ.*) EMPEROR *v.* BHAGAWAT SINGH RAM SINGH.

A.I.R. 1941 Lah. 372 (F.B.).

——**S. 32**—*Licence for procession—Breach of condition by some members unknown to licensee—Liability of licensee.*

Where a licence is issued to a person as a sole licensee to take out a procession on condition that no arms are carried by its members, the licensee is liable to conviction for breach of condition of licence under S. 32 of the Police Act, if arms are carried by some of the members of the procession, although this is unknown to the licensee (*Bartley and Akram, JJ.*) SHIBENDU SEKHAR ROY *v.* EMPEROR. **45 C.W.N. 663.**

——**S. 32**—"Violating the conditions of any licence"—Meaning of. *See* 1940 Dig, Col. 1019. SIBENDRA SEKHAR *v.* EMPEROR. **192 I.C. 850 = 13 R.C. 354 = 42 Cr L.J. 325 = A.I.R. 1941 Cal. 113.**

POSSESSION—Equitable right to—When can arise—Building on the land of another. *See* 1939 Dig., Col. 958. MEHERBAN *v.* YUSUFKHAN.

I.L.R. (1941) Nag. 655.

POST OFFICE ACT (VI OF 1898), S. 72—*Applicability—Charge against postman under S. 52 for secreting postal articles—Complaint by or by authority of Director-General or Postmaster-General—Necessity—Acts also constituting offence under S. 53—Effect of.*

The respondent, a postman, was charged by the police with an offence under S. 52 of the Post Office Act for secreting two postal articles in course of transmission by post and was committed for trial by the Court of Session. There was no complaint by order or authority from the Director-General of Posts and Telegraphs or Postmaster-General. A preliminary objection was taken that the acts also constituted an offence under S. 53 of the Act of detaining postal articles, which under S. 72 of the Act could not be taken cognizance of without such complaint:

Held, that the offence under S. 52 could be taken cognizance of without any complaint and the commitment was legal. The fact that the acts also constituted a minor offence under S. 53 was no bar to the trial of the offence under S. 52 of the Act. (*Lakshmana Rao, J.*) *J.*) PUBLIC PROSECUTOR *v.* KUNHIRAMAN NAYAR.

I.L.R. (1941) Mad. 345 = 195 I.C. 555 = 14 R.M. 232 = 42 Cr.L.J. 773 = 1941 M.W.N. 57 = 53 L.W. 70 = A.I.R. 1941 Mad 392 = (1941) 1 M.L.J. 44.

POWER—Construction—Authority given by Board of Directors of Company to Director to attend to all the affairs and Court proceedings relating to the Company—Authority to file insolvency petition against debtor. *See* 1940 Dig., Col. 1019. EBRAHIM SAIT *v.* METTUPALAYAM NARAYANI BANK, LTD. **191 I.C. 687 = 13 R.M 515 = (1940) 2 M.L.J. 495.**

POWER OF ATTORNEY—*Construction—Power to enter into reference to arbitration.*

Where the Bank by a power of attorney authorised its agent to sign any agreements, generally sign for the Bank, and take any legal proceedings on behalf of the Bank.

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Held, that the agent had authority to enter into a reference to an arbitration. (*Mir Ahmad and Soofi JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LEKHU RAM. **192 I.C. 758 = 13 R. Pesh. 44 = A.I.R. 1941 Pesh. 3.**

——Construction—Power to settle, liquidate and adjust all accounts—If includes power to refer question to arbitration *See* 1940 Dig., Col. 1020 RAMA NATHAN CHETTIAR *v.* KUMARAPPA CHETTIAR. **194 I C 826 = 14 R.M. 94.**

——*Stamp—Stamp Rules of* 1925, *R.* 10.

Under R. 10 of the Indian Stamp Rules of 1925 read with Appendix III to those rules, a power-of-attorney has to be stamped either with an engraved stamp or by the affixation and impressing of a label on it by the proper officer. (*Blacker, J.*) THE PEOPLES' INSTALMENT AND SAVINGS BANK, LTD., LAHORE *v.* GIAN CHAND. **196 I.C. 619 = 14 R.L. 161 = 43 P.L.R. 499 = A.I.R. 1941 Lah. 345.**

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——*Adjournment — Suit against alien enemy—Defendant internee and unable to appear in Court—His presence essential for defence of suit—If ground for adjournment of suit.*

Where the defendant in a suit is an alien enemy who is an internee and unable to be present in Court during war and his presence in Court appears to be essential in order to give instructions to his attorneys and counsel to cross examine the plaintiff, when he gives evidence, as well as his witnesses, the Court may adjourn the suit either, till the defendant is permitted according to law to appear and give instructions to his solicitors to defend the action, or *sine die* till the termination of the hostilities. (*Kania, J.*) VAIKUNTH P. MUNIM *v* PRAHLAD SHANKAR K SHUKLA. **43 Bom L.R. 827 = A.I.R. 1941 Bom. 406.**

——Admission. *See* PRACTICE (1) LEGAL PRACTITIONER—ADMISSIONS.
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——*Admission by pleader—Question of law—Binding nature of*

A wrong admission by a pleader on a pure question of law is not binding on his client. (*Tek Chand and Bec.*

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kett, JJ.) RAM KRISHAN *v.* OM PARKASH.
43 P.L.R. 489 = A.I.R. 1941 Lah. 347.

———Admission of counsel on point of law—Binding nature—Court, if can decide rights of parties on the true view of the law. *See* 1940 Dig., Col. 768. SOCIETE BELGE *v.* GIRDHARI LAL.
I.L.R. (1940) Kar (P.C) 208.

———Admissions—Admission on fact in trial and in appeal—If can be resiled from in second appeal. *See* MADRAS HEREDITARY VILLAGE OFFICES ACT, SS. 3 AND 5. **A.I.R. 1941 Pat 216.**

———Amendment. *See* C. P. CODE, S. 152 AND O. 6, R. 17.

———*Abandonment of issue—Later ruling on the point—Point if can be raised in appeal.*

Where in the trial Court an issue is not pressed by the counsel and subsequent to that there is an authoritative decision on the point, the party is not bound by the admission of his counsel in the trial Court and can raise the point in appeal. (*Yorke, J.*) ASIA BEGAM *v.* RAGHUBAR DAYAL. **192 I.C. 327 = 13 R O. 352 = 1941 A.W.R. (C.C) 13 = 1940 O W.N 1249 = 1940 O.A. 1210 = 1941 O.L.R. 113 = A.I.R. 1941 Oudh 203.**

———Appeal—Abatement—Suit against several persons including minors—Decision against plaintiff—Appeal by plaintiff without impleading minor defendants—Abatement. *See* 1940 Dig., Col. 1020. SHEONANDAN GOPE *v.* SHAHDEO KHATIK. **191 I.C. 597 = 13 R.P. 332 = 7 B R. 235.**

———Appeal—Appreciation of evidence—Interference. *See* 1940 Dig., Col. 1021. NAND KISHWAR BUX ROY *v.* GOPAL BUX RAI. **I.L.R. (1940) Kar. (P.C.) 235.**

———*Appeal—Appreciation of evidence by trial Court—Interference*

Where the trial Court after a detailed examination of the evidence comes to the conclusion that the evidence was true the appellate Court ought not to reverse this finding without stating its reasons. (*Leach, C.J., Venkataramana Rao and Patanjali Sastri, JJ.*) MUNISAMI MUDALI *v.* NARASAPPA MUDALI.
I.L.R. (1941) Mad 785 = 196 I.C. 406 = 14 R.M. 293 = 1941 M.W N. 655 = A.I.R. 1941 Mad. 539 = (1941) 2 M.L.J. 79 (F.B.).

———*Appeal—Binding nature—Person unsuccessful in getting impleaded—Not bound by result of appeal.*

A person is not bound by the result of any appeal to which he has not succeeded in getting himself made a party. (*Tek Chand and Beckett, JJ*) SHANTI LAL *v.* F. HIRA LAL SHEO NARAIN. **43 P.L R 471 = A.I.R. 1941 Lah 402.**

———*Appeal—Competency—If affected by subsequent legislation.*

An appeal which was incompetent on the date when it was filed could not become competent as the result of a new Act passed subsequent to the filing of the appeal. (*Varma, J.*) HET RAM *v.* COLLECTOR OF ALIGARH. **197 I.C. 114 = 1941 A.L.J. 513 = 1941 A L.W. 828 = 1941 O.A. (Supp.) 634 = 1941 A W.R. (Rev.) 702 = 1941 R D. 772 = A.I R. 1941 All. 355.**

———*Appeal—Competency—Method of ascertainment.*

Ordinarily when one wishes to find out whether an appeal is competent one has to examine the judgment and decree or order and then see whether it can be brought within the statutory provisions which allow an appeal. One has not to decide the appeal on the merits before one is in a position to say whether the Court has jurisdiction to hear the appeal or not. (*Henderson, J.*) SAKKAL SARDAR *v.* ISWAR DAS THIRANI
I.L.R. (1941) 2 Cal. 366 = 4 F.L.J. (H.C.) 405.

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———*Appeal—Competency—Suit filed as small cause suit - Disposal by Judge having small cause powers—Right of appeal—Suit numbered as original suit—Effect.*

When a suit is filed as a small cause suit and is actually disposed of by a Judge who has the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit, and therefore there can be no right of appeal against the decree in the suit. This principle must be applied even though the suit may have been numbered as an original suit after filing and before disposal. (*King, J.*) ARUNAGIRI GOUNDAN *v.* RAMASWAMI PILLAI. **1941 M.W.N. 829 = 54 L.W. 324 = A.I.R. 1941 Mad. 867 = (1941) 2 M.L.J. 537.**

———*Appeal—Conversion into revision.*

The practice of filing an appeal, and then, when it is found by the Court that no appeal lies, requesting the Court to treat it as a revision, is not always desirable. (*Verma, J.*) HET RAM *v.* COLLECTOR OF ALIGARH. **197 I.C. 114 = 1941 A L.J 513 = 1941 A.L.W. 828 = 1941 O.A. (Supp.) 634 = 1941 A.W.R. (Rev.) 702 = 1941 R.D. 772 = A.I.R. 1941 All. 355.**

———*Appeal—Correction of decree though appeal incompetent.*

Where though an appeal is incompetent, the appellate Court can make alterations in the decree so as to bring the operative portion of the decree into conformity with the language used in the particular enactment in question. (*Baipai and Dar, JJ.*) MAHOMED MOHTASHIM *v.* JOTI PRASAD. **I.L.R. (1941) All 360 = 194 I.C 801 = 1941 A.W R (Rev) 306 = 1941 O.A. (Supp.) 237 = 1941 A.L.J. 246 = 1941 R D. 460 = 1941 A L W. 359 (2) = 14 R.A. 7 = 1941 O.W.N. 502 = 1941 A.W.R. (H.C.) 128 = A I.R. 1941 All. 277.**

———Appeal—Duty of appellant—Proof of incorrectness of judgment. *See* 1940 Dig., Col. 1021. RAM CHARAN DAS *v.* BHAGWAT SARAN. **191 I.C. 620 = 13 R.A. 242.**

———*Appeal—Failure to file first Court's order—Procedure to be followed.*

If an appeal is filed without the necessary copy of the first Court's order, the appeal should be deposited as incomplete and then when the copy is filed to decide the question of limitation. (*Shirreff, J. M.*) BACHAN RAI *v.* BRIJ NARAIN RAI.
1941 A.W.R. (Rev.) 565 (1) = 1941 O.A. (Supp.) 496 (1) = 1941 R.D. 668.

———Appeal—Filing of—Does not operate as stay *See* C. P. TENANCY ACT (1920), S. 6 (6).
1941 N.L J. 50.

———*Appeal—Finding based on inadmissible evidence—Value.*

Where the trial Court has acted upon evidence which was not legally admissible its finding is vitiated. (*Ba U and Shaw JJ.*) FATIMA BEE BEE *v.* OFFICIAL TRUSTEE. **A.I.R. 1941 Rang. 344.**

———*Appeal—Finding of fact based on oral evidence—Interference on appeal.*

A Court of appeal always attaches a great weight to the opinion of the trial Judge on the credibility of the witnesses called before him and it would be contrary to settled principles that the appellate Court should substitute its opinion on the facts based on the written depositions for the opinion of the trial Judge who saw the witnesses in the box. A decision arrived at on a consideration of the oral evidence cannot be lightly differed from and it is not open to the appellate Court to consider the evidence in print before it and find out whether it would have come to the same conclusion as the

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trial Judge had (*Beaumont, C.J. and Kania, J.*) KHIMJI KUVERJI *v.* LALJI KARAMSI.
I.L.R. (1941) Bom. 211 = 196 I.C. 858 = 43 Bom L.R. 35 = A.I.R. 1941 Bom. 129.

——*Appeal—Finding of fact—Interference.*

If it is not safe for the appellate Court to draw a particular inference from the evidence, it is not safe for the trial Judge to draw that inference. Not safe, means that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases, the appellate tribunal may select the inference they choose; but they can have no equal choice between an inference that is safe, and one that is unsafe. (*Lord Atkin.*) SRIS CHANDRA NANDY *v.* RAKHALANANDA THAKUR.
I.L.R. (1941) 1 Cal. 468 = 1941 P W.N 263 = 1941 O A 457 = 1941 A.W.R. (P C.) 34 = 1941 O.L R. 329 = 7 B.R 656 = 13 R.P.C. 173 - 73 C.L J. 555 = I.L.R. (1941) Kar. (P.C) 54 = 43 Bom.L.R. 794 = 193 I.C. 220 = 1941 O W N. 572 = 22 Pat L.T. 286 = 53 L W. 469 = 1941 M.W.N. 354 = 1941 A.L W. 419 = 45 C.W.N. 435 = A.I.R. 1941 P.C. 16 = (1941) 1 M.L.J. 746 (P.C.)

——*Appeal—Finding of fact—Interference.*

In a civil appeal the Court should not interfere with findings of fact unless it is satisfied that the trial Court is clearly wrong. The judgment must show that the findings of the trial Court and the reasons therefor have been fully considered by the appellate Court Further the appellate Court should give its reasons for reversing the findings of the trial Court if it decides to reverse them. (*Sen, J.*) NANI PATRA *v.* MADHUSUDAN BERA.
73 C L J. 196.

——*Appeal—If to be against whole decree.*

An appeal must be preferred against the whole decree, and not against any item or items in the decree, though for the purposes of valuation the subject-matter in dispute in appeal only is valued. (*Harries, C.J. Fazl Ali and Manohar Lall, JJ.*) KAJA BRAJA SUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO.
20 Pat. 459 = 195 I.C. 344 = 7 B.R. 906 = 14 B.R. 109 = 22 Pat.L.T. 736 = A.I.R. 1941 Pat 269 (S B.)

——Appeal—Interference—Credibility of witness—Opinion of trial Judge *See* 1940 Dig., Col. 1022 RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY.
I.L.R. (1941) 1 Cal. 457 - 13 R.C. 363 = 193 I.C. 82 = A.I.R. 1941 Cal. 20.

——Appeal—Interference—Entry in record of rights—Construction of—Finding that land described as "belagan" is not rent free land—Interference in Letters Patent appeal *See* RECORD OF RIGHTS—ENTRIES IN.
7 B.R. 750 = 194 I C. 300.

——*Appeal—Judgment of reversal—Discussion of reasons given by original Court—Necessity.*

It cannot be said that a judgment of reversal is not a proper judgment merely because all the reasons given by the original Court are not discussed. If the reasons given by the appellate Court are so cogent as to justify the finding, no discussion of other less convincing reasons is necessary. Consequently, in such a case omission to discuss all the reasons given by the original Court is perfectly justified. (*Khundkar and Lodge, JJ.*) SASHI KUMARI DEVI *v.* DHIRENDRA KISHORE.
I.L.R. (1941) 1 Cal 309 = 196 I.C. 241 = 14 R.C. 199 = 45 C.W.N. 699 = A I.R. 1941 Cal 248.

——*Appeal—Judgment of reversal—Reasons for—Necessity to give.*

PRACTICE—Appeal.

An appellate Court must give reasons based on the evidence, if it disagrees with the finding of the trial Court (*Harper, S.M. and Shirreff, J.M.*) RAM DASS *v.* RASIAWAN LONIA.
1941 A.W.R. (Rev.) 508 = 1941 O.A. (Supp.) 467 = 1941 R.D. 546 (1).

——Appeal—Letters Patent appeal—Leave when given. *See* 1939 Dig., Col. 963. GANPATRAO *v.* SHEIKH BADAR
I.L.R. (1941) Nag. 460.

——*Appeal—New case—If can be set up.*

A party cannot be allowed to set up, for the first time in appeal, a case diametrically opposed to his own pleas in the Court below, and utterly inconsistent with the position taken up by him in a previous litigation. (*Tek Chand and Beckett, JJ.*) RAM KRISHAN *v.* OM PARKASH.
43 P.L.R 489 = A.I.R. 1941 Lah. 347.

——*Appeal—New plea—Absence of cause of action.*

Where the point that the plaintiff has no cause of action was not taken before or even at the settlement of issues and no issue was framed thereon nor was it pressed in the trial Court the point must be presumed to have been waived and hence cannot be raised in appeal. (*Almond, J.C. and Soofi, J.*) MUKARRAM KHAN *v.* S. HARDIT SINGH
196 I.C. 301 = 14 R. Pesh. 25 = A.I R. 1941 Pesh. 69.

——*Appeal—New plea at late stage in appeal.*

The appellate Court is loath to grant an appellant permission to take an entirely new point for the first time in appeal. It would not be right to allow the appellant to raise at a late stage in the appeal a point which was never raised before. (*Harries, C.J and Fazl Ali, J.*) DEOKINANDAN PD SINGH *v.* PARMESHWARI PD. SINGH.
1941 P.W.N. 582.

——Appeal—New plea—Objection to maintainability of suit if can be raised in appeal—Duty of Court to raise when it comes to its notice. *See* 1940 Dig., Col. 1023. NAGABHUSHANA BHATTA *v.* SEETHAMMA.
45 Mys.H.C.R. 321.

——*Appeal—New plea—Plea of estoppel—If can be raised for first time in appeal or second appeal.*

A party wishing to avail himself of the plea of estoppel must plead the estoppel in the trial Court, so that his opponent may be able to show that there is no room for the application of the doctrine. If that is not so pleaded and the parties go to trial on other plain issues, the plea should not be allowed to be raised for the first time in appeal or in second appeal (*Manohar Lall and Chatterji, JJ.*) JADO SINGH *v.* BISHUNATH LAL.
196 I.C. 849 = 8 B.R. 127 = 22 Pat L.T. 821.

——*Appeal—New plea—Plea of limitation.*

Limitation when founded on facts which are not disputed is a question of law, and may be taken in appeal and the appeal may be decided on this new basis, (*Davis, C J. and Lobo, J.*) RUPOMAL KODUMAL *v.* MT. JANAT.
I.L R (1941) Kar 124 = 196 I.C. 565 = A.I.R. 1941 Sind 158.

——Appeal—New Plea—Plea of limitation given up before issues in trial Court. *See* 1940 Dig., Col. 1023. SHARIFA BEGAM *v.* COURT OF WARDS.
191 I C. 676 = 13 R.L. 343.

——*Appeal—New plea—Plea of minority in second appeal—Limitation.*

The plea of minority for the purpose of calling in aid the provisions of S. 6, Limitation Act, cannot be raised for the first time in second appeal. (*Stone, C.J. and Clarke, J.*) SHIVJIRAM DHANNALAL *v* GULABCHAND KALOORAM.
I.L.R. (1941) Nag. 144 = 194 I.C. 806 = 14 R.N. 14 = A.I.R. 1941 Nag. 100.

——*Appeal—New plea—plea of novation—If can be raised for first time in second appeal.*

PRACTICE—Appeal.

A plea that a contract amounts to novation within the meaning of S. 63, Contract Act, cannot be raised for the first time in second appeal. (*Stone, C.J. and Clarke, J.*) SHIVJIRAM DHANNALAL *v* GULABCHAND KALOORAM. **I.L.R. (1941) Nag. 144 = 194 I C. 806 = 14 R.N. 14 = A I.R. 1941 Nag. 100.**

———*Appeal—New plea—Plea of* res judicata*—If can be entertained and given effect to in appeal for first time —Subsequent events—Duty of Court to take note of.*

Ordinarily it is not permissible for an appellate Court to affirm the decision of the trial Court giving effect to a plea of *res judicata* taken before itself for the first time. But when the final finding on which the plea rests is given while the appeal is pending, the appellate Court is not only justified, but bound to take notice of the final judgment arrived at between the parties and give effect to the same. The Court is bound to take notice of events which have subsequently happened. (*Abdur Rahman, J.*) RANGAYYA *v.* RAMAYYA.

54 L.W. 241 = 1941 M.W N. 981 = A.I.R. 1941 Mad 815.

———Appeal—New plea—Plea not raised in trial Court or in grounds of appeal—If can be raised at hearing of appeal. *See* 1940 Dig., Col. 1023. NARASIMHA AYYAR *v.* KRISHNA AYYAR. **192 I.C. 85 = 13 R M. 526 = (1940) 2 M.L.J. 11.**

———*Appeal—New plea—Point of law depending on facts—If can be raised.*

It would not be right in appeal or second appeal to allow a point of law to be raised which depends on questions of fact which the party relying on the point has not chosen to raise in the lower Court. (*Beaumont, C.J.*) ANNU BAJABA *v.* DADU TUKARAM.

195 I.C. 732 = 14 R.B. 73 = 43 Bom.L.R 222 = A I.R. 1941 Bom. 197.

———*Appeal—New plea—Point of law—Legality of partnership as regards its constitution if can be raised for first time in appeal.*

The question as to the legality of the constitution of a partnership is clearly a mixed question of law and fact and the appellate Court cannot for the first time raise such a question and decide (*Davis, C.J. and Lobo, J.*) MULCHAND TAJIOMAL *v.* SHANDAS JETHANAND. **194 I C. 380 = 13 R.S 271 = A.I.R. 1941 Sind 73.**

———*Appeal—New plea—Question of fact—Plea of non-access between spouses—If permissible in appeal.*

A question which is purely one of fact, *e.g.*, as to non-access between spouses, and which is not definitely raised in the pleadings should not be permitted to be raised during the course of arguments even in the trial Court, much less so in a Court of appeal. An appellate Court should not permit such a plea to be raised before it or discuss it and make it the sole basis of its judgment. (*Abdur Rahman, J.*) MANICKA MUDALIAR *v.* AMMAKANNU. **54 L W 411.**

———Appeal—New plea—Second appeal — Point of law. *See* 1940 Dig., Col. 1023. FAZL HAQ *v.* DAWAR SHAH. **192 I.C. 343 = 13 R.Pesh. 37.**

———*Appeal—New plea—Second appeal—Question of undue influence.*

Where question of undue influence is not raised in Courts below it cannot be allowed to be raised for the first time in second appeal because evidence would have been necessary to prove or disprove the exercise of undue influence if raised in trial Court. (*Almond, J.C. and Mir Ahmad J.*) KARAM DIN *v.* ANANT RAM.

193 I.C. 51 = 13 R.Pesh. 49 = A.I.R. 1941 Pesh. 6.

———*Appeal —New point —Execution sale—Order rejecting application to set aside—Appeal—New plea of fact requiring investigation of facts—If can be raised for first time.*

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A judgment-debtor cannot lie by in the executing Court, and then bring up in appeal an allegation which would require an investigation into facts and found upon a proposition of law that the sale is bad. He ought to put forward such an allegation during the execution proceedings, and if he does not do so, he cannot be permitted to put forward the same in an appeal against an order refusing to set aside the sale. (*Burn and Mockett, JJ.*) SHANMUGHAM CHETTIAR *v.* NAGASWAMI AYYAR & CO. **54 L W. 365 = 1941 M.W.N. 985 = (1941) 2 M.L J. 550.**

———*Appeal—New point—Question of law—If can be raised.*

Though a point raised for the first time in appeal may involve a pure question of law, if it depends on facts and those facts are admittedly not disclosed in the plaint or anywhere in the record before the appellate Court, the plea is not entertainable at that late stage. (*Collister and Bajpai, JJ.*) SAGAR MAL *v.* PARSHOTTAM DAS **1941 A W.R. (H.C) 371 = 1941 A.L.W. 1095.**

———*Appeal—New point—Suit under S. 92, C. P. Code—Objection that suit not instituted by all who got consent—If open for first time.*

If the facts are in dispute, the point that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under S. 92 read with S. 93, C.P. Code, and therefore was not validly instituted, should not be allowed to be raised for the first time in appeal. But where there is no dispute about the facts, the point can be allowed to be raised for the first time in appeal. (*Davis, C.J. and Tyabji, J.*) MULCHAND *v.* HARKISHINDAS. **I.L.R. (1941) Kar 204 = 194 I C. 461 = 13 R.S. 277 = A.I.R. 1941 Sind 88.**

——— Appeal—Parties—Suit against principal and agent —Decree against one alone—Appeal by that defendant —Other defendant if a necessary party. *See* PRINCIPAL AND AGENT—SUIT AGAINST. **1940 Rang.L.R. 693.**

———Appeal—Remand—Duty of Court—Decision of some of the issues—Undesirability. *See* 1940 Dig. Col. 1037. SHEOLAL *v.* JUGAL KISHORE. **191 I.C. 566 = 13 R.N. 203.**

——— Appeal—Remand—When to be made—Remand enabling parties to adduce fresh evidence—Propriety of. *See* 1940 Dig., Col. 1025 BHAGAVAT SASTRULU *v.* LAKSHMIKANTAM. **191 I C. 383 = 13 R.M. 484 = (1940) 1 M.L.J. 60.**

———*Appeal—Reopening of case—Failure to adduce evidence on a point in the trial Court owing to wrong legal advice.*

Where a litigant on the advice of his counsel as to the legal position decides to call no evidence on a particular point he cannot be allowed to have the matter reopened in appeal on establishing that the view previously taken by his counsel was erroneous. (*Bennett and Madeley, JJ.*) JOGENDRA SINGH *v.* PEOPLES BANK OF NORTHERN INDIA LTD. **1941 O.W.N. 1309 = 1941 A.W.R. (Rev.) 1114 = 1941 O A. 993.**

———*Appeal—Right of—Nature.*

A right of appeal is a creature of statute. It does not avail an appellant to contend that a statute does not prohibit an appeal. It is necessary for him to show that the statute affirmatively confers the right of appeal. (*Varma, J.*) HET RAM *v.* COLLECTOR OF ALIGARH. **197 I.C. 114 = 1941 R.D. 772 = 1941 A L J. 513 = 1941 A.L.W. 828 = 1941 O A. (Supp.) 634 = 1941 A.W.R. (Rev.) 702 = A.I.R. 1941 All. 355.**

———Appeal—Subsequent events — Cognizance of change of circumstances or law during pendency of appeal. *See* U. P. TENANCY ACT, S. 296

1941 O.W.N. 969 = 1941 O.A. 674

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——*Appeal—Subsequent events—Power of appellate Court to take note of subsequent legislation and to grant relief on basis of same—Rule—Nature of appeal.*

An appellate Court is entitled to take into account legislative changes since the decision under appeal was given. The Court in the exercise of its appellate jurisdiction has the power not only to correct error in the judgment under appeal but to make such disposition of the case as justice requires; and in determining what justice does require, the Court is bound to consider any change, either in fact or law, which has supervened since the judgment was entered. An appeal is in the nature of a re-hearing, and in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. The duty of the Court is to administer the law of the land at the date when the Court is administering it, and the appeal may be heard and determined on the basis of a provision in an enactment passed only during the pendency of the appeal. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) JACHMESHWAR PRASAD SHUKUL *v.* KESHWAR LAL CHAUDHURI.

20 Pat 429 = 13 R F.C. 4 = 191 I.C. 659 = 1941 O.L R. 82 = 22 Pat L.T. 119 = 1941 A W.R F C.) 39 = 1941 M.W.N. 136 = 1941 O A. 224 = 45 C W.N. (F.R) 66 = 1941 O.W.N. 372 · 1941 P.W N. 133 = 7 B R. 362 = 3 F L J. 73 = 73 C.L.J. 51 = 53 L.W. 373 = 1941 A.L.W. 255 = A I.R. 1941 F.C. 5 = (1941) 1 M.L.J (Supp.) 49

——Attachment. *See* C. P. CODE, O. 38.

——*Attachment—Effect of—If gives right to sue for mesne profits.*

A mere attachment of the land does not create any interest in that land in the person attaching it so as to give him a right to sue for mesne profits especially against a person in lawful possession of the same. (*Almond, J.C.*) MAHOMED AKBAR KHAN *v.* MUSHARAF SHAH. **A.I.R. 1941 Pesh. 87.**

——Burden of proof. *See also* EVIDENCE ACT, CH. VII (SS. 101-114).

——*Burden of proof—Limitation.*

When limitation is pleaded in defence, the duty of proving that the suit is within limitation always lies on the plaintiff. (*Shirreff, S. M. and Sathe, J.M.*) LACHMAN *v.* SIA RAM. **1941 R D 672 = 1941 O A. (Supp.) 617 = 1941 A.W.R. (Rev.) 677.**

——Burden of proof—Misconduct—Risk note form H. *See* RAILWAYS ACT, S. 72—MISCONDUCT. **1941 A.W.R. (H C) 5.**

——*Burden of proof—Rectification of land register.*

The onus is plainly upon the party seeking rectification of the Land Register to show that the entry which is *prima facie* right ought not to be there. (*Lord Atkin.*) THE HEIRS OF PRINCE MOHAMED SELIM *v.* THE ATTORNEY-GENERAL OF PALESTINE.

197 I.C. 48 = 1941 A W R. (Rev.) 747 = 1941 O.A. 709 = A.I.R. 1941 P.C. 99 (P.C.).

——Burden of proof—Suit by Crown on the ground of escheat. *See* CROWN—SUIT BY. **1941 O.W N. 33**

——*Burden of proof—Suit for eviction and arrears of rent—Plea that land is inam and that defendant is occupancy ryot not liable to be ejected—Further plea that Civil Court has no jurisdiction—Onus.*

Where a defendant in a suit for arrears of rent and eviction raises the plea that the land is an inam and that therefore he has occupancy rights and cannot be evicted and that the Civil Court has no jurisdiction to try the suit, the burden is upon him to prove his allegation. It is not for the plaintiff to prove that the land is not an inam. (*King, J.*) SINGARACHARYULU *v.* SESHARAO. **1941 M.W N. 803 = 54 L.W. 602 = A.I.R. 1941 Mad. 865 = (1941) 2 M.L.J. 432.**

——Burden of proof—When a determining factor and when not—Withholding of evidence relying on onus—Propriety—Duty of parties. *See* 1940 Dig., Col. 137. CHAN WAN HONG TONG *v.* A. K. A. C. T. V. CHETTYAR FIRM. **194 I.C. 270 = 13 R.R 294 = A.I.R. 1941 Rang. 108.**

——Cause of action—Inchoate nature of—Remedy—Amendment when useful. *See* 1940 Dig., Col. 150. EUSOOF KARWA *v.* MRS. NIEMEYER. **194 I.C. 177 = 13 R.R. 275 = A.I.R. 1941 Rang. 37.**

——*Certiorari*—Writ of—Another remedy open—If can be issued. *See* BURMA TENANCY ORDINANCE—SS. 6 (3) AND 9. **A.I.R. 1941 Rang. 199.**

——*Certiorari*—Writ of—Jurisdiction of High Court—Madras Hindu Religious Endowments Act—Notification of temple under—Order of Religious Endowments Board made arbitrarily and in abuse of powers—High Court's power to quash. *See* GOVERNMENT OF INDIA ACT (1935), S. 306 **(1941) 2 M LJ. 175.**

——*Certiorari*—Writ of—Jurisdiction issue—Order without jurisdiction—Debt Conciliation Board—Order declaring debt discharged made without jurisdiction and in abuse of powers—Quashing of. *See* MADRAS DEBT CONCILIATION ACT, SS. 10 AND 23 **(1941) 1 M.L.J. 108.**

——*Certiorari*—Writ of—Power of Nagpur High Court to issue. *See* GOVERNMENT OF INDIA ACT, S. 224 (2). **I.L.R. (194) Nag. 397.**

——Compromise. *See* PRACTICE—DECREE.

——Costs. *See* (1) C. P. CODE, S. 35.
(2) LEGAL PRACTITIONER—COSTS.

PRACTICE—Declaratory suit.

——*Court, when to take note of point not pleaded.*

If there is any question of statutory requirement which compels the doing of a thing, the Courts must take note of that fact even though it is not pleaded. (*Stone, C. J. and Bose, J.*) RADHAKISAN JAIKISAN GINNING AND PRESSING FACTORY *v.* JAMNADAS NURSEY GINNING AND PRESSING CO., LLD. **I.L.R. (1941) Nag. 702.**

——*Court-fees—Duty of Court in fixing time for payment of deficit court-fee—Plaintiff not guilty of laches and fairly large amount asked for as court-fees—Peremptory order fixing short date and directing dismissal of suit on default—Propriety.*

Where a Court granting a decree to a plaintiff orders him to pay a fairly large amount of money by way of deficit court fee making it a condition precedent, it should give the plaintiff a fairly long time for the same and should not make a peremptory and final order leaving no possibility for any extension of time, such as, that the suit shall stand dismissed if the court fee is not paid by a fixed date. In a case where there has been no grave *laches* on the part of the plaintiff, such an order is unnecessarily stringent and is liable to be set aside in appeal. (*Chatterji and Meredith, JJ.*) RAMLAKHAN PANDEY *v.* TRIBENI DAS. **1941 P.W N. 516.**

—— Declaratory suits. *See* SPECIFIC RELIEF ACT, S. 42.

——*Declaratory suit—Cause of action—A contemplating instituting suit or complaint against B—Suit by B to declare that A has no cause of action—Maintainability.*

The mere fact that *A* is supposed to contemplate the bringing of an action or launching of a criminal complaint against *B*; or that *A* may have stated that he has grounds for such an action or complaint, does not entitle *B* to institute a suit against *A* to have it declared that

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A has not a cause of action against *B*. That is so whether the result depends merely upon questions of law or upon facts as to which there would or might be a conflict of evidence and a protracted trial. (*Blackwell, J.*) KANHAIYALAL HARKARANDAS *v.* MOHANLAL RAMVALLABH. **194 I C. 814=14 R B. 9=43 Bom.L.R 287=A.I.R. 1941 Bom. 219.**

———*Decree—Compromise—Compromise decree—Executability.*

If the compromise is mentioned in the operative part of the decree it is embodied in the decree and if it is in the operative part of the decree it is capable of execution. (*Thomas, C.J and Agarwal, J.*) LAL BHAGWAT SINGH *v.* HARI KISHAN DAS. **197 I.C 167=1941 O.A. 865=1941 A.W R. (Rev.) 949=1941 O.W.N 1138.**

———Decree—Compromise—Consent decree—Binding force—Party giving up right—If bound when subsequently it transpires that he had right. *See* 1940 Dig., Col. 371. CENTRAL CO OPERATIVE BANK, LTD., BARH *v.* DASARATH PANDEY. **1940 P.W.N. 1032.**

——— *Decree—Compromise—Consent decree—Binding nature.*

A consent decree raises an estoppel as much as a decree passed *in invitum*. It is binding as between the consenting parties and their successors-in-interest. (*Clarke, J.*) GOPAL MADHORAO *v.* ACHYUT SADASHEO. **196 I.C. 493=14 R.N. 108=1941 N.L.J. 388=A I.R. 1941 Nag. 271.**

———Decree—Compromise—Consent decree—Operation as estoppel. *See* 1940 Dig., Col. 371. SAHIB NASIB KHAN *v.* QUTBUNNISSA. **I.L.R. (1940) All. 691=192 I.C. 589=13 R.A. 340=A I.R. 1941 All. 18.**

———Decree—Compromise—Consent decree—Setting aside as having been fraudulently procured—Remedy—Application for review—Maintainability. *See* C P. CODE. O. 47, R. 1. **1941 P.W.N. 385.**

———Decree—Compromise—Consent decree—Validity—Undertaking of joint liability by majors and minors—Non enforceability against minors—Majors—If absolved from liability. *See* 1940 Dig., Col. 372. SHEONANDAN GOPE *v.* SHANDEO KHATIK. **191 I C. 597=13 R.P. 332=7 B R. 235.**

———Decree—Construction—Ambiguity — Reference to judgment. *See* 1940 Dig., Col. 556. RAJENDRA KISHORE BASU *v.* KUMAR PROMOTHA NATH ROY. **193 I.C. 842=13 R C. 461=A.I.R. 1941 Cal. 80**

———Decree—Construction—Direction to defendant to pay amount to plaintiff—Charge created on shares—Provision for instalments — Default clause—Sale of shares on default—Deficiency—Right to proceed against other property of defendant—Fresh personal decree—If necessary. *See* C. P. CODE, O. 34, R. 6. **43 Bom.L.R. 26.**

———*Decree—Construction—Mortgage decree in suit on two mortgages—First mortgage on property* A—*Second mortgage on* A *and* B—*Decree directing sale—Amount due on each mortgage mentioned separately and kept apart—Direction for sale of* A *first and then of* B *in case of deficiency—Sale of* A *resulting in deficit—Sale of* B *—Surplus sale proceeds—If can be appropriated towards deficiency.*

A suit was filed on two mortgages dated 9-6 1928 and 24-8 1929. The first mortgage was over property *A*, and the second was over *A* and *B*. There was a subsequent mortgage in favour of the appellant over *B* alone. A preliminary decree was passed and it recited separately the amounts due on each mortgage. Subsequently this decree was made final. The preliminary decree, in which the sums due under the two mortgages were kept

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apart, provided that the property *A* should be sold first and in the event of that property not producing the total amount due to the decree-holder, the property comprised in the second mortgage should be sold to satisfy the decree. In the sale proclamation it was declared that properties would be sold in satisfaction of the amount of the two decrees (the total amount being given). The sale of property *A* realised an amount which was not sufficient to satisfy the decree on the first mortgage. Property *B* was then put up for sale; the decree-holder who was the purchaser under the first sale was also the purchaser in the second sale. The amount realised was sufficient to satisfy the balance due to the decree-holder under the two decrees together, though it was more than the amount due under the second mortgage, *i.e.*, the mortgage over property *B*. The appellant, the subsequent mortgagee of property *B*, who had also been impleaded in the suit as a party defendant applied to the Court to set aside the sale, on the ground, *inter alia*, that the decree-holder-purchaser was bound to deposit into Court the balance of the sale price in excess of the amount due under the second mortgage, and not having done so, the property must be re-sold.

Held (1), that the preliminary decree and the final decree based upon it must be construed as a whole, and on such construction, it was never the intention of the Court in drawing up the decree that the properties comprised in either of the mortgages could be sold to satisfy more than what was due on the mortgage relating to the particular property; (2) that property *B* could never be made to bear a greater burden than the amount due on the mortgage on that property; (3) that the decree-holder was not entitled under the decree to appropriate the surplus in the 2nd sale towards the deficiency due to him in respect of the first mortgage, *i.e.*, on property *A*, but had to deposit it into Court under O. 21, R. 16. (*Harries, C.J. and Fazl Ali, J.*) MAHABIR PRASAD *v.* JUGAL KISHORE PRASAD. **195 I.C. 837=14 R.P. 159=7 B.R. 975=22 Pat.L.T 313=A I.R. 1941 Pat. 447.**

———Decree—Construction—"Suit dismissed with costs"—Meaning of—Separate set of costs for defendants—If permissible—Practice in mofussil and appellate side of Bombay High Court. *See* 1940 Dig., Col. 557. SHRIDHAR BALKRISHNA *v.* POONA CITY MUNICIPALITY. **I.L.R (1940) Bom. 837=192 I.C. 174=13 R.B. 238=A.I.R. 1941 Bom. 16.**

———Decree—Construction—Suit on promissory note—Attachment of land before judgment—Compromise decree creating charge on land and directing defendant to pay in instalments—Provision for sale of land through Court in default—Defendant exempted from personal liability—Effect of—Decree not registered and hence ineffective for charge—Execution by attachment and sale of land—Permissibility. *See* 1940 Dig., Col. 557. CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ. **I.L.R. (1941) Bom. 34=13 R.B 266=192 I.C. 597=A I.R. 1941 Bom. 1.**

———Decree—Effect of—If forms root of title—If can operate as assignment of property. *See* 1940 Dig., Col. 557. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **192 I C. 17=13 R.P. 362=7 B.R. 283.**

———*Decree—Executability—Construction of decree—Instalment decree—Entire amount becoming due in case of default and property hypothecated to be taken as foreclosed.*

Where an award made a rule of Court provided that in default of payment of the instalments provided the entire balance became immediately due and in lieu thereof the property hypothecated was to be deemed asfore-

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closed and the rights of the judgment-debtor were to be deemed extinguished from that date, it was held that such decree was not purely a declaratory one and could be executed. (*Bennett and Ghulam Hasan, JJ.*) TULSA DEVI *v.* SURAJ NARAIN. **195 I.C. 610 = 14 R.O 100 = 1941 O.L.R 601 = 1941 A.L.W. 815 = 1941 A W R. (C.C) 275 = 1941 O.W N. 965 = 1941 O.A. 678 = A.I.R 1941 Oudh 587.**

———Decree—Finality—Decree not reversed or set aside in appeal, review, revision or by separate suit—If can be superseded by decree in another suit. *See* MYSORE C. P. CODE, S. 11. **19 Mys.L.J. 192**

———Decree—Setting aside—Collusive decree obtained by fraud practised by both parties on Court—Suit to set aside by one party on ground of fraud—Competency. *See* FRAUD—PARTY TO FRAUD. **42 Bom L R. 1185.**

———Decree—Setting aside—Fraud—Falsity of claim—If and when a material fact—Domestic and foreign judgments—Distinction between. *See* 1940 Dig., Col 559. KUNJABEHARI CHAKRABARTI *v* KRISHNA DHONE MAJUMDAR. **I.L.R. (1940) 2 Cal. 477 = 192 I.C. 563 = 13 R.C. 323 = 72 C.L.J 447.**

———*Decree—Setting aside—Fraud—Nature of.*

Per *Mitter, J.*—To set aside a decree on the ground of fraud the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and the decree sought to be set aside must be obtained by that contrivance. (*Mitter and Khundkar, JJ.*) MAHOMED HASHIM ALI KHAN *v.* IFFAT ARA HAMIDI BEGUM. **74 C.L.J. 261.**

———Decree—Setting aside—Fraud—Nature of proof. *See* 1940 Dig., Col. 559. DURGAGATI BANERJEE *v.* TAHARULLA MIA. **195 I.C 388 = 14 R C. 80 = A.I.R. 1941 Cal. 215.**

———Decree—Setting aside—Fraud—Non-service of summons. *See* 1940 Dig., Col. 559. ROMESH CHANDRA DAS *v.* NATIONAL TOBACCO CO. OF INDIA, LTD. **191 I.C. 535 = 13 R.C. 251.**

———Decree—Setting aside—Fraud—Proof required—Suppression and non-service of summons—Effect of. *See* 1940 Dig., Col. 559. KUNJABEHARI CHAKRABARTI *v.* KRISHNADHONE MAJUMDAR. **I.L.R. (1940) 2 Cal. 477 = 192 I.C. 563 = 13 R.C 323 = 72 C.L.J. 447.**

———*Decree—Setting aside—Right of third party—Collusion—Proof required.*

When it is a question of protecting himself against the effects of a judgment obtained by collusion, it is open to a third party to the judgment to ask that it should be treated as void so far as his interests are concerned, though it may be binding on the parties to the judgment and so has to remain upon the record. His proper remedy is by way of a civil suit. When a question of collusion thus arises, it is not necessary for the plaintiff to have overheard the other parties conspiring together or to have obtained some secret information as to the details of the conspiracy. It is sufficient for him to show in the first instance that the obvious and the necessary effect of the voluntary settlement was to defeat his legitimate interests; and if it cannot be shown on the other side that there was any other motive for the settlement, the Courts are entitled to presume that the intention was to defraud the party injuriously affected. (*Tek Chand and Beckett, JJ.*) SHANTI LAL *v.* F. HIRA LAL SHEO NARAIN. **43 P L R. 471 = A.I.R. 1941 Lah 402.**

———*Decree—Setting aside — Suit for- Maintainability—Grounds for—Fraud—Nature of fraud to be alleged and proof—Fraud extraneous to suit—What*

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amounts to—Conspiracy and trick to deceive Court and defendant.

It is established that a decree will not be set aside merely on proof that it was oblained by perjury or that the document upon which it is based was a forged document. The questions whether there was any perjury or forgery are matters which must be taken to have been decided in the suit itself. Where, however, the plaintiff in a suit to set aside a decree on the ground of fraud, alleges that there was a deliberate conspiracy of a number of people not only to hoodwink the Court into passing a wrong decree, but also to deceive the plaintiff (defendant in the former suit) as to the nature of the suit and by a trick to prevent him from resisting the suit, there is a case of fraud much wider than the scope of the matters in the actual suit wherein the wrong decree was obtained and the allegations amount to a case of fraud extrinsic to the matters adjudicated upon in the earlier suit so as to justify the cancellation or setting aside of that decree on the ground that it has been obtained by fraud. (*Wadsworth, J.*) KONDA BOYAN *v.* PALANISWAMI GOUNDAN. **54 L.W. 373 = (1941) 2 M L J. 640.**

———Decree—Validity--Decree against wrong legal representative of deceased—True legal representative—When barred—Conditions. *See* C. P. CODE, O. **22,** RR. 4 AND 5. **22 Pat.L T. 338 = A.I R. 1941 Pat. 299.**

———Duty of Courts—Ascertainment of law applicable—Resort to expert witnesses—Propriety. *See* 1940 Dig., Col. 1026. SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **I.L.R. (1940) Kar (P.C.) 251 = 22 Pat.L.T. 140 = 73 C L.J. 199 = (1940) 2 M.L J. 903 (P.C.).**

———*Duty of Courts—Existence of statutes—Resort to general principles—If proper.*

Courts must be guided by the statutory provisions and not by general principles, when the law has been codified in the form of several enactments. (*Harper, S.M. and Sathe, J.M.*) ALLAH TALA *v.* SURAJ BIKRAM SINGH. **1941 O.W.N 89 = 1941 R.D. 57 = 1941 A.W.R. (Rev.) 222 = 1941 O A. (Supp.) 157.**

———*Duty of Court—Issues—Agreement between parties that certain things should be done in suit—Issue raised by consent—Court—If bound to give effect to agreement in final decree or to find on issue.*

It cannot be held that because the parties to a suit agree that, certain things should be done in a suit and the Court embodies such agreement in an order and a consent issue is raised, the Court is bound in its final decree to give effect to such agreement or to find upon the issue, when such issue is struck out as irrelevant and not arising on the pleadings. An issue must arise on the pleadings and cannot be raised at the will of the parties. (*Davis, C.J. and Weston, J.*) RAMA BROS. *v.* FORBES, FORBES CAMPBELL & CO., LTD. **I.L.R. (1941) Kar. 227 = 195 I.C. 626 = 14 R.S 40 = A.I.R. 1941 Sind 103.**

———*Duty of Court—Issues— Record of findings thereon.*

Trial Courts should realise that when issues are struck in regard to material points in dispute between the parties, clear findings in regard to those issues should always be recorded by them and those points should not be left undetermined. (*Abdul Qayoom, C.J. and Wazir, J.*) FATEH BIBI *v.* NIZAM DIN. **42 P.L.R. J. & K. 413.**

———*Duty of Court—Passing of orders—Examination of record.*

Judicial officers are always expected to pass orders after carefully examining the record. They should realise that when they carelessly pass any order without consulting the record, they not only waste their own

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time and the time of other Courts, but cause unnecessary trouble and inconvenience to the litigant public. (*Abdul Qayoom, C.J. and Kichlu, J.*) LACHHMAN BAYU *v.* MADHO BUT. **43 P.L.R. J. & K. 89.**

———*Duty of Courts—Remarks against Government.*

Per *Gwyer, C. J.*—Courts of justice while giving no countenance to the theory that Governments are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of Government, when suddenly faced with a serious and perhaps dangerous situation. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM. **72 C.L.J. 550 = 1941 A L J 170 = 1941 R.D. 121 = 192 I.C. 138 = 1941 O.L R 121 = 3 F.L.J. 97 = 7 B.R. 433 = 53 L.W. 397 = 13 R.F.C. 15 = 1941 A.L.W. 201 = 1941 M.W.N. 581 = 22 Pat L.T. 578 = I.L.R. (1941) Kar. (F.C.) 72 = 45 C.W.N. (F.R) 27 = 1941 A.W.R. (Rev.) 109 = 1941 O A. 159 = 1941 O.W.N. 297 = 1941 A.W.R. (F.C.) 3 = A.I.R 1941 F.C. 16 = (1941) 1 M.L.J. (Supp.) 65.**

———Duty of Court — Witness—Condemnation by Court without affording opportunity of explanation—Propriety *See* 1940 Dig, Col. 1028 NAGABHUSHANA BHATTA *v.* SEETHAMMA. **45 Mys.H.C R. 321.**

———*Equity—Bequest with direction to pay allowance out of profits—Reduction of profits—If should entail reduction in the allowances.*

Where certain properties are bequeathed with a charge for the payment of certain maintenance allowances out of the profits of those properties, if subsequently there is a reduction in the profits, there should be reduction in the allowances also. (*Yorke, J.*) ASIA BEGAM *v.* RAGHUBAR DAYAL.

192 I C. 327 = 13 R.O 352 = 1940 O.W.N. 1249 = 1940 O.A. 1210 = 1941 O L R 113 = 1941 A.W.R. (C.C.) 13 = A I R. 1941 Oudh 203.

———*Estoppel—Election of reliefs — Rejection of claim as grove holder—Claim as full proprietor in later proceedings.*

Where in the earlier revenue proceedings a person's claim to a particular plot as grove holder is rejected, that does not estop him from subsequently claiming as full proprietor the same plot in other proceedings, by virtue of adverse possession for over the statutory period. (*Braund, J.*) MAHOMED YUSUF *v.* SARJU SINGH.

1941 A.W.R. (Rev.) 1072 = 1941 A.L.W. 1028 = 1941 O.A. (Supp) 870 = 1941 A.L.J. 676.

———Estoppel—Plea of—When to be raised—Sustainability for first time in appeal. *See* APPEAL—NEW POINT. **22 Pat L.T. 821.**

———Evidence—Onus when immaterial. *See* 1940 Dig., Col. 1028. MAUNG MAUNG *v.* MA SEIN KYI. **192 I.C. 49 = 13 R.R. 163.**

———Evidence—Statement of witness—If binds party calling him. *See* 1940 Dig., Col. 1028. JALAL DIN *v.* NAWAB. **193 I.C. 186 = 13 R L. 437 = A.I.R. 1941 Lah. 55.**

———*Evidence—Witness—Duty of Court—Court deciding that witness is competent to give evidence—Subsequent decision to the contrary and stopping of cross-examination and expunging evidence already recorded—Propriety—Procedure.*

When a person is called to give evidence and when there is reason to suspect that he may be incapable of giving rational answers to questions put to him, this is, as a rule, know either to the prosecution or to the defence or to both. In such a case the usual course is for the attention of the Court to be drawn to the matter

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and for the Court to question the person with a view to ascertaining whether he is competent to give evidence or not. When a Court has once decided that a witness is competent to give evidence, it ought not at a later stage to interfere *suo motu*, and reverse its previous decision and expunge the evidence already recorded, especially when that evidence has been recorded at some length. In such a case the cross-examining pleader must be permitted to proceed with his cross-examination, it being left to him to decide whether it is useless to proceed further. (*Varma and Shearer, JJ.*) RAMPADARATH SINGH *v.* EMPEROR. **20 Pat. 339 = 196 I.C. 478 = 14 R.P. 201 = 8 B.R. 30 = 1941 P.W.N. 413 = 42 Cr.L.J. 878 = A I.R. 1941 Pat. 513.**

———*Execution—Application for—Duty of decree-holder—Subsequent application filing supplementary list of properties to be proceeded with—Discretion of Court to allow—Such application, if continuation of old.*

The law requires that a decree-holder in executing a decree should indicate in his application for execution the various modes of execution, which he wishes the Court to adopt. He should also as far as possible indicate the properties of the judgment-debtor against which execution proceedings should be taken, it being of course understood that he should not take execution proceedings against more items of property than he considers sufficient to satisfy his decree. Provided the application for execution is in accordance with law and has been duly registered, if a subsequent application is filed for the purpose of amending the list of properties against which the decree-holder wishes to proceed, the Court is vested with a reasonable discretion to deal with the matter according to the circumstances of the case. Of course, to accept such a petition would result in effect in the amendment of the application for execution. Such an amendment should not be allowed, if it has the effect of substantially altering the character of the execution proceedings, but in a case in which it was discovered on the objection of the judgment-debtor himself that execution could not proceed against the attached properties, the Court would exercise a reasonable discretion in accepting a supplementary petition filed by the decree-holder asking for permission to be allowed to add several other properties to the list given in his original application. The subsequent petition should be regarded as a continuation of the original application and not as a fresh application for purposes of limitation. (*Edgley and Biswas, JJ.*) SHEKENDERALI *v.* ABDUL RASHID.

I.L.R. (1941) 2 Cal. 251 = 45 C.W.N. 903.

———*Execution—Application for—Technical defect—Procedure—If a ground to refuse execution.*

A technical defect in an execution application can be remedied at any time and affords no proper ground for refusing to execute the decree. (*Roberts, C.J. and Dunkley, J.*) V. M. R. P. CHETTYAR FIRM *v.* HAJEE MAHOMED SULTAN. **A.I.R. 1941 Rang. 316.**

———Execution—Executing Court—Duty of—Claim to attached property —Rejection — Sale — Purchase by decree-holder and recording of full satisfaction—Subsequent suit by claimant and decree in his favour—Effect on sale—Right of decree-holder to execute decree afresh —Duty of executing Court to grant relief. *See* C. P. CODE, O. 21, R. 63. **20 Pat. 261.**

———Execution—Executing Court—Duty of—Objection by judgment-debtor that property advertised for sale is ghatwali and hence not saleable—Duty of executing Court to consider—Summary rejection on ground of having been raised at late stage—Propriety. *See* C. P. CODE, S. 47. **7 B.R. 148.**

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———Execution—Executing Court—Duty of—Wrong order in proceedings with jurisdiction—If can be ignored. *See* BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT, S. 16. **1941 P.W.N. 234 = 22 Pat.L.T. 374.**

———*Execution—Executing Court—Powers of—Express decision as to point raised in suit—If open to attach in execution—Power of executing Court to go behind.*

A Court executing a decree is bound by the decision of the Court which passed the decree. When there is a distinct issue raised on a point in the suit, and the issue is decided against a party, it is not open to that party to obtain by execution what has been expressly denied to him by the decision in the suit. If however on the face of the decree there is any ambiguity, it is open to the executing Court to interpret it with reference to the judgment. But the executing Court cannot go behind the decision of the trial Court in execution. (*Dhavle and Chatterji, JJ.*) RADHAMONI DEVI *v.* GOBIND CHANDRA. **7 Cut L.T. 55.**

———*Execution—Executing Court—Powers of—Sale contrary to decree—Legality.*

In performance of its duty of executing a decree the executing Court has no jurisdiction to hold a sale in contravention of the terms of the decree. (*Dhavle and Meredith, JJ.*) BHAN KUMAR CHAND *v.* LACHMI KANTA RAI. **A.I.R. 1941 Pat. 566.**

———*Execution—Execution application—Order on—Should be 'filed'—Meaning—Propriety of such orders.*

An order at the foot of an execution application that it should be filed in the office, has no judicial meaning. The phrase does not explain whether the execution application was satisfied or not; nor does it give any indication as to the reasons which prompted the learned Judge to take no further action as regards its contents. (*Davies.*) MOHAN LAL *v.* SRI RAM.

1940 A.M.L.J. 130.

———Execution—Liability for—Assets of deceased Mahomedan sufficient for only his funeral expenses. *See* MAHOMEDAN LAW—ADMINISTRATION.

1941 A.M.L.J. 6.

———*Execution—Minor—Representation in proceedings—Necessity for—Non-representation—Remedy.*

It may be taken as settled law that proceedings in execution would not be set aside where the interests of a minor had in effect been represented, though not in form as when his interests are identical with those of other members of his family. But there is no case in which it has been held that it is not necessary in execution proceedings that the interests of a minor should be represented in some way or another. The law regarding the attachment and alienation of land in execution proceedings contemplates that some opportunity should be given to the judgment-debtor of raising any valid objection he may have with regard to the liability of his land to attachment and the protection thus afforded becomes useless if the land can be alienated without notice being given to any one who can be said to represent the interests of a minor judgment debtor. In such circumstances, any one prepared to represent the minor judgment-debtor has the right to come forward and claim that the proceedings in execution should be set aside. Such relief can be claimed only by an application under S. 47, C. P. Code, to the executing Court, and not by means of a separate suit, as the matter is clearly one relating to the execution of the decree. (*Tek Chand and Beckett, JJ.*) ANNU MAL HAR NARAIN *v.* BRIJ LAL.

196 I.C. 611 = 14 R.L. 164 = 43 P.L.R 479 = A.I.R. 1941 Lah. 327.

———*Execution—Mortgage decree of British Indian Court—Part of property in Berar—If can be executed in Berar—Suit on British Indian judgment—Necessity.*

(Per *F.B., Niyogi, J.*, dissenting).—A mortgage decree obtained in British India, in respect of property situate in Berar as well as within the local limits of the Courts in which the suit is instituted can be executed in Berar as it stands without the necessity of suing again upon the British Indian judgment. (*Stone, C.J., Grille, Niyogi, Gruer and Bose, JJ.*) JAGNI RAM *v.* GANPATI. **I.L.R. (1941) Nag. 1 = 1941 N.L.J. 1 = A.I.R. 1941 Nag. 36 (F.B.).**

———*Execution—Objection as to limitation not taken—If bars similar objection regarding subsequent applications.*

Where the execution proceeding has not rectified the failure of the judgment-debtor to file an objection on the ground of limitation does not preclude him from filing such an objection on a subsequent application. (*Bennett and Madeley, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* AIJAZ ALI.

1941 O.W.N. 1313 = 1941 A.W.R (C.C.) 382 = 1941 O.A. 987.

———*Execution—Reopening of proceedings—Decree fully satisfied.*

If a person who is a party to the execution proceedings attempts to raise objections after the decree has been fully satisfied, it may be held that the time has past when such objections could be entertained. This does not mean that proceedings can never be reopened in a proper case after a decree has once been satisfied or an alienation effected, for example, where it is found that the proceedings throughout were irregular. Where there has been no effective representation of a minor, the proceedings can be reopened by way of review. (*Tek Chand and Beckett, JJ.*) ANNU MAL HAR NARAIN *v.* BRIJ LAL. **196 I.C. 611 = 14 R.L. 164 = 43 P.L.R 479 = A.I.R. 1941 Lah. 327.**

———Execution—Revival—Stay pending appeal—Dismissal of appeal—Fresh execution application, if necessary. *See* C. P. CODE, O. 41, R. 5 AND S. 47.

1941 O.W.N. 1186.

———Execution—Revival—Striking of execution application—Subsequent application—If fresh application or revival of former. *See* 1940 Dig., Col. 612. SIVASUBRAMANIAM CHETTIAR *v.* MURUGESA MUDALIAR. **193 I.C. 225 = 13 R.M. 646 = (1941) 1 M.L.J. 537.**

———*Execution—Sale in—Auctioneer—Remuneration fixed at certain percentage on sale proceeds—Sale not effected—Auctioneer, if entitled to any remuneration.*

Where the auctioneers have agreed to their remuneration being paid at a certain percentage on the sale proceeds and have definitely stated that there will be no further charges they are not entitled to any remuneration when there is no sale effected by them. (*McNair, J.*) DEVA DUTTA SAROWGEE *v.* P. C. MITTER & SONS. **I.L.R. (1941) 2 Cal. 37.**

———Execution — Sale in—Validity — Presumption. *See* 1940 Dig., Col. 614. SHEIKH TAMIZALI *v.* NASAR ALI BHUIYA **193 I.C. 451 = 13 R.C. 439 = A.I.R. 1941 Cal. 58.**

———*Execution — Sale — Validity — Objections—Failure of judgment-debtor to raise in execution proceedings—Effect—Waiver—Right to raise objection in suit by purchaser for possession.*

Where a judgment-debtor who had opportunities in the execution proceedings to object to an execution sale refrains from doing so, he must be deemed to have waived his objections, and he cannot afterwards raise objections to the validity of the sale in a suit by the purchaser for possession. (*Nagesvara Iyer and Venkatarange*

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Iyengar, JJ.) AMEER BI *v.* BUDAN SAB.
46 Mys.H.C.R 61 = 19 Mys.L.J. 113.

———*Execution—Sale — Validity—Sale not held on date fixed —Declaration sought that sale is nullity—Proof required*

When a party seeks a declaration that an execution sale is a nullity it is necessary for him to prove the circumstances which would nullify the sale. It is not sufficient for him to show only that the sale was not held on the first day of the month of sales or on the actual date fixed in the sale proclamation but also to show that the monthly sales had come to an end before the sale was actually held. *(Agarwala, J.)* SASHINATH CHOUDHURY *v.* UGRANARAIN. **13 R P. 685 = 7 B.R. 732 = 194 I.C. 219 = A.I.R. 1941 Pat. 507.**

———Execution—Sale—What passes. *See* 1940 Dig., Col. 614. JASRAJ FAOOJI *v.* SUGRABAI. **191 I C. 483.**

———*Execution—Sale—What passes—"Right, title and interest"—Meaning of—Decree against manager of Hindu joint family—Execution against family property.*

The expression "right, title and interest" is an ambiguous one. It is quite consistent with the sale of every interest which the judgment debtor might have sold, and it is a question in each case what has in fact been sold. In the case of a sale of joint family property in execution of a decree against the manager of a Hindu joint family, "the right, title and interest" of the judgment debtor does not necessarily mean his individual share in the property only. *(Broomfield and Divatia, JJ.)* MULGUND CO-OPERATIVE CREDIT SOCIETY *v.* SHID LINGAPPA ISHWARAPPA. **43 Bom L.R. 807 = A.I.R. 1941 Bom. 385.**

———*Execution—Transmitted decree—Plea of limitation—In which Court to be raised.*

It cannot be said that objections as to limitation which go to the root of execution can only be taken in the Court to which a decree is transmitted for execution. It is no doubt often the most convenient course. But it is the Court which passed the decree, that has and retains control of the proceedings. It is merely a question of convenience or of priority of application which determines the Court which shall decide such questions. *(Mya Bu and Mosely, JJ.)* SUBRAMANIAN CHETTIAR *v.* L. N. CHETTYAR FIRM. **1940 Rang.L.R. 725 = 193 I.C 318 = 13 R R. 244 = A.I.R 1941 Rang. 56.**

———Ex parte *suit—Proof of claim—Necessity.*

Even when a defendant is *ex parte* the claim against him must be proved before there can be a decree *(Davis, C.J. and Lobo, J.)* VASUMAL *v* KARAM CHAND. **I L R. (1941) Kar. 146 = 194 I.C. 81 = 13 R.S 243 = A.I.R. 1941 Sind 41.**

———*Federal Courts—Costs—Advocate-General intervening—Right to costs.*

Gwyer, C.J.—It is not the practice of the Federal Court to give costs to an Advocate-General intervening. *(Gwyer, C.J., Sulaiman and Varadachariar, JJ.)* SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **I.L R (1941) Kar (F C) 25 = 192 I C. 225 = 13 R.F.C. 47 = 1941 A.W R (Rev) 192 = 73 C L J 1 = 1941 O.W.N. 425 = 22 Pat L.T. 155 = 1941 P.W.N 98 = 1941 O.L R 157 = 3 F.L J. 157 = 1941 R D. 205 = 7 B.R. 523 = 1941 A.L.W. 329 = 1941 M W.N 100 = 45 C W N. (F.R.) 1 = 1941 O.A. 237 = 53 L.W. 109 = A.I R. 1941 F C 47 = (1941) 1 M.L.J. (Supp) 1.**

———*Federal Court—High Court decree—Power to vary at the instance of a stranger to the suit.*

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Per *Gwyer, C. J.*—It is impossible for the Federal Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it had given as between plaintiff and defendant. *(Gwyer, C.J., Sulaiman and Varadachariar, JJ.)* UNITED PROVINCES *v.* ATIQA BEGUM. **I L.R. (1941) Kar. (F C) 72 = 192 I C. 138 = 13 R F C 15 = 72 C.L.J 550 = 1941 A.L.J. 170 = 1941 R.D. 121 = 1941 O.L.R. 121 = 3 F L.J. 97 = 7 B R 433 = 53 L.W. 397 = 1941 A.L.W 201 = 1941 M.W.N. 581 = 22 Pat L.T. 578 = 45 C.W.N. (F.R.) 27 = 1941 A.W.R. (Rev) 109 = 1941 O.A. 159 = 1941 O W N. 297 = 1941 A W.R. (F.C.) 3 = A.I.R 1941 F C. 16 = (1941) 1 M.L J. (Supp.) 65.**

——— Federal Court—Review — Powers of — Rehearing on merits—Rights of applicant to urge new point on ground that counsel at original hearing was not fully instructed. *See* 1940 Dig., Col. 616. RAJA PRITHVI CHAND LAL *v.* SUKHRAJ. **20 Pat 298 = 74 C.L.J. 90 = 1941 P.W.N. 322 = 45 C.W.N (F.R.) 93 = 13 R F.C. 1 = 7 B.R. 191 = 1941 A.W R. (F.C) 1 = 1941 O.W N. 35 = 1941 O.A. 60 = 53 L W. 50 = 22 Pat L.T. 87 = 43 P L R. 134 = 1941 A.L.W. 64 = A.I R. 1941 F.C. 1 = (1941) 1 M L.J. (Supp) 45.**

———Fraud—Decree obtained by. *See* PRACTICE—DECREE.

——— *Fraud—Decree declared null and void on ground of—Decree holder if can be declared entitled to continue suit from stage prior to impugned decree.*

Where a plaintiff has been found to be guilty of fraud in filing a suit and obtaining an *ex parte* decree therein against the defendant and the decree is declared null and void in the suit brought by the defendant for that purpose, the person found guilty of fraud cannot claim in the latter suit to be declared to be entitled to continue his suit from the stage which it had reached prior to the passing of the impugned decree. *(Bennett, J.)* JAGRUP *v.* RAM SABAD. **197 I C 178 = 1941 O W.N. 1202 = 1941 O.A. 928 = 1941 A.W.R. (C.C.) 351.**

———*Fraud—Decree obtained by—What constitutes.*

Where there has been an active concealment of the proceedings resulting in a decree being passed against a lady, it is clear fraud and vitiates the decree. *(Bennett and Ghulam Hasan, JJ.)* GOKUL PRASAD *v* MAHADEI. **194 I.C. 195 = 13 R.O. 563 = 1941 O.L R 425 = 1941 A.L.W. 520 = 1941 O.W.N. 643 = 1941 O.A. 412 = 1941 A.W R. (C C) 166 = A I.R. 1941 Oudh 341.**

———*Fraud—Party to fraud—If can set up own fraud—Joint fraud by both plaintiff and defendant—Benami sale deed by defendant in favour of plaintiff—Suit by plaintiff for possession as beneficial owner—Duty of Court—Dismissal of suit.*

No Court will allow itself to be used as an instrument of fraud, and no Court, by the application of the rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, the Court refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some advantage derived from his own fraud, that is not due to any action on the part of the Court. It is a fraud for a plaintiff to claim beneficial title under a deed in respect of which he is a benamidar, and the Court cannot refuse to allow the defendant to prove the benami nature of the transaction, even though in doing so the defendant may have to rely on his own wrongdoing. The fact that a fraud was perpetrated by the plaintiff and the defendant

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in the past cannot justify the Court at the present time in assisting the plaintiff to perpetrate a further fraud on the defendant. (*Beaumont, C.J., Divatia and Macklin, JJ.*) GUDDAPPA CHIKKAPPA *v.* BALAJI RAMJI 196 I.C. 90 = 14 R.B. 93 = 43 Bom.L.R. 681 = A.I.R. 1941 Bom. 274 (F.B).

———Fraud—Party to fraud—Plea of one's own fraud to avoid liability—Permissibility. *See* MORTGAGE—MORTGAGOR. 1941 A M.L.J. 59.

———Fraud—Party to fraud—Right to relief on basis of fraudulent scheme to delay creditors—Duty of Court to refuse relief. *See* 1941 Dig., Col 619. NAGABHUSHANA BHATTA *v.* SEETHAMMA. 45 Mys H.C.R. 321.

———*Fraud—Party to fraud—Right to relief on ground of fraud—Collusive award and decree against party—Both parties practising fraud on Court—Suit to set aside decree on ground of fraud and collusion—Maintainability.*

A party to a decree cannot complain of any fraud practised by himself and another upon the Court. In other words a party cannot be permitted to take advantage of his own baseness or permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. It would be otherwise if one of the parties and the Court were deceived by the fraud of another. Where both parties are guilty of practising fraud on the Court in obtaining an order of reference and an order making the award a decree of the Court, such collusive conduct in a judicial proceeding cannot be made the basis of an action by either party to nullify the judgment of the Court. (*Beaumont, C.J. and Wassoodew, J.*) SHRIPADGOUDA VENKANGOUDA *v.* GOVINDGOUDA NARAYANGOUDA. I.L.R. (1941) Bom 160 = 193 I.C. 795 = 13 R.B. 343 = 42 Bom.L.R. 1185 = A.I.R. 1941 Bom. 77.

———Fraud—Proof—Basis of finding—Inference of fraud from mere fact of unfairness of bargain—If justified. *See* 1940 Dig., Col. 619. HARIHAR PRASAD SINGH *v* NARSINGH PRASAD SINGH 13 R.P. 471 = 192 I.C. 441 = 7 B.R. 402 = 22 Pat L.T. 553 = A.I.R. 1941 Pat. 83.

———*Fraud—Proof of.*

Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding based on suspicion and conjecture could not be upheld. (*Lord Atkin.*) A. L. N. NARAYANAN CHETTIAR *v.* OFFICIAL ASSIGNEE, RANGOON. 196 I.C. 404 = 14 R.P C. 26 = 1941 O.A 719 = 1941A.W R. (Rev) 754 = 1941 O.L R. 710 = 54 L.W. 606 = 1941 A.L J. 683 = 8 B.R. 56 = A.I.R. 1941 P.C. 93 (P.C.).

———*Fraud—Proof of.*

The principle to be kept in view in a case of fraud is that mere suspicion cannot be accepted as proof, and that "unless the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud". (*Rachhpal Singh, C.J. and Masud Hasan, J.*) KHEM RAJ *v.* MANSA RAM AMAR NATH. 43 P.L.R J. & K. 172.

———Fraud—Proof of—Requirements. *See* 1940 Dig., Col. 619. HANSRAJ GUPTA *v.* DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO., LTD. I.L.R. (1940) Kar. (P.C.) 216.

———*Fraud—Revenue sale—Mortgagor's fraud in allowing property to be sold for arrears of revenue—Mortgagee's right to obtain reconveyance from purchaser.*

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Where a mortgagor is imputed with fraud in allowing the mortgaged property to be sold for arrears of revenue to the detriment of the mortgagee, the mortgagee cannot obtain a reconveyance from the purchaser at the revenue sale unless it can be shown that he was a privy to the fraud designed by the mortgagor or at least had notice of it before his purchase at the revenue sale. (*R.C. Mitter and Khundkar, JJ.*) HARIDAS SAHA *v.* DULAL CHANDRA. A.I.R. 1941 Cal. 305.

———Fraud—Suit to set aside decree on ground of—Maintainability—Nature of fraud to be set up and proved—Conspiracy to deceive Court and trick to deceive defendant as to nature of suit, to prevent him from defending suit—Effect of—Liability of decree to be set aside in suit. *See* PRACTICE — DECREE—SETTING ASIDE. 54 L.W. 373 = (1941) 2 M L.J. 640.

———Injunction. *See also* (*i*) C. P. CODE, O 39.
(*ii*) SPECIFIC RELIEF ACT, SS. 55 AND 56.

———*Inventory—Partition suit—Plaint insufficiently stamped—Matter of court-fee not decided—Jurisdiction to issue order for inventory of movables before deciding court-fee.*

Where the plaint in a partition suit is insufficiently stamped, and the question of court-fee has not been decided by the Court, the Court is not competent to order an inventory to be taken. It is not properly in seisin of the case, because until the proper court fee is paid, the Court is not properly in seisin of the case and no suit is pending before it. In such a case the Court has no jurisdiction to issue a writ or order for an inventory of the movable properties alleged to be partible before the court-fee matter is disposed of. (*Varma and Shearer, JJ.*) BHUWNESHWAR KUER *v.* RAGHUBANSMANI PRASAD NARAIN SINGH. 195 I.C. 757 = 14 R P. 157 = 7 B.R. 967.

———Legal practitioner—Advocate on trial on charge of criminal offence—Right to appear as counsel for accused in case. *See* MADRAS CRIMINAL RULES OF PRACTICE, R. 82. (1941) 2 M L.J. 156.

———Legal practitioner — Advocate — Power to compromise on behalf of client. *See* 1940 Dig., Col. 768. HAJI HUSSAIN *v.* HAJI VALI MAHOMED. 193 I.C. 45 = 13 R.S. 210 = A I.R. 1941 Sind 28.

———*Mortgage suit—Person made party claiming paramount title and asking to be discharged.*

Where a person is joined in a mortgage suit and he does not dispute the mortgage but simply claims paramount title and asks to be discharged from the suit, he should be discharged. The suit would then be kept within its proper boundaries and not complicated with an entirely different matter. (*Stone, C. J. and Bose, J.*) NEMASAO *v.* MADHORAO GANESH. 1941 N.L.J. 634.

———*Multiplicity of suits.*

It is a cardinal principle of law that there should be no multiplicity of suits. (*Sathe, J.M.*) BASUDEO *v.* DATWA. 1941 O.W.N 691 = 1941 R.D 373 = 1941 A.W.R. (Rev.) 480 (2) = 1941 O.A. (Supp) 439 (2).

———New plea. *See also* (*i*) APPEAL—NEW PLEA.
(ii) PRIVY COUNCIL—NEW PLEA.
(iii) REVISION — NEW PLEA (S. 115, C.P. CODE).

———*Pauper suit—High Court—Application for leave to sue in* forma pauperis *in respect of claim for damages for slander—Summary dismissal on ground that claim could not exceed amount within jurisdiction of Court of lower grade—If justified.*

In an application in the High Court for leave to sue in *forma pauperis* for damages for slander in respect of certain defamatory statements, the plaintiff claiming

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Rs. 12,500 by way of damages, the Master held that the damages claimed could not in any event exceed Rs. 5,000 and that therefore the plaintiff should be referred to a Court of lower jurisdiction to agitate his claim.

Held, that the claim for damages for slander being one in which the damages were at large, the damages could not be ascertained until there had been an examination of all the evidence; nor could it be said that they could not in any event exceed any particular sum, and therefore the summary dismissal of the application for leave to sue as pauper was wrong. (*Gentle, J.*) VENKATASUBBA ROW *v.* TAYLOR STANLEY PHILIP.
1941 M.W.N. 921 = (1941) 2 M.L.J. 505.

——*Pleadings — Admissions in — If binding in another suit*

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. A party is often prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit and certainly not for all time. (*Beaumont, C.J. and Sen, J.*) RAMABAI SHRINIWAS *v.* GOVERNMENT OF BOMBAY. **194 I.C. 431 = 13 R.B. 371 = 43 Bom.L.R. 232 = A.I.R. 1941 Bom. 144.**

——*Pleadings—Admission of execution, but document pleaded to be ineffective—Effect.*

An admission by the defendant that he had executed the document on which the plaintiff relies, accompanied by a pleading that the document is of no effect, is no admission at all of the defendant's liability. (*Mya Bu and Mosely, JJ.*) U MIN SIN *v.* KO KYE.
194 I.C. 31 = 13 R.R. 274 = A.I.R. 1941 Rang. 117.

——*Pleadings—Allegation of fact in affidavit by applicant—Absence of counter-affidavit by opposite party—Inference of allegation being true—If justified.*

Where an allegation of a fact is made in an affidavit in support of an application, but there is no counter affidavit filed by the opposite party, the application must be disposed of on the footing that the allegations in the applicant's affidavit are correct. In the absence of a counter-affidavit the matter must be dealt with on the footing that the fact alleged by the applicant is true. (*Rowland, J.*) GOPI LOHAR *v.* MAHESHWAR PRASAD NARAIN SINGH. **192 I.C. 211 = 13 R.P. 436 = 7 B.R. 329 = 21 Pat.L.T. 1082 = A.I.R. 1941 Pat. 141.**

——*Pleading—Alternative plea — Permissibility—Title and adverse possession.*

A defendant who claims title from a person other than the plaintiff is not estopped from pleading adverse possession in the alternative. (*Agarwal, J.*) RAM CHARAN SINGH *v.* CHUNNI LAL. **195 I.C. 168 = 4 R.O. 57 = 1941 O.L.R. 545 = 1941 O.A. 585 = 1941 A.W.R. (Rev.) 604 = 1941 R.D. 559 = 1941 O.W.N. 843 = A.I.R. 1941 Oudh 454.**

——*Pleading—Amendment—Amendment of written statement—Delay—Effect of.*

Mere delay in applying for amendment of a written statement is no ground for refusing the application, in so far as it may be compensated for by the award of costs. But where a new case is thereby sought to be sprung upon the plaintiff for the first time, and there is nothing to show that the facts newly set up were not within the knowledge of the defendant or could not be ascertained by him earlier, the Court will be justified in rejecting the application. (*Edgley and Biswas, JJ.*) SARADINDU MUKHERJEE *v.* JAHARLAL AGARWALLA.
74 C.L.J. 61 = 46 C.W.N. 33.

——Pleadings—Amendment in appeal—Suit in individual capacity—Objection by defendant to frame of suit—Plaintiff persisting in going to trial without amendment—Amendment in appeal to make suit representative suit—Permissibility. *See* 1940 Dig., Col. 1030. MADINA BIBI SAHIBA *v.* ISMAIL DURGA ASSOCIATION. **194 I.C. 766 = 14 R.M. 58 = (1940) 1 M.L.J. 872.**

——*Pleadings—Amendment—Second appeal—If can be allowed.*

In a suit to set aside a sale held by a township officer in Lower Burma the plaintiff sought an amendment of his plaint at the stage of second appeal to the effect that parts of Ss. 55 and 56, Burma Land and Revenue Act, were *ultra vires*.

Held, that the amendment could not be allowed at the stage of second appeal. (*Roberts, C.J., Mosely and Dunkley, JJ.*) AH TWE *v.* MA MAI SEIN.
1941 Rang.L.R. 7 = 193 I.C. 372 = 13 R.R. 248 = A.I.R. 1941 Rang. 97.

——*Pleadings—Change of — Permissibility—Question of benami transaction.*

Where a plaintiff originally asserts that properties standing in her name were her own and the defendant alleges that it is benami for her husband, there is nothing to prevent the plaintiff from falling back upon the plea of advancement in case she was unable to satisfy the Court that the moneys expended for the purchase of the property were her own. (*Yorke and Agarwal, JJ.*) SARDAR JAHAN *v.* AFZAL BEGAM.
16 Luck. 341 = 192 I.C. 873 = 13 R.O. 415 = 1941 O.L.R. 240 = 1941 A.W.R. (C.C.) 93 = 1941 A.L.W. 328 = 1941 O.W.N. 208 = 1941 O.A. 154 = A.I.R. 1941 Oudh. 288.

——Pleadings—Charge of wilful default—Necessity to take plea—Rule—Exception—Mortgagee in possession. *See* 1940 Dig., Col. 1032. KARSON CHAMPSI *v.* MEGHJI ASARIA SHAH. **13 R.B. 257 = 192 I.C. 569 = A.I.R. 1941 Bom. 28.**

——*Pleadings—Construction—Mofussil pleadings—Right of easement.*

A right of easement must no doubt be specifically pleaded, but pleadings are often so loosely expressed in the mofussil that it may be doing an injustice to litigants in many cases to construe them much too strictly. The Court would be disposed to lean towards a construction which would permit rather than shut out an adjudication of the real rights of parties, when from the facts set out, such adjudication may be held to be justified, though not asked for in specific terms or in strict form. (*Biswas, J.*) MAHINDRA NATH GUIN *v.* SURAJMAL.
45 C.W.N. 17.

——*Pleadings—Easement—Plea of easement on presumption of lost grant—If involves pleading of easement by prescription.*

In pleading an easement on the basis of a lost grant the essential fact to aver is user or enjoyment for a sufficient length of time which might give rise to the presumption of such a grant. Ordinarily such length of user will exceed the statutory period of 20 years required for acquiring an easement by prescription under S. 26 of the Limitation Act. To plead an easement on the presumption of a lost grant may from that point of view be said to involve a pleading of easement by prescription, assuming, of course, an averment of the other elements necessary for establishing such a right. (*Biswas, J.*) MAHINDRA NATH GUIN *v.* SURAJMAL.
45 C.W.N. 17.

——*Pleadings—Inconsistent pleas—Jurisdiction.*

Where a party raises a plea of want of jurisdiction before a particular Court and succeeds in his contention, he cannot thereafter be permitted to plead in a different Court that the former Court alone had jurisdiction. (*Harper, S.M. and Shirreff, J.M.*) SUNDAR LAL *v.*

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SADA SEWAK. **1941 A.W.R. (Rev.) 598 (1)= 1941 R.D. 518 = 1941 O.A. (Supp.) 552 (1).**

———*Pleadings — Plaint returned for presentation to another Court—Representation to same Court—True copies of defendant's written statement in first proceeding put on record in subsequent proceeding without any objection—If amounts to acceptance of same.*

In a suit the plaint which was at first returned to the plaintiffs for presentation to another Court was subsequently represented to the same Court when it was readmitted without giving to the suit on re-admission the same number as was given to the proceedings in the old suit. However, true copies of the defendant's written statement in first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected.

Held, that it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case. (*Davies, C.J. and Tyabji, J.*) MULCHAND *v* HARKISHINDAS. **I.L.R (1941) Kar. 204 = 194 I C. 461 = 13 R.S. 277 = A.I.R. 1941 Sind 88.**

———*Pleadings—Suit for partition of joint family property—Claim by defendant for property entrusted by latter to plaintiff—If can be set up and enquired into.*

In a suit for partition of joint family property by a member of the family it is not open to a defendant to make a claim for certain property belonging to such defendant and said to have been entrusted by the latter to the plaintiff personally. Such a claim is a separate and distinct matter and can find no room in a suit for partition of joint family property, though a separate suit may be instituted by such defendant against the plaintiff on that cause of action. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM. **I L.R (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.**

———Pleadings—Suit on basis of unregistered lease—Lease inadmissible for want of registration—Right to set up oral lease without possession. *See* T. P. ACT, S. 107. **1941 P.W.N 38.**

———*Precedents—Decision of Full Bench—If can be overruled by later Full Bench consisting of more Judges.*

Quære:—Whether a later Full Bench of a High Court can overrule an earlier Full Bench merely because the later Bench consists of more Judges than the earlier. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* NINGAPA RAMAPPA. **43 Bom.L.R. 864 = A.I.R. 1941 Bom. 408**

———Precedents—*Stare decisis. See* 1940 Dig., Col 1033. COMMISSIONER OF INCOME TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I C. 340 = 13 R.P. 295 = 1940 P W.N. 1044 = 7 B R. 172.**

———Precedent—*Stare decisis*—Principle of—Decision affecting title to land—Rule as to. *See* 1940 Dig., Col. 1033. CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ. **I L R (1941) Bom, 34 = 13 R.B. 266 = 192 I.C. 597 = A I.R. 1941 Bom. 1**

———*Precedents—Subordinate Courts—Duty of—If bound by decisions of High Court of another province.*

The Subordinate Courts of a province are bound by the decisions of the High Court of that province only, as Courts subordinate to that High Court. They are not bound by the decisions of another High Court, even in the absence of a decision on the point of the High Court to which they are subordinate. (*Davis, C.J and Weston, J.*) EMPEROR *v.* DHOLARAM HOLARAM. **I L.R. (1941) Kar. 431 = A.I.R. 1941 Sind 221.**

———*Precedents—Value of.*

No number of previous decisions as to the existence of some personal law or custom of persons domiciled in

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India are binding on the Courts in India in the sense that they are *res judicata*, all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reagitated and an issue must formally be framed. (*Mya Bu and Mosely, JJ.*) YIN WIN LIN *v.* MA KYIN SEIN. **1940 Rang.L.R. 685 = 194 I.C. 323 = 13 R.R. 304 = A.I R. 1941 Rang. 66.**

———Precedents—Value of—Generality of expressions found in judgment—If governed by particular facts of case. *See* 1940 Dig, Col. 1033. PUNJAB CO-OPERATIVE BANK, LTD. *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **67 I A. 464 = I.L.R. (1940) Lah. 685 = I.L.R. (1940) Kar. (P.C.) 447 = 191 I.C 548 = 13 R.P.C. 130 = 7 B.R. 309 = 1940 M.W.N. 1275 = 22 Pat.L.T. 1 = 45 C.W.N. 232 = 1941 P.W.N. 54 = 1941 O.L.R. 42 = 43 P.L R. 168 = 43 Bom.L.R. 372 = 73 C.L.J. 302 = (1941) 1 M.L.J. 130 (P.C.).**

———Privy Council—Academic questions. *See* 1940 Dig., Col. 1033. RAJENDRA NARAYAN BHANJ DEO *v.* COMMISSIONER OF INCOME-TAX, B & O. **I L.R. (1940) Kar. (P.C.) 335.**

———*Privy Council—Concurrent findings of fact—Interference.*

The rule that the Privy Council will not interfere in appeal with concurrent findings of fact by the lower appellate Court is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely destructive of the findings of fact (*Lord Atkin*) MATILDA PEIRIS *v.* R. M. SEI LAMUTTU PILLAI. **195 I C. 658 = 14 R P C. 15 = 1941 O.W.N. 1070 = 1941 O L.R 629 = 7 B.R. 985 = 1941 A L.W. 890 1941 O.A. 830 = 1941 A.W.R. (P C) 85 = 1941 A.L J. 499 = A.I.R 1941 P C. 55 (P.C.).**

———*Privy Council—Concurrent findings—Interference.*

Where both the Courts in India have reached the same conclusion upon questions of fact, their Lordships of the Privy Council will decline to interfere if no reason is or can be suggested for a departure by them from the course which they normally pursue in such circumstances. (*Lord Russell of Killowen.*) NATHU MAL *v.* GOKAL CHAND. **195 I C. 624 = 14 R P.C. 13 = 1941 O L.R. 623 = 7 B.R. 978 (P.C.).**

———*Privy Council—Criminal appeal—Certificate under R. 8 of Judicial Committee Rules—Responsibility of counsel.*

The granting of a certificate by Council in India under R. 8 of the Judicial Committee Rules that the petitioner has reasonable grounds of appeal to the Board, is a very serious matter not only because those who so certify are misusing their professional position, but because the due course of criminal justice is interfered with if the delay of application to the Board is interposed without any valid reason between the judgment of the Court in India and the due execution of the sentence which that Court thinks it right to pronounce. (*Lord Chancellor.*) MAHOMED NAWAZ *v.* EMPEROR. **196 I C. 692 = 1941 O L.R. 805 = A.I R. 1941 P.C. 132 (P.C.).**

———*Privy Council—Criminal appeal—Limits of jurisdiction.*

The Judicial Committee is not a revising Court of criminal appeal: that is to say, it is not prepared or required to retry criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence, or with

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questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross examination as a hostile witness or in awarding particular punishments. Broadly speaking, the judicial committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial, where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant wttnesses. Similarly, of course, if the tribunal was shown to have been corrupt or not properly constituted, or incapable of understanding the proceedings because of the language in which the proceedings were conducted. Another and obvious example would arise if the Court had no jurisdiction either to try the crime, or to pass the sentence. (*Lord Chancellor*) MAHOMED NAWAZ *v.* EMPEROR. **196 I.C. 692=1941 O L R. 805= A I.R. 1941 P.C. 132 (P.C.).**

———*Privy Council—Criminal case—Interference—Practice.*

The Privy Council will not interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. (*Sir Philip Macdonell.*) FAKISANDHLA NKAMBULE *v.* THE KING. **191 I.C. 4=13 R.P.C. 106= 1941 P.W.N. 11=7 B.R. 203=42 Cr.L J. 13= 1941 M.W.N. 228 (P.C.).**

———Privy Council—Leave to appeal. *See* C. P. CODE, SS 109 AND 110.

———*Privy Council—Leave to appeal—Grant of—When not warranted.*

A case in which no legal principle is involved and in which there are concurrent findings of fact by the lower Court does not warrant the grant of leave to appeal to His Majesty in Council. (*Lord Justice Luxmoore.*) ERNEST HUGH CANNING *v.* SOOBRAN PARTAP. **179 I.C 118=1941 A.W.R. (P.C.) 51= 1941 O.A. 603=A.I R. 1941 P C. 106 (P C.).**

———Privy Council—New plea—Party, if a pardanashin—Question of fact—Absence of issue—If can be raised. *See* 1940 Dig., Col. 1034. BANK OF KHULNA, LTD. *v.* JYOTI PRAKASH MITRA. **67 I A. 377=I.L.R. (1940) Kar. (P.C.) 341= 45 C.W.N. 259=1941 P.W.N. 228 (P.C.).**

———Privy Council—New plea—Permissibility. *See* 1940 Dig., Col. 1034. KISHORI LAL *v.* BHAWANI SHANKAR. **I L.R. (1940) Kar. (P.C.) 282**

——— *Privy Council—New point of law.*

It is neither convenient nor conducive to accuracy that new and important points of law should be raised for the first time at their Lordships' Board, or that decisions should be given upon matters not duly submitted to the High Court. (*Sir George Rankin.*) COMMISSIONER OF INCOME-TAX, PUNJAB *v* DEWAN KRISHNA KISHORE. **196 I.C. 707= 1941 A.W R. (P.C.) 98=54 L.W. 635= 1941 O.A. 974=1941 I.T.R. 695=8 B.R. 137= 1941 O.L R. 798=1941 A L W. 953= 1941 O.W.N. 1151=A.I.R. 1941 P C. 120= (1941) 2 M.L.J. 972 (P.C)**

———Privy Council—*Obiter*—Value. *See* 1940 Dig., Col. 1035. SHRI NATH SHAH *v.* OFFICIAL LIQUIDATOR. **I.L.R. (1941) All. 153= 192 I C. 357=13 R.A. 311= 1941 O.A. (Supp.) 1=1941 A.L.W. 12.**

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———Privy Council—Special leave—Points other than those on which application was admitted—If can be argued. *See* 1940 Dig., Col. 1035. BROWNLEES *v.* VIVIAN MACMILLAN. **191 I.C. 433= 13 R.P C. 136=7 B.R. 319=1941 O.L R. 35.**

———Procedure—Guardian and ward—Hindu joint family—Manager—Application to Court for appointment of guardian of minor coparcener's undivided property and for sanctioning sale of family property as being for minor's benefit—Procedure—Duty of Court—*Ex parte* order—Propriety of. *See* LETTERS PATENT (BOMBAY), CL. 17. **43 Bom.L R. 926 (S B.).**

———Procedure—Offence against public justice—Proceedings for sanction—Appeal—Notice—If to go to Public Prosecutor or Government Pleader. *See* CR. P. CODE, S. 476. **(1941) 1 M.L.J. 611.**

——— *Procedure—Appeal to High Court—Change in case law as a result of decision of Privy Council—Change in complexion of case causing embarrassment to appellant and giving rise to new questions not raised in pleadings or issues—Disposal of appeal without giving appellant opportunity to make out case open on new points.*

Where during the pendency of an appeal before the High Court, a decision of the Privy Council alters or changes the case law to be applied to the case, and this alteration in the case-law changes the entire complexion of the case pending the appeal, putting the appellant in a most embarrassing position and giving rise to a fresh set of questions which were never raised by the pleadings or the issues framed in the case, the appeal should not be disposed of as it stood, as that would entail injustice to the appellant. The appellant, in such a case, should be allowed the fullest opportunity to make good such case as he may have upon the new points arising in the case as a result of the alteration in the case-law. (*Sir George Rankin.*) APPA TRIMBAK *v.* WAMAN GOVIND. **196 I C. 518=14 R P.C 38=8 B.R. 90= 1941 O A. 853=1941 A W R. (P C.) 86= 54 L.W. 534=1941 O.L.R. 726= A.I.R 1941 P.C. 85=(1941) 2 M L.J. 733 (P.C.).**

———*Procedure—Suit for rent—Allegation of settlement at specie rate of rent—Absence of prayer for declaration of liability of land to assessment of fair rent—Settlement found against—Suit, if can be tried as one for declaration of liability to assessment of fair rent.*

In a suit for rent, the plaintiff asserted that the land had been settled at Rs. 7-2-0 per annum with the defendants. No declaration that the land was liable to assessment of fair and equitable rent was sought for. The alleged settlement was not proved and was found against. The plaintiff prayed in second appeal that the suit should be remanded in order to decide what would be the damages properly payable to the plaintiff (appellant) for the use and occupation of the land by the defendant.

Held, that the suit could not be allowed to be tried as a suit for declaration that the land was liable to be assessed for rent. (*Manohar Lall, J.*) RAMGOBIND SAHU *v.* MOSO DHOBI. **7 B.R. 639=193 I.C. 780= 13 R.P. 647=A.I R. 1941 Pat. 371.**

———Receiver. *See* C. P. CODE, O. 40.

———*Relief—Decree on basis of case not made out in plaint—If can be passed.*

A plaintiff cannot be permitted to succeed on a case not made out in his plaint. (*Mahomed Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. **22 Pat.L.T. 666.**

———*Relief—Duty of Court—Buddhist law (Burmese)—Suit by widow for share in husband's estate—Children made defendants to suit—Issue raised as to*

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respective shares of widow and children—Ascertainment of shares of children—Duty of Court—Suit if should be framed as administration suit.

W. B., a Burman Buddhist, died intestate on 28—12—1907, leaving him surviving a son (appellant), two daughters and a widow (4th respondent) and three children of a son K.P.C., who had predeceased him by only 15 days. The plaintiff was the widow of that predeceased son K.P.C. The plaintiff who had re-married in 1910, brought a suit in 1912 against the appellant K.S., his sister and her three children by her deceased husband, claiming a share not in the whole estate of K.P.C., but in the properties, movable and immovable, standing in the joint names of K.P.C. and K. and in the joint names of K.P.C., K.S. and W. B. The trial Court determined the share of the plaintiff (widow) but refused to do so in respect of the shares of her children who were made defendants to the suit on the ground that the suit was only a suit for partition, and not an administration suit. The pleadings in the suit however raised a distinct question between the plaintiff and her children as to their respective shares in the subject-matter of the suit and an issue was framed for the purpose of deciding that question. The preliminary decree, moreover, directed an enquiry not merely as to the plaintiff's share, but as to the entire share of K.P.C. in the subject-matter of the suit. On appeal by the three children, the High Court held that whether the suit be described technically as a suit for partition or as a suit for administration, it was a clear duty of the Court to declare not only what properties or shares therein formed the estate of K.P.C., but also to declare the rights of the plaintiff and her children in such properties; the High Court therefore set aside the decree of the trial Court and remanded the case for the purpose of enabling the three children to prosecute their claims and of having a proper final decree drawn up.

Held, that though the suit was not a suit for the administration of K.P.C.'s estate and there was no claim for administration or accounts or enquiries usually directed in such a suit, that in no way concluded the matter, and in the circumstances of the case it was not only competent for the Court to ascertain and declare the shares of the three children of K.P.C., but it was the Court's plain duty to do so, and that the three children, though defendants, were entitled to have their interests in the properties, the subject-matter of the suit, determined by the Court and should not be forced to bring a separate suit for that purpose. (*Lord Romer.*) MAUNG SIN *v.* MAUNG BYAUNG. **195 I C. 118 = 14 R.P.C. 8 = 1941 O.L.R. 568 = 7 B.R. 932 = 74 C.L.J. 112 = A.I.R. 1941 P.C 51 = (1941) 2 M.L.J. 233 (P.C.)**

——Relief—Duty of Court to grant suitable relie though not asked for. *See* CR. P. CODE, S. 88 (6-D). . **(1941) 2 M L.J. 510**

——*Relief—Facts found different from those pleaded in plaint—Plea of cash consideration for bond—Relief on admission of execution though consideration was not n cash.*

The Court is entitled to apply the law to the facts actually proved by the evidence even though the allegations of both parties are found to be untrue and incorrect. A plaintiff who fails to prove the facts alleged by him may yet obtain the relief, if the facts pleaded by the defendant and found by Court show him to be entitled to it. Where a plaintiff in a suit on a bond pleaded cash consideration and the defendant while admitting execution denied the receipt of cash as consideration, and it was found that there was no consideration, it was held that relief could be given to the plaintiff on the basis of admission of execution by defendant, but that he should be deprived of his costs for having raised a false plea and persisted in it. (*Gruer, J.*) BHIKULAL *v.* GANPATI SITARAM. **1941 N.L.J. 530.**

——*Relief—Grant of lesser relief—Suit for declaration of title—Plaintiff in possession under written instrument—Written instrument found inadmissible—Declaration that plaintiff was in lawful possession—If can be granted.*

Where in a suit by the plaintiff for a declaration of his title to the property of which he was in possession under a written instrument of transfer, the written instrument of transfer is found to be inadmissible for want of registration, the proper course for the plaintiff is to apply for amendment of the pleadings by changing his cause of action from one based on an actual transfer of title to one based on part performance under a personal contract. The absence of such an amendment is not a fatal defect provided the main facts are sufficiently clear. The plaintiff's suit in such a case cannot be dismissed altogether on the ground of the instrument of transfer being inadmissible but the plaintiff is entitled to a lesser relief, namely, a declaration that he is lawfully in possession of the property in dispute which was delivered to him and over which he has a lien for the purchase-money paid by him to the vendor. (*Tek Chand, Monroe and Beckett, JJ.*) SHANKRI *v.* MILKA SINGH. **43 P.L R 656 = A I.R. 1941 Lah. 407 (F B.).**

——*Relief—Permission to withdraw prayer—Grant of—Suit against mortgagor and mortgagee—Prayer for perpetual injunction restraining mortgagor from dealing with mortgaged property—Interim injunction issued to mortgagor—Order allowing relief for injunction to be dropped at hearing—If justified.*

In a suit against the mortgagor and the mortgagee the Court on the basis of the prayer in the plaint for a perpetual injunction restraining the mortgagor from dealing with the mortgaged property issued an interim injunction against the mortgagor and permitted the relief for injunction to be dropped at the hearing.

Held, that the order permitting relief for injunction to be dropped at the hearing was not justified. (*Davis, C. J. and Lobo, J.*) VASUMAL *v.* KARAMCHAND **I.L R. (1941) Kar. 146 = 194 I.C. 81 = 13 R.S. 243 = A I.R. 1941 Sind 41.**

——Relief—Prayer for larger relief—Grant of smaller relief. *See* 1940 Dig., Col. 1036. KHANTA MANDALANI *v.* HEM KUMARI DEBI. **A.I.R. 1941 Pat 29.**

——*Relief—Rent suit—Suit based on contract—Contract not proved—Compensation for use and occupation—If can be awarded.*

Compensation for use and occupation cannot be awarded in a suit based upon an alleged contract of tenancy where the plaintiff fails to prove the contract and has made no alternative prayer. (*Agarwala, J.*) KIRPA SANKER WARRAH *v.* JANKI PRASAD I ALLU. **196 I.C. 650 = 8 B R. 77.**

——*Relief—Suit for declaration of title and possession—Decree for joint possession.*

Where in a suit for a declaration of title to certain land and for recovery of possession thereof, the plaintiff cannot get a declaration of his exclusive title to the land inasmuch as there has not been a partition, the Court can give the plaintiff a declaration of his title with respect to his share and a decree for joint possession of the land. (*Sen, J.*) SHEIK SAIRAT *v.* MAHOMED YUNUS ALI AKANDA. **73 C.L J. 42.**

——Relief—Suit for ejectment of tenant—Failure to prove lease set up—Defendant setting up permanent

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tenancy but failing to prove same—Decree for ejectment —If can be made. *See* LANDLORD AND TENANT—EJECTMENT. **19 Mys L.J. 86.**

———Res judicata. *See* C. P. CODE, S. 11.

——— *Revenue cases—Formalities—Necessity.*

An unnecessary insistence on formality has never been demanded in revenue cases. An order in appeal by which a minor is appointed patel cannot be assailed on the ground that the minor was not a party who pressed his claims for appointment, when in fact his father as appellant had pressed his claims. (*Greenfield.*) MADHO HARI *v.* SAMBHARAO. **1941 N.L.J. 552.**

———Review. *See* C. P. CODE, O. 47.

———Revision. *See* C. P. CODE, S. 115.

——— *Right of suit—Overcharges in violation of obligation imposed on public utility company—Payments—If voluntary—Right to recover as money had and received.*

It is settled law that overcharges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as "money had and received." The payments cannot be said to be voluntary payments. (*Patanjali Sastri, J.*) PALGHAT ELECTRIC CORPORATION. LTD. *v.* VEERARAGHAVA AYYAR. **1941 M.W.N. 253= 53 L.W. 359=A.I.R. 1941 Mad. 439= (1941) 1 M.L.J. 411.**

———Second appeal. *See* C. P. CODE, S. 100.

———Subsequent events. *See also* PRACTICE—APPEAL—SUBSEQUENT EVENTS.

——— *Subsequent events—Duty of Court.*

Per *Agarwal, J.*—It is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances, as they stand at the time the decree is made. (*Ghulam Hasan and Agarwal, JJ.*) BISHWANATH SARAN SINGH *v.* MUJTABA HUSAIN. **195 I C. 402=14 R.O. 82= 1941 A L.W 538=1941 O.L.R. 584= 1941 O A. 432=1941 A.W R. (C.C.) 175= 1941 O.W.N. 661= A.I.R. 1941 Oudh 422**

——— *Subsequent events—If can create a new, or complete an incomplete cause of action.*

Nothing arising after action is brought can either create a new, or complete a then incomplele, cause of action entitling the plaintiff to any relief in that same then existing suit. A.I.R. 1938 Rang 134, Rel. on. (*Sharpe, J.*) U BA MAUNG *v.* U CHIT HLAING. **193 I.C. 234=13 R.R. 260=4 F.L.J. (H C.) 42= A.I R. 1941 Rang. 27.**

——— *Trial—Forbidding cross-examination — Propriety.*

Where the Judge actually forbade the further cross-examination of a witness on the ground that she was embarrassed, it was held, that the trial was badly conducted. (*Roberts, C.J. and Dunkley, J.*) MA AYE MYA *v.* CHEW CHENG GUAT. **A.I.R. 1941 Rang. 334.**

PRECEDENTS. *See* PRACTICE—PRECEDENTS.

PRE-EMPTION—Custom—Hindus of Sylhat district. *See* 1940 Dig., Col. 1038. RAJNANDINI *v.* ASWINI KUMAR CHOWDHURY. **I.L.R. (1941) 1 Cal 457= 13 R.C 363=193 I.C. 82=A.I.R. 1941 Cal. 20.**

——— *Custom—Right recognised by—Applicability in Ahmedabad—Extent of right—If confined to ancient city and if restricted to houses—Open sites—Transfer of lease-hold.*

The custom of pre-emption amongst Hindus in Ahmedabad must be recognised; it has been judicially recognised as applying to Ahmedabad.

Quaere: Whether the custom of pre-emption applies only within the limits of the City of Ahmedabad as it

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existed in the time of the Moghuls or whether it also applies to the recent extended limits of that city?

Quaere: Whether the custom is confined to house property or applies also to open sites? The custom of pre-emption, however, exists only as between free holders, that is to say, the neighbouring land in respect of which the custom is claimed must be free hold, and the land sought to be pre-empted must also be free-hold. The right of pre-emption under the Mohomedan law attaches only to sales of proprietary interest in the land and does not extend to property held under a precarious lease-hold tenure. (*Beaumont, C.J., Divatia and Sen, JJ.*) DASHRATHLAL CHHAGANLAL *v.* BAI DHONDUBAI **I.L.R. (1941) Bom. 460=195 I.C. 464= 14 R.B. 34=43 Bom.L R. 581= A.I R 1941 Bom. 262 (F.B.).**

———Decree for—Scope of appeal—Power of appellate Court to interfere with price and time for payment. *See* 1939 Dig., Col. 977. SARJABAI *v.* BHAGWANJI. **I.L R. (1941) Nag. 276.**

———Lis pendens—*Vendee improving his status during pendency of suit—Effect of.*

A vendee can improve his status effectively right up to the adjudication of the pre-emptor's suit against him. This improvement can, in certain circumstances, be effected even by dealing with the land which is the subject-matter of the suit. The effect of the rule of *lis pendens* is only to bind the transferee if he happens to be a third person with any decree that is made in the suit even if he is no party to it. (*Tek Chand, Din Mahomed and Beckett. JJ.*) THAKUR RADHO SINGH *v.* JAMES R R. SKINNER. **43 P.L R. 581= A.I.R. 1941 Lah. 433 (F.B.).**

——— *Object of the law of—No* bona fide *object to exclude stranger—Maintainability of suit.*

The object of the law of pre-emption is to make it possible to exclude strangers and to keep the property in the family or community, and suits which are not brought with this object should be clearly discouraged. A suit not instituted *bona fide* with this object is not maintainable. (*Bennet and Madeley, JJ.*) KESHRI KUMAR SINGH *v.* RAM SWAROOP SINGH. **196 I.C. 175=14 R O. 138=1941 A L.W. 877= 1941 O.L.R 654=1941 O A. 746= 1941 A.W.R, (Rev.) 778=1941 O W N. 1027.**

——— *Permissibility of pre emption of part of property sold—Conditions.*

If a pre-emptor wishes to pre-empt part of the property sold he can only do so on payment of the amount paid for the whole of the property. (*Bennett, J.*) SHEO DAT TIWARI *v.* BHAGWAT DAS. **1941 O.W.N. 1276=1941 A.W.R (C.C.) 385= 1941 O.A. 972.**

——— *Pre emptor claiming as co-sharer on strength of lease—Absence of plea of fraud—Pre emptor if can show lease to be sale.*

Where a pre-emptor does not claim as a member of the village community but as a co-sharer on the strength of a lease of *birt* land for which he has to pay rent to the 'pukhtadar' and there is no plea of fraud that it was a cloak to defeat pre emption, or other co sharers, it is not open to such a plaintiff to go behind the lease and lead evidence to show that it was a sale. The plaintiff cannot plead fraud to take advantage as a pre emptor. Such cases of interpretation of the title deeds of pre-emptors must be distinguished from cases of interpretation of the title deeds of vendees. (*Madeley, J.*) SITA RAM SINGH *v.* JAGDEO MISIR. **196 I C. 617= 14 R O. 197=1941 R.D 907=1941 O.L.R. 725= 1941 O.W.N. 1122=1941 O A. 838= 1941 A.W.R. (Rev.) 936**

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———*Price paid by vendee—Proof of.*

In a claim for pre-emption where the vendee establishes that the bulk of the amount stated in the sale deed was paid before the sub-registrar, it is the best evidence of what has been paid. It is not then necessary for the Court to determine the market price of the property sought to be pre empted by other evidence (*Almond, J.C. and Mir Ahmad, J.*) PESHAWARI LAL *v.* DHARAM CHAND. **195 I.C 26 = 14 R. Pesh 8 = A I.R. 1941 Pesh 52.**

———Right of co-sharer —Principles —Co sharer—Sale to stranger—Demand by co sharer—Suit for partition by purchaser—Suit for pre emption by co-sharer—*Ex parte* preliminary decree in partition suit—Subsequent decree in suit of co-sharer allowing pre-emption—Effect on partition suit—Decree in partition suit—If bars right of pre-emption. *See* 1940 Dig., Col. 1039. CHAMRU LAL *v.* SHYAM SUNDER LAL **192 I.C. 248 = 13 R P. 449 = 7 B R. 358.**

———*Right of—Custom of—If mere personal right or right attached to land.*

Although the right of pre-emption does not apply to British India generally, it has been adopted by custom in certain localities, and the custom as adopted in a particular locality must be in accordance with the law as it originally was. Therefore in places where the law of pre-emption exists by custom, it must be regarded as a right annexed or attached to the land and not as a mere personal right. (*Beaumont, C.J., Divatia and Sen, JJ.*) DASHRATHLAL CHHAGANLAL *v.* BAI DHONDUBAI. **I.L.R. (1941) Bom. 460 = 195 I.C. 464 = 14 R B. 34 = 43 Bom L.R. 581 = A.I.R. 1941 Bom. 262 (F.B.).**

———*Right of—Vendee having equal right of pre emption joining stranger with him in purchase—Such vendee purchasing stranger's share during pendency of pre emption suit but after limitation—Effect of.*

It is true that by joining a stranger with himself a vendee with an equal right of pre-emption loses his right in the first instance, but this loss of the right is not irremediable. If the vendee during the pendency of the pre-emption suit removes the defect by purchasing the stranger's share, the pre-emptor cannot succeed irrespective of the fact that the subsequent acquisition takes place after the limitation has expired (*Tek Chand, Din Mohammad and Beckett, JJ.*) ALI MOHAMMAD *v.* MOHAMMAD DIN. **43 P L.R. 566 = A.I.R. 1941 Lah. 444 (F.B.).**

———Right to claim—Conditions of—Occupancy tenant or tenant of garden or orchard—Right to pre-empt. *See* 1940 Dig., Col. 1039. KRISHNA BAHADUR *v.* GANGA PRASAD SAH. **A.I R. 1941 Pat 35.**

———*Right to claim pre emption of part of property on payment of whole price—If can be claimed in appeal for the first time.*

A plaintiff in a pre-emption suit cannot be allowed in an appeal by him to take up the position for the first time that he should be permitted to pre empt part of the property sold on payment of the whole price. (*Bennett and Madeley, JJ.*) GAURI SHANKAR *v* BASHIR AHMAD. **1941 O W.N. 1306 = 1941 A.W R. (C.C.) 388 = 1941 O.A. 996**

———*Right to—Question whether purchase by pre-emptor is* benami—*If relevant.*

In the case of a claim for pre-emption the question whether the purchase by the pre-emptor is *benami* is an inadmissible notion. If the pre-emptor produces money and has the requisite qualifications for pre empting, the Court has no cause for going into his *bona fides* or to trace the origin of the money which he has offered to pay. The basic principle is that after all the statutory right to pre-empt depends on certain qualifications and the production of money, and when those requirements are met with nothing else remains but to grant a decree. (*Almond, J.C. and Mir Ahmad, J.*) PESHAWARI LAL *v.* DHARAM CHAND. **195 I.C. 26 = 14 R Pesh 8 = A.I.R. 1941 Pesh. 52.**

PRESY. S. C. C. ACT (1882), S. 16.

———*Right to—Sale of land—Compromise, if amounts to*

A pre-emption suit was decreed on payment of Rs. 1,800. This sum was deposited in Court and was taken out by the vendees. Subsequently, the pre-emptor applied for execution of his decree by being put in possession of the land and during the execution proceedings the pre-emptor and the vendee entered into a compromise whereby the vendees paid Rs. 2,000 to the pre-emptor to cover the cost of the land and the expenses incurred by him in the litigation and the pre-emptor agreed that the suit should be considered as dismissed. Rs. 2 000 was paid in the presence of the Court which passed an order that the execution should be filed in full satisfaction.

Held, that the question of whether a sale was a sale of land or not must depend on the circumstances of each particular case, and that there was an out and out sale of land by virtue of the compromise inasmuch as the land had vested in the pre emptor by virtue of the decree when he deposited Rs. 1,800 in Court and he was at the time of the compromise the absolute owner of the property of which he could get possession by execution (*Almond, J.C. and Mir Ahmad, J.*) INZAR GUL *v.* HAJAB GUL. **194 I.C. 92 = 13 R. Pesh. 72 = A.I.R. 1941 Pesh. 26.**

———*Right to, with reference to part of property sold —When can be allowed.*

Pre-emption of part of the property sold can be allowed if the pre-emptor offers to pay the entire sale consideration for the part to which he has a right of pre-emption. (*Thomas, C.J. and Agarwal, J.*) ALI NAQI *v.* ZAHUR HUSAIN. **196 I.C. 449 = 14 R.O. 178 = 1941 O.W.N. 1097 = 1941 O.A 813 (2) = 1941 R D 847 = 1941 O.L.R. 687 = 1941 A.W.R. (Rev.) 862 (2).**

———*Suit for—Decree on payment of price plus compensation—Forum of appeal.*

The value of a pre-emption suit which is decreed on payment of price and compensation for improvements, does not include the amount of compensation for improvements for purposes of appeal. The appellate forum must be determined on the basis of price made payable. A.I.R. 1923 Lah. 107, Foll. (*Almond, J.C.*) MAHOMED ALI JAN *v.* MIRZA ABDUL HAKIM. **193 I C. 385 = 13 R. Pesh. 55 = A.I R. 1941 Pesh. 14.**

———Transaction if a sale or lease—Factors which decide. *See* 1940 Dig., Col. 1040. MAHARAJA PANDE *v.* CALI DIN PANDE. **A.I.R. 1941 Oudh 12.**

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 9—Calcutta Small Cause Court Rules, O. 5, R. 18—Service of summons by registered post—Proof. *See* 1940 Dig. Col 1040. ROMESH CHANDRA DAS *v.* NATIONAL TOBACCO CO. OF INDIA LTD. **191 I.C. 535 = 13 R.C. 251.**

———**S. 16**—*Scope and effect—Decree of Presidency Small Cause Court—If becomes a decree of High Court for purposes of limitation for execution*

The law of limitation is dealt with in the Limitation Act and all questions relating to limitation must be decided with reference to the provisions of that Act, subject of course to the express provisions of any special or local law. S. 16 of the Presidency Small Cause Courts Act in no way affects the provisions of the Limi-

PRESY. S. C. C. ACT (1882), S. 35.

tation Act, and in the case of execution of a decree of the Presidency Small Cause Courts Act, the limitation applicable is that provided by Art. 182 of the Limitation Act. S. 16 has not the effect of making the decree by a Presidency Small Cause Court a decree of a High Court for purposes of limitation. (*Dhavle and Chatterji, JJ.*) RANGANADHAM *v* PONNA CHARAMMA.

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——**Ss 35 and 31**—Transmission order under S 31 by Registrar—If judicial order. *See* 1940 Dig., Col 1040. RAMNARAYAN JAGANNATH *v.* RADHAGOBINDA DEBNATH. **191 I.C 574=13 R C. 269**

—— **S. 38**—*Judgment—Validity of—Case heard by two judges and judgment prepared and signed by them—Judgment also signed in error by third Judge who has not heard case—If invalidates judgment.*

Where an application for a new trial under S. 38 of the Presidency Small Cause Courts Act is actually heard by two Judges of the Court and the judgment is prepared and signed by those two Judges, but by some error the judgment thus completed is also signed by the third Judge who has had nothing whatever to do with the trial of the case, this error cannot be taken to detract from the validity of the judgment, and the superfluous initials of the third Judge cannot be said to make the judgment a judgment of that Judge also who has initialled it in error. (*Wadsworth. J.*) KUPPIAH CHETTY *v* SARASWATI AMMAL. **1941 M W.N. 919= 1941 Comp. C. 334=A.I.R. 1941 Mad. 769= (1941) 2 M.L.J. 571.**

——**S. 38**—*Powers of Full Bench under—Fresh findings of fact in conflict with those of trial Judge—If can be given—Procedure.*

A Full Bench of the Small Cause Court under S. 38 of the Presidency Small Cause Courts Act does not exercise appellate powers and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision, the proper procedure is not to give fresh findings of fact (which are in conflict with those of the trial Judge) but to order a retrial at which the facts may be gone into afresh. (*Wadsworth, J*) KUPPIAH CHETTY *v.* SARASWATI AMMAL. **1941 Comp C. 334= 1941 M.W.N. 919=A.I.R. 1941 Mad. 769= (1941) 2 M.L J. 571.**

——**S. 43**—Scope and effect of—If modifies ordinary law of relationship of landlord and tenant—Order against tenant—If affects sub-tenant—Right of latter to retain possession—Evidence Act, S. 116. *See* 1940 Dig., Col. 1041. VENKATA RAO *v.* SUBBA RAO.

13 R.M. 638=193 I.C. 251=(1940) 1 M.L.J. 605

——**S. 43**—*Time mentioned in order for giving possession—Extension of—Power of Court—C. P. Code, S. 148.*

The Judge of the Presidency Small Causes Court has no jurisdiction to extend the time fixed by his order under S. 43 of the Presidency Small Cause Courts Act, directing the bailiff to give possession. S. 148, C P. Code, has no application to such a case (*Sen, J.*) THE OFFICIAL TRUSTEE OF BENGAL *v.* TAJ MAHAMMAD. **46 C W.N 11.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), (as amended in 1927), S 7. Proviso

—Construction and scope—"Any matter arising under S. 36"—Meaning and effect of—Jurisdiction of Insolvency Court—When ousted—Question of title—Jurisdiction to decide.

There is no ambiguity whatever in the language used in S. 36 of the Presidency Towns Insolvency Act, by the Legislature, and the only matters which arise under

PRESY. TOWNS INSOL. ACT (1909) S. 9

S. 36 for purposes of the proviso to S. 7 of the Presidency Towns Insolvency Act as amended in 1927, are alleged indebtnedess to the insolvent by a third party and alleged possession by a third party of any property belonging to the insolvent. The proviso to S. 7 would not therefore come into operation unless the proceedings under S 7 involve the decision of such a matter arising under S 36. If the third party summoned under S. 36 admits his indebtedness to the insolvent or admits his possession of property belonging to the insolvent, the Court has power to deal with him under Cls. (4) and (5) of S. 36. If the person summoned under S. 36 denies his indebtedness to the insolvent or denies that he has in his possession or power any property belonging to the insolvent, the Court has no power under S 36 to deal further with that person under S 36 and is precluded from deciding such matters in insolvency jurisdiction by the proviso to S. 7, unless all the parties agree. Where, however, the question is not whether the person summoned is indebted to the insolvent or whether he is in his possession of, or has in his power, any property belonging to the insolvent, but whether the person summoned has a title to certain disputed property, the proviso to S. 7 is no bar to the jurisdiction of the Insolvency Court dealing with and disposing of the matter involved. A matter may be said to arise under S. 36 of the Act, although no person may have been summoned and examined under that action. Similarly, even if a person has been summoned and examined under S 36, the mere fact of his examination would not bring into operation the proviso to S. 7 unless the matter of the examination is such as arises under S. 36, and thus relates to the indebtedness to the party examined to the insolvent, or to the fact of possession by him of property belonging to the insolvent. Where the dispute between the Official Assignee and the person examined is not matter of possession but a matter of title to property, the matter is not one arising under S. 36, and the jurisdiction of the Insolvency Csurt under S. 7 is not ousted by the proviso to that section. (*Lobo, J.*) OFFICIAL ASSIGNEE *v.* EBRAHIM VALI & SONS.

I.L.R. (1941) Kar. 455.

——**S. 8 (1)**—Limitation—Application for review—Limitation applicable—Limitation Act, Arts 162, 173 and 181. *See* 1940 Dig., Col. 1042. THANWERDAS KALUMAL, *In re.* **192 I C 721= 13 R.S. 199=A.I.R. 1941 Sind 1.**

——**S. 8 (1)**—Powers of Insolvency Court to review—Extent of—If subject to restrictions as under S. 47, C. P Code. *See* 1940 Dig., Col. 1042. THANWERDAS KALUMAL, *In re.* **192 I.C. 721=13 R.S. 199= A.I.R 1941 Sind 1.**

——**S. 8 (1)**—Right to apply for review—Person not party to proceedings sought to be reviewed—Remedy of. *See* 1940 Dig., Col. 1042. THANWERDAS KALUMAL, *In re.* **192 I.C. 721=13 R S 199= A I.R 1941 Sind 1.**

——**S. 9 (e)**—*Act of insolvency—Invalid attachment—Effect—Attachment of property not liable to be attached—If sufficient to support petition by creditor.*

No Court would adjudicate a debtor insolvent unless it is satisfied that an act of insolvency specified under S. 9 of the Presidency Towns Insolvency Act was clearly established by the petitioning creditor. Where the petition of the attaching creditor is founded on an alleged attachment as specified in S. 9 (*e*) of the Act, the property which is said to be attached must be such property of the debtor as can under law be attached in execution of a decree against him. Where a licensee or lessee from the Government of India for the manufacture of salt deposits a sum of money with the Salt and Excise

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Department of the Central Government in pursuance of a condition precedent upon which he is granted the licence, as security for securing Government interests and for securing the due fulfilment and observance by the lessee of the covenants and agreements on his part, such a deposit is not liable to attachment in execution of a decree against him, because the amount cannot be regarded as a debt due to him until all the transactions connected with the licence or lease are closed. An attachment of such deposit under O. 21, R. 52, C. P. Code, is not a legal attachment which would amount to an act of insolvency under S. 9 (*e*) of the Presidency Towns Insolvency Act. (*Lobo, J.*) LOUIS THOMAS PINTO, *In the matter of*. **I.L.R. (1941) Kar. 50 = A.I.R. 1941 Sind 193.**

——**S. 9 (e)**—Successive attachments—Last attachment—If can be relied on for founding insolvency petition. *See* 1940 Dig., Col. 1043. EBRAHIM SAIT *v.* METTUPALAYAM NARAYANI BANK, LTD.
191 I.C. 687 = 13 R.M. 515 = (1940) 2 M.L.J. 495.

——**Ss. 10 and 14**—*Disqualified proprietor—If can be adjudicated insolvent.*

If a debtor who applies to be adjudicated insolvent satisfies the conditions laid down by the Presidency Towns Insolvency Act, he is entitled to be adjudged insolvent under that Act notwithstanding that his estate or part of it is already in the hands of the Court of Wards. (*Derbyshire, C.J and Panckridge, J.*) AMULYA MOHAN BASAK *v.* MOINUDDIN.
I.L.R. (1941) 1 Cal 318 = 196 I.C. 170 = 14 R.C. 181 = A.I.R. 1941 Cal. 505

——**Ss. 12 and 13**—*Practice—Act of insolvency alleged in petition and facts set out in detail in affidavit—If sufficient compliance.*

Where a creditor's petition for adjudication states that the debtor has given notice to his creditors that he has suspended or is about to suspend payment of his debts, and the affidavit verifying the petition shows that this is in fact the case, there is sufficient compliance with the law's requirements. The petition and the affidavit should be read together, and if the petitioning creditor sets out in detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit. (*Leach, C. J. and Chandrasekhara Ayyar, J.*) MADHAVLAL DESAI *v.* BALABHAI & SONS **1941 M.W.N. 916 = 54 L.W. 438 = (1941) 2 M.L.J. 598.**

——**S. 13** (2)—Duty of Court—Proof of debt—Decree obtained by creditor against debtor—If conclusive. *See* 1940 Dig., Col. 1043. JETHMAL NARANDAS *v.* MAHADEO ANANDJI **I.L.R. (1941) Bom. 156 = 13 R.B. 301 = 193 I.C. 54 = A.I.R. 1941 Bom. 62.**

——**S. 17**—Applicability—Transfer by debtor before adjudication—Suit by creditor under S. 53, T. P. Act, after adjudication—Leave of Insolvency Court—Necessity. *See* PROVINCIAL INSOLVENCY ACT, S. 28 (2).
(1941) 2 M.L.J. 684 (F.B.).

——**S. 23 (1)**—*Annulment of adjudication—Effect of—Order directing assets to remain in hands of Official Assignee subject to further order—Construction.*

Under S. 23 (1) of the Presidency Towns Insolvency Act, the effect of the annulment of an adjudication is to divest the Official Assignee of the debtor's property, which reverts to the debtor unless the Court by order appoints some one in whom it shall vest, not necessarily the Official Assignee. Where the Court annulling an adjudication directed that the assets should remain in the hands of the Official Assignee subject to the further order of the Court.

Held, that the effect of that order was not to vest the debtor's property in the Official Assignee under S. 23 (1) of the Presidency Towns Insolvency Act but to cause such property to revert to the debtor on condition that the assets already in the hands of the Official Assignee were to remain in his hands subject to the further order of the Court. (*Lort Williams, J.*) MIRJA MAHOMED MASRUR ALI KHAN, *In re.*
I.L.R. (1941) 1 Cal. 509.

PRESY. TOWNS INSOL. ACT (1909), S. 52.

——**S. 25** (3)—Protection order—Effect of—If available as ground of exemption from imprisonment for failure to pay maintenance under S. 488 (3), Cr. P. Code. *See* 1940 Dig., Col. 1043. EMPEROR *v.* MAHOMED HUSSAIN. **191 I.C. 198 = 13 R.B. 156 = 42 Cr.L.J. 101.**

——**S. 31**—"*Duly made*"—*Meaning of—Creditor denied participation in dividend through fraud of insolvent—Right to apply for order on other creditors to refund amount to make up dividend payable to excluded creditor.*

Where a person who is found to be a creditor has been denied participation in the dividend paid by reason of a fraud practised upon the Court by the insolvent, it must be held that the payment of dividend to the other creditors is not a payment "duly made" within the meaning of S. 31 of the Presidency Towns Insolvency Act. In such a case the Court, on the application of the creditor who has not participated, can order the other creditors who have been paid to pay back to the Official Assignee, such amount each as would be necessary to make up the proper dividend payable to the creditor concerned on the amount of his claim. (*Krishnaswami Ayyangar, J.*) PANCHAPAKESA IYER, *In re.*
54 L.W. 560 = 1941 M.W.N. 928 = (1941) 2 M.L.J. 847.

——**S. 36** — Scope—Matters falling under. *See* PRESIDENCY TOWNS INSOLVENCY ACT (AS AMENDED IN 1927), S. 7, PROVISO.
I.L.R. (1941) Kar. 455.

——**(Rangoon), Ss. 39 (1) (b) and 60 (2)**—Suspension of discharge—Courses open—Addition of appropriation order to a suspension order—Power of Court. *See* 1940 Dig., Col. 1044. RAMASWAMY NAIDU *v.* A. Y. LAZARUS. **192 I.C. 293 = 13 R.R. 169 = A.I.R. 1941 Rang. 26.**

——**(Rangoon), S. 39 (2) (a), (d), and (e)**—*Case falling under—Proper order.*

The object of the order of the discharge is to enable a person to recommence with a clean slate and it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Act, should, as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. Hence, in a case falling under S. 39 (2), Cls. (*a*), (*d*) and (*e*) Court's order should be an order suspending the discharge for a specific time. (*Roberts, C.J and Blagden, J.*) M DO CARMO LOBO *v.* OFFICIAL ASSIGNEE.
193 I.C. 764 = 13 R.R. 265 = A.I.R. 1941 Rang. 127.

——**Ss. 52 and 60**—*Insolvent receiving salary less than Rs.* 100 *as public servant—Order for payment of portion of salary—Powers of Court—Discretion.*

S. 60 of the Presidency Towns Insolvency Act does not interfere with the provisions of S. 52. Where the salary of an insolvent who is a public servant falls below Rs. 100 per mensem, a "prospective order" for payment of a portion of his salary to meet the debts due to his creditors cannot be passed under S. 60 of the Presidency Towns Insolvency Act. But such salary, though below Rs. 100, becomes the insolvent's property when paid to him, and therefore falls within S. 52 of the Act. It would then be open in law

PRESY. TOWNS INSOL. ACT (1909), S. 53.

to the Official Assignee to apply, after the salary has been received, for an order directing a portion of it to be paid over to him for the benefit of the creditors. Unless the circumstances are exceptional, the Court might refuse to pass such an order in view of the principle embodied in S. 60 of the Act and S. 60, C. P. Code. (*Leach, C.J. and Chandrasekhara Ayyar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* D'SILVA.

1941 M.W.N. 899 = 54 L.W. 420 = A.I.R. 1941 Mad. 906 = (1941) 2 M.L.J. 591.

——**Ss. 53 (3) and 51**—*Protection of purchaser—Burden of proof.*

Under S. 53 (3) if it can be shown that a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on S. 51. The party seeking to validate an otherwise invalid purchase by relying on S. 53 (3) must show that he is covered by it. (*Panckridge, J.*) KEDARNATH SEN, *In re.*

194 I.C. 423 = 13 R.C. 505 = A.I.R. 1941 Cal. 112.

——**S 54**—Receiver appointed in execution—Judgment debtor subsequently adjudicated insolvent—Costs, charges and expenses incurred by receiver—If can be recovered from insolvent's estate. *See* C. P. CODE, O. 40, R. 1—EXECUTION. **I.L.R. (1941) 2 Cal. 37.**

——**Ss. 56 and 116**—*Application to set aside transfer on ground of fraudulent preference—Adjudication order based on that transfer—If conclusive against creditor preferred—Latter not party to adjudication proceedings—Effect.*

Where one of the acts of insolvency on which an order of adjudication is based is fraudulent preference of one creditor over others, the order, so long as it exists, is conclusive against the creditor who is preferred that that act of insolvency has in fact been committed, although he is not a party to the adjudication proceedings. If he is dissatisfied with the adjudication order being based on the ground that the transfer to him is a fraudulent preference, he can appeal from that order. If he does not do so, the order would operate against him as *res judicata* in an application by the Official Assignee to set aside the transfer as a fraudulent preference under S. 56 of the Presidency Towns Insolvency Act. (*Derbyshire, C.J. and McNair, J.*) M. S YOUSUFF *v.* OFFICIAL ASSIGNEE OF CALCUTTA **45 C.W.N. 441.**

——**S. 60**—Scope—Debtor borrowing and agreeing to repay in instalments—Authority to employer to pay creditor part of salary every month and allowing creditor to collect same—Effect of—If operates as charge or assignment—Insolvency of debtor—Payments after—Right of Official Assignee to recover back from creditor. *See* 1940 Dig., Col. 1046. OFFICIAL ASSIGNEE *v.* SECRETARY, M & S. M RAILWAY EMPLOYEES' CO-OPERATIVE URBAN BANK, LTD.

I.L.R. (1941) Mad. 61 = 194 I.C. 318 = 13 R.M. 748 = 53 L.W. 662 = A.I.R. 1941 Mad. 297 = (1941) 1 M.L.J. 703.

——**S. 60**—Scope—If controls S. 52. *See* PRESIDENCY TOWNS INSOLVENCY ACT, Ss. 52 AND 60.

(1941) 2 M.L.J. 591.

——**S. 60**—*Scope—Order under—Nature—If liable to be revoked by having resort to S. 60 (1) (i), C. P. Code and proviso.*

S. 60 of the Presidency Towns Insolvency Act is not at all concerned with attachments. When a Court makes an order of allocation under S 60 it does neither in fact nor in form direct the attachment of the property (or salary as the case may be) of the insolvent. Neither S. 60 (1) (*i*), C. P. Code, nor the proviso thereto can be invoked for the purpose of enabling an insolvent to get rid of a liability placed upon him by an order under

PRESS (EMERG. POW.), ACT (1931), S. 4

S. 60 of the Presidency Towns Insolvency Act. (*Krishnaswami Ayyangar, J.*) P. D. CURTIS, *In re.*

54 L.W. 570 = 1941 M.W.N. 924 = (1941) 2 M.L.J. 845.

——**S. 68 (1) (d)**—*Construction—"Relating to the property of the insolvent"—Money decree against insolvent—Appeal from—If falls under S. 68 (1) (d).*

A suit relating to the property of the insolvent as contemplated by S. 69 (1) of the Presidency Towns Insolvency Act means a suit which, if successful, will increase the assets distributable amongst the creditors or the defence of which may prevent the assets being diminished. A right to institute an appeal which merely relates to a money decree against an insolvent is not a suit or legal proceeding relating to the property of the insolvent and does not fall within the powers given to the Official Assignee by S. 68 of the Act. (*Beaumont, C.J. and Macklin, J.*) CHANDRAKANT DEVJI *v.* NAROTAMDAS AMARCHAND. **196 I.C 339 = 14 R.B 123 = 43 Bom L.R. 644 = A.I.R. 1941 Bom. 293.**

——**(Rangoon), S. 103 A and Rangoon City Municipal Act (1922), S. 12**—*S. 103-A of the Insolvency Act, if impliedly repealed by S. 12 of the Municipal Act—Effect of harmonious construction—Certificate—Contents.*

S. 103-A of the Presidency Towns Insolvency Act is not impliedly repealed by S. 12 of the Rangoon City Municipal Act. It is quite possible to read the two sections together by saying that their combined effect is that an undischarged insolvent is disqualified for election, but that his disqualification only ceases when he gets his discharge *plus* the certificate mentioned in S. 103 A. It may not be necessary that there should be a separate document headed "certificate"; but there must be somewhere in the record a statement by the Court granting the discharge that the insolvency of the insolvent was caused by misfortune without any misconduct on his part. (*Sharpe, J.*) MARTIN *v.* WELLINGTON.

1941 Rang.L.R. 615.

——**Ss. 108 and 109**—Scope and effect of—Attachment of estate of deceased debtor in execution—Subsequent order for administration under S 108—Effect of on attachment—Preferential right. *See* 1940 Dig., Col. 1047. D. D. ITALIA *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.L.R. (1941) Mad. 398 = 193 I.C. 460 = 13 R.M. 701 = A.I.R. 1941 Mad. 183 = (1940) 2 M.L.J. 979.**

——**Ss. 116 and 56**—Application to set aside transfer on ground of fraudulent preference—Adjudication order based on that transfer—If conclusive against creditor preferred—Latter not party to adjudication proceedings. *See* PRESIDENCY TOWNS INSOLVENCY ACT, Ss. 56 AND 116. **45 C W N. 441.**

PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867), Ss. 1 and 9—"Book or pamphlet"—Single sheet of paper containing article on current topic—If book or pamphlet. *See* 1940 Dig., Col. 1047. MADHUSUDAN MAHANTI *v.* EMPEROR.

42 Cr.L.J. 78 = 7 R.R. 145.

——**S. 16**—Scope—Conviction and sentence—Legality. *See* 1940 Dig., Col. 1048. MADHUSUDAN MAHANTI *v.* EMPEROR. **42 Cr L.J. 78 = 7 B R. 145.**

PRESS (EMERGENCY POWERS) ACT (XXIII OF 1931), S. 4 (1) (a) and (d)—*Applicability—Exhortation to labourers to raise cry of revolution and to destroy present social order by bloody revolution—Reference to masters or exploiters—Effect of—If falls under Act.*

The petitioner, the keeper of a press published a poem entitled "Labourers—the mainstay of the world", whic

PRESS (EMERG. POW.), ACT (1931) S. 30.

inter alia, exhorted the labourers in these words. "Labourers. Raise now the cry of Revolution. The Heavens will tremble, the universe will shake and the flames of revolution will burst forth from land and water. You who have been the subject of exploitation. Now dance the fearful dance of destruction on this earth Truly, labourers, only total destruction will create a new world order and that will bring happiness to the whole world".

Held, (1) that it could not be said that these words tended to bring into hatred or contempt any class or section of His Majesty's subjects; the words "masters or exploiters" were too wide to denote a definite or ascertainable class so as to come with Cl. (*d*) of S. 4 (1) of the Press Act and the poem did not therefore come within the mischief of S. 4 (1) (*d*); (2) that the revolution contemplated by the poet was clearly revolution through violence, and that the exhortation was obviously an exhortation to the labourers to destroy the existing social order and to destroy it by force and violence, and clearly came within S. 4 (1) (*a*) of the Act. Bloody revolution and forcible and violent destruction of the present social order involved all kinds of cognisable offences involving violence and would in all probability involve murder, and it was unnecessary to show that the words tended to incite to or to encourage the commission of a particular offence or offences. (*Harries, C.J. Dhavle and Manohar Lall, JJ.*) BADRI NARAIN *v.* CHIEF SECRETARY TO THE GOVERNMENT OF BIHAR. **194 I.C. 273 = 42 Cr L J. 548 = 13 R P. 702 = 7 B R. 743 = 1941 A.W.R (Supp) 12 = 1941 O A (Supp.) 302 = 22 Pat.L T. 260 = 1941 P.W.N. 151 = A.I R. 1941 Pat. 132 (S.B.)**

——**Ss. 30, and 23**—*Scope and extent of the jurisdiction of High Court—Proceedings under* S. 7 (1)—*If can be questioned.*

The Press (Emergency Powers) Act 1931 deals with the exact scope of the powers of superintendence which the High Court is to have in respect of these matters and consequently the High Court cannot travel beyond the powers so conferred and so delimited. Under S. 30 of the Act the jurisdiction of the High Court is expressly barred to question a proceeding under S 7 (1) of the Act (*Bose, J.*) DESHPANDE *v.* EMPEROR.

191 I.C. 296 = 42 Cr.L J. 108 = 13 R.N. 193 = 1941 N.L J. 44 = A I R. 1941 Nag. 97.

PRINCIPAL AND AGENT. *See also* CONTRACT ACT, SS. 182 TO 213.

——Bank manager authorised to certify cheques—Certification contrary to instructions—Effect on rights of innocent third parties in respect of cheque *See* BANKER AND CUSTOMER. **A.I.R. 1941 Cal. 372.**

——*Contract of personal liability to perform by agent—Contract on behalf of Government—Liability of agent in the first instance if affected.*

There is nothing to prevent an agent from entering into contract on the basis that he is himself to be liable to perform it as well as his principal. Where certain statutory Commissioners express themselves in a contract to be acting "on their own behalf as well as on behalf of and with the approval of the Government of the province of Ontorio", the words 'on its own behalf' are *prima facie* directed to separate liability when read in conjunction with the words that follow, *viz*: "as well as on behalf of "the Crown, such a provision would make them liable in the first instance, though they are said to be acting on behalf of the Crown. (*Lord Luxmore.*) INTERNATIONAL RAILWAY CO *v.* NIAGARA PARKS COMMISSION. **197 I.C. 186 = 1941 O A 901 = 1941 A.W.R. (P.C.) 76 = A.I.R. 1941 P.C. 114.**

PROBATE,

——Conversion—Agent purchasing goods for principal with own money and on his own responsibility—Title to goods—If passes to principal—Agent pledging goods—Liability to principal for damages for conversion—Position of agent *vis a vis* principal—If that of unpaid seller. *See* 1940 Dig., Col. 1049. VENKATASUBBAYYA *v.* SATYANARAYANAMURTHI. **193 I.C. 356 = 13 R.M. 657 = (1940) 1 M.L.J. 465.**

——*Liability of agent—Agent let into possession to realise rents from tenants—If can challenge title of principal to receive moneys realised by him.*

A person who is let into possession as an agent, on behalf of the principal to realise rents from tenants, cannot challenge the title of the principal to receive the moneys realised by him. (*Fazl Ali and Manohar Lall, JJ.*) DEB PRASANNA MUKHERJI *v.* LAKHI NARAYAN MANDAL **196 I C. 641 = 14 R.P. 222 = 8 B R. 67 = 1941 P.W.N. 565.**

——*Mortgage in favour of firm's agent—Use of firm's seal—Interence.*

Where the money advanced was the firm's money, but the mortgage was in favour of the firm's agent the mere fact that he used the firm's initials would not show that the transaction was entered into by the firm. (*Mya Bu and Mosely, JJ.*) MAHOMED OSMAN *v.* JAMBULINGAM CHETTIAR. **195 I.C 221 = 14 R.R. 30 = A.I.R. 1941 Rang. 122.**

——*Relationship of—Contract for remuneration—Construction—Principles.*

Where a firm in one place introduces a customer to another firm in another place and both embody in an agreement their terms of remuneration to the former firm, the relation-hip of that firm is that of an agent of the latter firm. In such a case the agent cannot recover his remuneration unless he shows that the written conditions of the written agreement have been fulfilled. The contract being in writing it must be strictly construed in accordance with its terms. Where it is succinct, the subsequent behaviour of the parties cannot be taken into consideration. (*Davies.*) SANGHI *v.* RAJA CYCLE AND MOTOR GARAGE, AJMER.

1940 A.M.L J. 74.

——*Suit against—Prayer for relief in the alternative—Decree against one only—Appeal by him—Proper parties—The other, it can be made a party after limitation.*

Where a person has contracted with another upon the footing that the latter if an agent and is in doubt whether to proceed against the principal or against the self styled agent and makes each of them defendants in the alternative and obtains judgment against one and the other is dismissed from the suit, the unsuccessful defendant cannot, by omitting to join the successful defendant as a respondent in the appeal and then showing that the latter was really liable, deprive the plaintiff of his right to establish his claim. When the right of appeal against the dismissal of one of the defendants from the suit is time barred, the latter is entitled to hold the decree in his favour and it is 'a substantive right of a very valuable kind of which he should not lightly be deprived of; and so he cannot be joined as a respondent to the appeal thereafter. (*Roberts, C.J. and Blagden, J.*) SEIN DASS *v.* LAKHAJEE.

1940 Rang.L.R. 693 = 194 I.C. 306 = 13 R R. 301 = A.I.R. 1941 Rang. 63.

PRINCIPAL AND SURETY. *See* SURETY.

PRIVY COUNCIL. *See* PRACTICE, PRIVY COUNCIL.

PROBATE.

See (1) WILIS.
(2) SUCCESSION ACT.

PROMISSORY NOTE.

See (1) NEGOTIABLE INSTRUMENTS.
(2) NEGOTIABLE INSTRUMENTS ACT.

PROVIDENT FUND—Amounts contributed—Liability to attachment. *See* C. P. CODE, S. 60 AND O. 21, R. 46. **A.I R. 1941 Rang. 256.**

———Amounts contributed—Nature of interest of subscriber in—Liability to attachment. *See* T. P. ACT, (1882), S. 19. **A.I.R. 1941 Rang. 239.**

PROVIDENT FUNDS ACT (XIX OF 1925), S. 2 (d)—*"Government Provident Fund"- Rules of private body approved by Government—Sufficiency.*

S. 2 (*d*) requires that the 'fund' should be constituted by the authority of the Government. The mere fact that the Provident Fund Rules framed by a private body have been approved by the Government, is not sufficient to show that the fund to which the rules relate was constituted by the Government in the absence of proof that the Government made any rules requiring the private body to maintain the Provident Fund. (*Bhide, J.*) AHMAD HUSSAIN *v.* BELI RAM.
A.I R. 1941 Lah. 168

PROVIDENT FUND RULES, R. 17, Note 1—"Judicially separated"—Meaning of—Hindu wife receiving separate maintenance from husband under decree—If can be excluded from participation in fund. *See* 1940 Dig., Col 1051. SUBHADRAMMAL *v.* KANNAMMAL.
193 I.C. 329 = 13 R M 650 = (1940) 1 M.L.J. 715.

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 4, 25 (2) and 75 (1), Proviso (2)—*Decision as to right to present petition—Second appeal.*

The words 'of any nature whatsoever' used in S. 4 of the Provincial Insolvency Act do not include or embrace within its purview the determination of the question whether the debtor has a right to present the petition for insolvency. Such a decision is contemplated only under S. 25 (2). Hence where a District Judge in appeal sets aside the decision of the civil Judge and holds that the applicant was not entitled to present a petition for adjudication and dismisses his application, the order is one under S. 25 (2) of the Act and no second appeal lies to the High Court under S. 75 (1), proviso (2). (*Gulam Hasan, J.*) DULLU *v.* MISRI LAL.
196 I,C. 881 = 1941 O.L R. 793 = 1941 O.A. 913 = 1941 A W.R. (C C.) 347 = 1941 A.L.W. 1033 = 1941 O.W.N. 1218.

———**Ss. 4, 9 and 25**—*Powers of Court—Petition by creditor—Dismissal on ground that questions are complicated and difficult and must be decided in regular suit—Legality.*

The Insolvency Court has no power or discretion to dismiss an application by a creditor against a debtor on the ground that the questions raised in it are too difficult or complicated for the Insolvency Court to decide, the Insolvency Court cannot refuse to decide the questions or relegate the parties to a regular suit. (*Burn and Happell, JJ.*) GANGI REDDI *v.* NARASIMHA REDDI. **1941 M.W.N. 797 = 54 L.W. 278 = A.I.R. 1941 Mad. 895 = (1941) 2 M.L.J. 362.**

———**S. 4**—*Remedy under—Right of creditor—Transaction alleged to be fictitious.*

S. 4 of the Provincial Insolvency Act gives jurisdiction to the Insolvency Court to deal with matters which were not previously within its jurisdiction, but a creditor who under the old law could not have filed a suit to establish a right could not be given by its terms any right to move the Insolvency Court. The right of suit to establish a claim to property as part of the insolvent's estate lies in the receiver in exercise of his powers under item (*d*) of S. 59 of the Act and this is true whether the right is exercised in the Insolvency Court itself by virtue

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of the jurisdiction conferred on it by S. 4, or by way of separate suit in the appropriate Court. Where, therefore, the Court is called upon to exercise jurisdiction under S. 4 for declaring a transaction as fictitious, it should be for the receiver to move the Court in this behalf, and a creditor should not be allowed to do so in his own name even with the permission of the Court. (*Biswas and Roxburgh, JJ.*) MT. GARIBIA BIBI *v.* OFFICIAL RECEIVER. **73 C.L.J. 225 = A.I.R. 1941 Cal 298.**

———**S. 4**—Scope—Adverse decision against Official Receiver in Civil Court—Proper remedy—Application to Insolvency Court—Civil Court's decision—It can be challenged or questioned. *See* 1940 Dig., Col. 1052. ARUNACHALAM CHETTIAR *v* OFFICIAL RECEIVER, COIMBATORE. **193 I.C. 138 = 13 R.M. 624.**

———**Ss. 4 and 53**—*Powers of Court under S. 4—Questioning transfer not falling under S. 53.*

It is open to an Insolvency Court to try a question under S. 4 of the Provincial Insolvency Act relating to the fictitious character of the transfer even though it does not fall under S. 53 of the Act. (*Bennet and Ghulam Hasan, JJ.*) AVADH RAJ SINGH *v.* MANGREY. **194 I C. 600 = 1941 A.W R (C.C.) 186 = 14 R.O 16 = 1941 A.L.W. 590 = 1941 O.L.R. 508 = 1941 O.A. 481 = 1941 O.W.N. 752 = A I R. 1941 Oudh 403.**

———**Ss. 4 and 53** *Remedy under—Transfer by insolvent and transfer by transferee*

The remedy in respect of a transfer by an insolvent may be asked for in the alternative, either under S. 53 or under S. 4 of the Provincial Insolvency Act if the transaction is proved to be fictitious; but the remedy in respect of a second transfer by the transferee can only be obtained from the Insolvency Court in exercise of its jurisdiction under S. 4. (*Biswas and Roxburgh, JJ.*) MT. GARIBIA BIBI *v.* OFFICIAL RECEIVER
73 C.L J. 225 = A.I R. 1941 Cal. 298.

———**Ss. 4 (2) and 53**—Decision in proceeding under S. 53—*Res judicata. See* 1940 Dig., Col. 1052. ASIA KHATUN *v.* AMARENDRA NATH BASU.
191 I.C 783 = 13 R.C. 283.

———**S. 6 (b)**—Act of insolvency—Transfer of interest in immovable property. *See* 1940 Dig., Col. 1053. CHANAN MAL *v.* GOBIND SARUP. **191 I C. 414 = 13 R.L. 290.**

———**S. 6 (e)**—Act of insolvency—Sale of property for arrears of rent under Madras Estates Land—Effect of. *See* 1940 Dig., Col. 1053. VENKATESA MUDALI *v.* DESAPPA MUDALI. **193 I.C. 787 = 13 R.M. 713 = A.I.R. 1941 Mad. 99 (1) = (1940, 2 M.L.J. 555**

———**S. 9**—Petition for adjudication of joint Hindu family firm—Names of proprietors given in heading and body of petition—Amendment of petition—If should be allowed. *See* 1940 Dig., Col. 1054. POHLO MAL *v.* BASANT RAM MEHR CHAND.
I L R. (1941) Lah. 55 = 192 I C. 532 = 13 R L. 388 = 43 P.L.R. 363.

———**Ss. 9 and 79**—Rules under S. 79 framed by Lahore High Court, R. 3—Joint Hindu trading firm—If can be adjudicated as such. *See* 1940 Dig., Col. 1054. POHLO MAL *v.* BASANT RAM MEHR CHAND.
I.L.R. (1941) Lah. 55. 192 I,C. 532 = 13 R.L. 388 = 43 P.L.R. 363.

———**S. 9 (1) (b)**—*Deferred dower—If a debt under the section—Nature of wife's interest.*

A Mahomedan husband's liability to pay his wife's deferred dower is a 'debt' within the meaning of S. 9 (1) (*b*) of the Provincial Insolvency Act in respect of which a petition for adjudication as insolvent could be filed. The interest of the wife is a vested and not a contingen

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one. It is not liable to be displaced by the happening of any event, not even her own death, because her heirs can claim the money, if she dies. (*Bose, J.*) BIBI JANBI *v.* ABBAS ALI. **195 I C. 706 = 14 R.N. 67 = 1941 N L.J. 181 = A.I.R 1941 Nag. 167**

——**S. 16**—Order of substitution—When may be made. *See* 1940 Dig., Col. 1055. LORIND SINGH *v.* GULAB SINGH. **191 I C. 654 = 13 R.L. 324.**

——**S. 16**—*Scope and object of Creditor substituted in place of original petitioning creditor—Right to take advantage of date of original petition—Original petitioner not qualified to file petition—Effect.*

The object of S. 16 of the Provincial Insolvency Act is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute his petition; a second creditor who is substituted under S. 16 on the ground that the original petitioning creditor was not prosecuting with due diligence, gets the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into the case. The mere accident of the fact that the creditor who originally filed the petition should turn out not to have been qualified to do so will not prevent the subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date. The creditor substituted under S. 16 cannot be compelled to prove the qualification of the original creditor to file the petition. (*Happell, J.*) VENKATARATNAM CHETTI *v.* VENKATAYYA. **54 L.W. 548 = 1941 M.W N 994 = (1941) 2 M.L.J. 778.**

——**Ss. 17 and 38**—*Adjudication after death of debtor—Legal representative if can enter into composition.*

Where a debtor dies and an adjudication order is passed subsequently, his legal representatives can enter into a composition with the creditors. Composition with creditors is one of the proceedings for the realisation and distribution of the property of the debtor and so would come under S. 17 of the Provincial Insolvency Act. (*Clarke, J.*) KISANLAL *v.* GULAM DASTGIR. **196 I.C. 67 = 14 R.N. 81 = 1941 N.L.J 218 = A I R. 1941 Nag. 238.**

——**S. 25 (2)**—Applicability—Decision as to right to present petition. *See* PROVINCIAL INSOLVENCY ACT, SS. 4, 25 (2) AND 75 (1), PROVISO (2).
1941 O.W.N. 1218 = 1941 O.A. 913.

——**S. 27**—*Time for applying for discharge—Starting point—Order fixing time challenged in appeal and revision.*

Where an order of the Insolvency Court fixing a year for the insolvent to apply for discharge, is challenged by way of appeal and revision, the original order of the Insolvency Court is not the final order in matter and time for applying for discharge should be calculated from the date of the order in revision. (*Bennett and Ghulam Hasan, JJ.*) HASAN ABBAS ALI KHAN *v.* ABDUL RAHMAN. **193 I.C. 776 = 13 R.O. 506 = 1941 O.W.N. 587 = 1941 A.W.R. (C.C.) 155 = 1941 A.L.W. 439 = 1941 O.A 363 = 1941 O.L R. 341 = A.I.R 1941 Oudh 308.**

——**S. 27**—*Time fixed under—Power of Court to extend—Limits.*

A Court has jurisdiction to extend the time originally fixed under S. 27 of the Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of the time but before an order of annulment is passed under S. 43 of the Provincial Insolvency Act. (*Bennett and Ghulam Hasan, JJ.*) HASAN ABBAS ALI KHAN *v.* ABDUL RAHMAN. **193 I C. 776 = 13 R.O 506 = 1941 O.W.N. 587 = 1941 A.W.R. (C.C.) 155 = 1941 A.L.W. 439 =**

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1941 O.A. 363 = 1941 O.L.R. 341 = A.I.R. 1941 Oudh 308.

——**Ss. 27 (2) and 43**—*Scope and construction of—Insolvent applying for discharge—Default—Court if bound to annul adjudication—If can enlarge time fixed for discharge at the instance of creditor or* suo motu.

S. 43 of the Provincial Insolvency Act must be read as subject to S. 27 (2) of the Act. Where an insolvent after applying for his discharge within the time fixed does not appear on the day fixed for hearing, the Court is not bound to annul the adjudication when a creditor applies for extension of the time fixed for applying for discharge. S. 27 (2) imposes no conditions on the powers of the Insolvency Court to enlarge the time save the existence or proof of a sufficient cause and *a fortiori* it is open to the Court to extend the time instead of annulling the adjudication, and the Court can exercise its powers either of its own accord or at the instance of a debtor or a creditor. (*Thomas, C J. and Ghulam Hasan, J.*) MUNIR-UD-DAULAH DILAWAR HUSAIN *v.* ABDUR RAHMAN. **1941 O.W.N. 1190 = 1941 O.A. 897 = 1941 A.W R. (C C.) 335.**

——**S. 28**—*Joint Hindu Mitakshara family—Insolvency of father—Position and rights of receiver.*

The effect of the insolvency of a member of a joint Hindu Mitakshara family is to vest his interest in the joint family property in the receiver who, so to say steps into the shoes of the former. If the insolvent happens to be the father of the other coparceners of the joint family consisting of himself and his descendants, the receiver in insolvency would have all the powers which the insolvent had. The receiver would thus be able to bind by his sale the share of the other coparceners, if the insolvent himself could have sold for those debts of his the joint property including the share of his descendants, that is to say, the receiver will have the powers to bind the non-insolvent coparceners by his sale of the entire joint property, provided the family at the time of his sale was still undivided, and provided the sale is for the liquidation of the personal debts of the father (insolvent) which were not of immoral nature. The position, therefore, is that he steps into the shoes of the father who has become insolvent. In accordance with this principle he will not be entitled to take possession of the entire joint undivided properties, but would only be entitled to joint possession with the other non-insolvent coparceners of the family. (*Mitter and Khundkar, JJ.*) GANGADHAR DAS *v.* NIHAR KUMAR. **45 C.W.N. 329.**

——**S 28**—Proceedings against insolvent—Adjudication of mortgagor during pendency of mortgage suit—Decree and sale after appointment of receiver—Receiver not impleaded—Receiver, if bound by sale. *See* 1939 Dig., Col. 994. INDIAN COTTON CO., LTD. *v.* RAM CHARANLAL. **I.L.R. (1941) Nag. 559.**

——**Ss. 28 and 29**—Scope and applicability. *See* 1940 Dig., Col. 1056. CHIDAMBARAM CHETTYAR *v.* U. MAUNG MAUNG. **191 I.C. 690 = 13 R.R. 147.**

——**S. 28 (2)**—Applicability—Debts provable in insolvency—Hindu insolvent—Claim by mother and unmarried sisters for arrears of maintenance, marriage expenses residence and clothing—Suit without leave of Court—Maintainability—S. 34 (2). *See* 1940 Dig., Col. 1056. RANGANAYAKI AMMAL *v.* RAJAGOPALASWAMI NAIDU. **191 I.C. 670 = 13 R.M. 519 = (1940) 2 M.L.J. 239.**

——**S. 28 (2)**—*Applicability—Transfer by debtor before adjudication—Suit by creditor to set aside under S. 53, T. P. Act, after insolvency—Leave of Insolvency Court—Necessity.*

A suit by a creditor under S. 53 of the Transfer of Property Act to set aside an alienation made by the

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debtor before he is adjudged an insolvent is maintainable without the leave of the Insolvency Court under S. 17 of the Presidency Towns Insolvency Act or S. 28 of the Provincial Insolvency Act as the case may be. The property transferred by the debtor before insolvency does not form part of his estate which will at once rest in the Official Assignee or Official Receiver. It will vest only when the Official Assignee or Official Receiver or a creditor obtains a declaration that the transaction offends against S. 53, T. P. Act. If the creditor desires to make the Official Assignee or Official Receiver a party to the suit, the leave of the Insolvency Court is necessary. (*Leach, C.J., Krishnaswami Aiyangar and Chandrasekhara Ayyar, JJ.*) CHIDAMBARAM CHETTIAR *v.* SELLA KUMARA GOUNDAN.

54 L.W. 495 = 1941 M.W.N. 942 = A.I.R. 1941 Mad. 903 = (1941) 2 M.L.J. 684 (F.B.).

——**S. 28 (2)**—Hindu Law—Partition suit by minor son—Insolvency of father—Sale of minor's share of family property by Official Receiver—Validity—Filing of suit—If effects severance of status. *See* HINDU LAW—PARTITION. **1941 M.W.N. 778.**

——**S. 28 (2)**—*Scope and effect—Bar on rights of creditor.*

The provisions of sub S. (2) of S. 28 of the Provincial Insolvency Act do not create any right of suit which does not otherwise exist; they operate as a bar on the rights of creditors in respect of remedies, suits and proceedings otherwise existing. That bar is in itself subject to an exception, namely, that permission of the Court may remove it. But permission of the Court operating as an exception to the bar created by the sub-section certainly cannot give the creditor any right which he has not apart from this sub-section. (*Biswas and Roxburgh, JJ.*) MT. GARIBIA BIBI *v.* OFFICIAL RECEIVER. **73 C.L.J. 225 = A.I.R. 1941 Cal 298.**

——**Ss. 28 (2) and (7) and 51 (1)**—*Scope and effect of—Execution levied and assets realised before admission of insolvency petition — Official Receiver's right to claim assets.*

S. 28 (2) of the Provincial Insolvency Act excepts from its operation the other provisions of the Act including S. 51, and it is therefore clear that the Official Receiver's title to the property of the insolvent does not extend to the assets realized in the course of execution levied against the property of the insolvent before the date of the admission of the insolvency petition. (*Patanjali Sastri, J.*) GURUVAYYA *v.* OFFICIAL RECEIVER, GUNTUR. **1941 M.W.N. 268 (1) = 53 L.W. 357 = A.I.R. 1941 Mad. 575 = (1941) 1 M.L.J. 405.**

——**S. 28 (4)**—Construction and scope—Devolution of estate on undischarged insolvent—Subsequent discharge—Suit afterwards to recover property belonging to estate from strangers—Maintainability. *See* 1940 Dig., Col. 1057. SURAYYA *v.* MANGAYYA. **A I.R. 1941 Mad. 345**

——**S. 28 (4)**—*Scope and effect—Decree for costs in favour of insolvent after adjudication—If vests in Official Receiver—Right of insolvent to assign.*

A decree for costs obtained by an insolvent after the order of adjudication vests in the Official Receiver under S. 28 (4) of the Provincial Insolvency Act, and the insolvent is not competent to transfer or assign it. (*Venkataramana Rao and Horwill, JJ.*) SATYANARAYANAMURTHI *v.* PAPAYYA. **I.L.R. (1941) Mad. 824 = 54 L.W. 758 = 1941 M.W.N. 539 = A I.R. 1941 Mad. 713 = (1941) 2 M.L.J. 834.**

——**S. 33**—*Failure to produce evidence of claim—Notice threatening striking off of creditor's name—Legality.*

PROV. INSOLV. ACT (1920), S. 37.

Where a notice issued to a creditor to produce details of what is owing to him together with the evidence thereof, threatens him that if they are not supplied his name will be struck off the schedule, the latter part is *ultra vires* since it is not in accordance with the provisions of S. 33 of the Provincial Insolvency Act. The debt can be proved at any time before discharge and an official receiver is legally incapable of directing the striking off of a creditor from the schedule for failure to produce the necessary evidence. (*Davies.*) BIRDHI CHAND *v.* DHANNA LAL. **1940 A.M.L.J. 84.**

——**S. 33**—Proof of debt—Mode of. *See* 1940 Dig., Col. 1057. ALLAHABAD BANK, LTD., LAHORE *v.* SPECIAL OFFICIAL RECEIVER, PUNJAB. **192 I. C. 414 = 13 R.L. 373 = A.I.R. 1941 Lah. 6.**

——**Ss. 34 (2) and 28 (2)**—*Obligation of insolvent to pay maintenance to brother's widow under Hindu Law—If debt provable in insolvency—Suit for arrears of such maintenance against Receiver—Maintainability.*

The obligation on the part of an insolvent under the Hindu Law to pay maintenance allowance to his brother's widow is a debt provable in insolvency as laid down in S. 34 (2) of the Provincial Insolvency Act. His liability is not a personal liability, but a liability which has got to be met from the property which he inherited from his father and this property is now vested in the receiver for the benefit of the creditors. If the brother's widow has a charge declared upon the property in respect of her maintenance allowance by a competent Court, the receiver may be compelled to pay the money out of the estate in his hands. But in the absence of a charge, she can only rank as an ordinary creditor and can prove the liability in insolvency proceedings. A suit by her for arrears of maintenance allowance is not, therefore, maintainable against the receiver. (*Mukerjea and Roxburgh, JJ.*) NIRODA SUNDARI DEBYA *v.* KSHITISH CHANDRA. **45 C.W.N. 808.**

——**Ss. 35 and 37**—Order of annulment—Caution to be observed. *See* 1939 Dig., Col. 996. RAMDAYAL *v.* KANHAIYALAL. **I.L.R. (1941) Nag. 500.**

——**S. 37**—Annulment of adjudication—Interpretation of order—Absence of an appointee and vesting—Debtor, if could claim property back from receiver. *See* 1939 Dig., Col. 997. MEGHAJI *v.* V. D. BHAKE. **I.L.R. (1941) Nag. 410.**

——**S. 37**—*Power of appointee.*

The persons in whom property vests under S. 37 of the Provincial Insolvency Act have full power to deal with the property vested in them and can proceed to distribute the estate. (*Tek Chand and Beckett, JJ.*) NIZAM KHAN *v.* HUKAM CHAND. **43 P.L.R. 369 = A.I.R. 1941 Lah. 316.**

——**S. 37**—*Scope—Decree against debtor before adjudication—Annulment of adjudication for failure to apply for discharge—Execution of decree and realization by creditor—Subsequent order of vesting under S. 37—Effect of on fruits of execution.*

A creditor of an insolvent obtained a money decree before the order of adjudication was passed. The adjudication was subsequently annulled by the Insolvency Court under S. 43 of the Provincial Insolvency Act for failure of the insolvent to apply for discharge within the time prescribed, but no order under S. 37 of the Act was passed then. After the annulment the creditor executed his decree and realized the money due to him. The Insolvency Court subsequently made an order under S. 37 revesting the properties of the insolvent in the Official Receiver.

Held, that the amount realized by the decree-holder in execution after the date of the annulment and before the revesting order could not be affected by such order

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and should be excluded from its scope. (*Patanjali Sastri, J.*) VEERAYYA *v.* KOTIREDDI.

1941 M.W.N. 350=53 L.W. 466=
A.I.R. 1941 Mad. 588=(1941) 1 M.L.J. 537

——S. 37—*Scope—Vesting order under—Effect of.*

Where the property of an insolvent is vested in the Official Receiver or any other appointee under S. 37 of the Provincial Insolvency Act, it is the Insolvency Court which retains control of it and the Insolvency Court must direct its disposal in the interests of the general body of creditors. The property comes completely under the Insolvency Court and can only be disposed of under its direction. The property can only be distributed equally among all the creditors and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of other creditors. Where the property is, by the order under S. 37, vested in the Official Receiver or other appointee in the interests of the general body of creditors, there is a statutory trust created by virtue of the order in favour of the creditors. (*Venkataramana Rao, J.*) CHANDRAYYA *v.* CHINNAPPA REDDI.

1941 M.W.N. 489=A.I.R. 1941 Mad. 753.

——S. 37—*Vesting order under—Subsequent decree against insolvent and Official Receiver obtained by one creditor—Effect—Payment of money to creditor by Receiver under order of executing Court—Power of Insolvency Court to order refund.*

The question whether one creditor is entitled to appropriate the money which is intended for the distribution among all creditors of the insolvent, in priority to other creditors, can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in insolvency; the Official Receiver by himself cannot be said to represent the creditors in regard to the decision on the question of priority. An order of an executing Court that a decree obtained by an individual creditor against the Official Receiver and the insolvent after a vesting order under S. 37 of the Provincial Insolvency Act is executable does not in any way affect the power of the Insolvency Court over the fund at its disposal. The fact that the Official Receiver is compelled by order of an executing Court to pay moneys in his hands cannot affect the power of the Insolvency Court to make orders regarding the money in the hands of the Receiver; and it s competent to the Insolvency Court to direct a refund of any sum of money taken away by a creditor, who is amenable to its jurisdiction, in excess of what he is justly entitled to. (*Venkataramana Rao, J.*) CHANDRAYYA *v.* CHINNAPPA REDDI. 1941 M.W.N. 489=
A.I.R. 1941 Mad. 753.

——Ss. 37 and 43—*Vesting order after annulment—Jurisdiction of Insolvency Court.*

The Insolvency Court continues to have jurisdiction even after passing an order annulling adjudication to pass a vesting order under S. 37 of the Provincial Insolvency Act, and the Official Receiver is the proper person to take control of the remaining estate. (*Tek Chand and Beckett, JJ.*) NIZAM KHAN *v.* HUKAM CHAND.

43 P.L.R. 369=A.I.R. 1941 Lah. 316.

——S. 38—Composition by legal representatives—Validity—Adjudication after debtor's death. *See* PROVINCIAL INSOLVENCY ACT, SS. 17 AND 38.

1941 N.L.J. 218.

——S. 38 (2) and (7)—*Proposal for composition—Non-acceptance by creditors—Approval by Court under S.* 38 (7)—*Justifying circumstances.*

Where a proposal for composition has not been duly accepted by the creditors under S. 38 (2), Provincial Insolvency Act, it is open to the Court to approve the proposal under S. 38 (7). The Provincial Insolvency Act seems to contemplate a possibility that public morality and the interests of the general body of creditors may both require that such a proposal be accepted. The Legislature has armed the Court with power to accept the proposal even though the creditors have not accepted it. An Insolvency Court could only reasonably approve a proposal that had been refused by the creditors in very extraordinary circumstances involving very unusual behaviour on the part of the creditors refusing. Some sort of exceptional circumstances would be necessary before a Court could properly approve a proposal that the creditors had refused. (*Stone, C.J. and Bose, J.*) KESHEORAO BUTY *v.* NARAYAN GANPAT.

I.L.R. (1941) Nag. 764=1941 N.L.J. 523=
A.I.R. 1941 Nag. 355.

——S. 41—*Scope—Duty of Court—Order refusing absolute discharge—Omission to pass further orders or conditions—Propriety.*

If a Court, on application by the insolvent for discharge, refuses an absolute discharge under S. 41 (2) (*a*) of the Provincial Insolvency Act, it should then consider the possible application of Cl. (*b*) or (*c*) or both and pass an order accordingly. It is not proper for the Court to merely refuse to grant an absolute discharge without specifying any further conditions and without settling the future position of the insolvent. (*Chatterjee and Meredith, JJ.*) JIWACHI MAHTA *v.* BANWARI SAH. 193 I.C. 546=13 R.P. 604=
7 B.R. 559=A.I.R. 1941 Pat. 285.

——S. 42—*Scope—Delay in applying for discharge. —If ground for refusing absolute discharge.*

Delay on the part of the insolvent to apply for discharge is not a ground for refusing him absolute discharge, although it is a ground for annulling the order of adjudication. (*Chatterjee and Meredith, JJ.*) JIWACHI MEHTA *v.* BANWARI SAH. 193 I.C. 546=
13 R.P. 604=7 B.R. 559=A.I.R. 1941 Pat. 285.

——S. 43—*Application for discharge made after time—Separate application showing cause for delay—Court directing admittance of discharge petition and ordering notice—If condonement of delay—Power of Court to excuse delay.*

Where an insolvent fails to apply for his discharge within the time fixed, it is open to the Court in a proper case to allow time, when even no application for time has been filed until after expiry of the time fixed, provided that the adjudication has not been annulled under S. 43 of the Provincial Insolvency Act. But when an application for discharge is filed after the time fixed and a separate application is also filed showing cause for delay in applying for discharge, and the Court orders notice to creditors directing the discharge petition to be admitted, it does not mean that the delay has been condoned. (*Chatterjee and Meredith, JJ.*) JIWACHI MAHTA *v* BANWARI SAH. 193 I.C. 546=
13 R.P. 604=7 B.R. 559=A.I.R. 1941 Pat. 285.

——S. 43—*Effect of annulment—Pending proceedings under Ss.* 53 *and* 54—*It abate.*

The annulment of an adjudication under S. 43 of the Provincial Insolvency Act does not operate so as to cause the abatement of proceedings already instituted under Ss. 53 and 54 of the Act. (*Tek Chand and Beckett, JJ.*) NIZAM KHAN *v.* HUKAM CHAND. 43 P.L.R. 369=
A.I.R. 1941 Lah. 316.

——S. 43—*Failure of insolvent to appear on date fixed—Courses open to Court.*

The Insolvency Court is not bound to pass an order annulling the adjudication under S. 43 of the Provincial Insolvency Act when the insolvent fails to appear on the date fixed for hearing his application for discharge or at any of the times mentioned in that section. That section can be interpreted as allowing an Insolvency

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Court to postpone annulment after default either by extending the time in which the debtor is to apply for his discharge or by merely postponing the actual pronouncement after the default has occurred. On this view, there will be two courses open to the Court when an insolvent fails to appear on the date fixed. If there is still any considerable estate to be administered, and more particularly if there are any outstanding claims with regard to property transferred before adjudication, then it would be much simpler and also work for more efficient control if the Court postpones the order of adjudication instead of assuming control under S. 37. On the other hand, if there are no such outstanding disputes, the Court may find it more convenient to annul the adjudication at once even though there is still some estate to be administered and in that case it would still have jurisdiction to exercise some control over the subsequent administration of the estate and any connected proceedings. (*Tek Chand and Beckett, JJ.*) NIZAM KHAN *v.* HUKAM CHAND. **43 P.L.R 369 = A.I.R. 1941 Lah. 316**

——— **Ss. 43 and 78**—Scope and effect—Adjudication—Suit by legal representative of insolvent pending insolvency—Subsequent annulment of adjudication—Effect—If validates suit. *See* 1940 Dig., Col. 1060. MUTHUSAMI CHETTIAR *v.* PERIYAL ACHI. **A.I.R. 1941 Mad. 84 = (1940) 2 M.L.J. 606**

——— **S. 43**—Scope—It subject to S. 27 (2). *See* PROVINCIAL INSOLVENCY ACT, SS. 27 (2) AND 43. **1941 O.W.N. 1190.**

———**S. 44**—*Order of discharge—Effect of—Decree of Liquidator of Co operative Society against insolvent—If can be executed.*

An order of discharge under S. 44 of the Provincial Insolvency Act releases an insolvent from his liability under a decree passed by a liquidator of a Co operative Society against him either as a debtor to the Society or as a member liable to contribute to its assets, and the decree cannot, therefore, be executed against him thereafter. (*Din Mahomed, J.*) MOLAR *v.* CO-OPERATIVE CREDIT SOCIETY OF SAMALKA. **43 P.L.R. 422 = A.I.R. 1941 Lah. 314**

———**S. 44**—*Scope and effect—Decree against debtor—Subsequent adjudication of debtor—Attachment of house in execution—Claim by wife—Dismissal—Suit to set aside—Dismissal—Subsequent order of discharge—Effect on decree—Debt—House if can be seized and sold.*

The first appellant was adjudicated an insolvent on 26—3—1927 on a petition presented on 2—10—1926. He had no assets and so his creditors took no interest in the proceedings after the adjudication. The result was that his application for discharge was unopposed and it was granted on 8—2—1928. *H* had obtained a decree against the first appellant and on 21—2—1923, *H* attached a house as property belonging to the first appellant. In fact the house was the property of his wife, having been transferred to her by the first appellant on 12—2—1923, and the transfer had been upheld as lawful. The wife's application for removal of the attachment was dismissed, as also her suit which followed. The representatives of *H* sought to have the house sold in execution of the decree in favour of *H* and it was contended in defence that the order of discharge granted to the appellant had the effect of making the decree debt unenforceable under S. 44 of the Provincial Insolvency Act.

Held, that the 1st appellant was released, by reason of the statute, from all liability to pay the decree debt; as the wife of the insolvent was under no personal obligation to pay the debt and did not come under any of the categories mentioned in S. 44 (3) of the Act, a creditor of the insolvent was not entitled to bring the house to sale after the discharge. (*Leach, C.J. and Horwill, J.*) HAJI ABDUL KUTHUS SAHIB *v.* INAYATHULLAH SAHIB. **1941 M.W.N. 388 = 53 L.W. 494 = A.I.R. 1941 Mad. 620 = (1941) 1 M.L.J. 565**

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———**S. 44 (1) (c)**—Applicability—Insolvent playing fraud on creditor and preventing him from appearing in insolvency proceedings—Deliberate concealment of debt—Absolute discharge in spite of S. 42 (1) (*a*)—If bar to suit by creditor. *See* 1940 Dig., Col. 1061. SUNDARAMMAL *v.* THIRUVENGADATHU AIYANGAR. **A.I.R. 1941 Mad. 100 (1) = (1940) 2 M.L.J. 379.**

———**S. 44 (2)**—*Applicability—Personal liability of mortgagor—If debt provable in insolvency—Application for personal decree under O. 34, R. 6, C. P. Code, after order of absolute discharge in insolvency of mortgagor—If lies.*

A mortgagor's personal liability under the mortgage deed is a debt provable in insolvency within the meaning of S. 44 (2) of the Provincial Insolvency Act, and such liability would be discharged by an order of absolute discharge. A mortgagee is not therefore entitled to apply under O. 34, R. 6, C. P. Code, for a personal decree against the mortgagor after an order of absolute discharge has been made in the mortgagor's insolvency. (*Venkataramana Rao, J.*) ATHIAPPA CHETTIAR *v.* IBRAMSA ROWTHER. **54 L.W. 523 = 1941 M.W.N. 937 = (1941) 2 M.L.J. 690.**

———**S. 47**—Mortgagee — Ignoring insolvency—Remedy. *See* 1940 Dig., Col. 1061. KHUPCHAND *v.* RAJESHWAR. **192 I.C. 572 = 13 R.N. 270.**

———**S. 51**—If subject to S. 28 (2)—Assets realized in execution before admission of insolvency petition—Right to. *See* PROVINCIAL INSOLVENCY ACT, SS 28 (2) AND (7) AND 51 (1). **(1941) 1 M.L.J. 405.**

———**S. 51 (1) and (3)**—Applicability—Sale in execution of award under Co-operative Societies Act—Decree-holder if entitled to preference over receiver—Protection of title of *bona fide* purchaser—Madras Co-operative Societies Act. *See* 1940 Dig., Col 1061. GOVADA BALABHARATHI CO-OPERATIVE CREDIT SOCIETY *v.* VENKATAKRISHNAYYA. **193 I.C. 555—13 R.M. 681 = (1940) 2 M.L.J. 388.**

———**S. 51 (1)**—"*Benefit of the execution*"—*Meaning of*—"*Date of admission of the petition*"—*What is*—*Amount directed to be refunded to Official Receiver—Right to interest on.*

In execution of a decree against *K*, three lots of properties were sold in auction on 30th June, 1933, at the instance of the appellant. Two lots were sold for Rs. 7,500 which amount was paid in full then and there. This third lot was sold for Rs 4,520. and 25 per cent. of this was deposited on 30th June. 1933 and the remaining three quarters on 4th July, 1933. The amount of Rs. 12.020, thus realised, was rateably distributed between the appellant and another creditor. On 3rd July, 1933, an insolvency petition was presented against *K*, and he was adjudicated. The Official Receiver applied to the Court for an order directing the appellant and the other creditor to pay to him the sums which had been distributed to them with interest under S. 51 (1) of the Provincial Insolvency Act. On the insolvency petition which was presented on 3rd July, 1933, the Court ordered "check and file emergently", and it was so checked and filed, and the Court on the same day ordered publication charges to be deposited by 7th July, 1933. On 7th July, 1933, notice and publication were ordered. It was contended that the insolvency petition was not admitted till 7th July, 1933, and therefore the Official Receiver could not claim the amounts from the creditors to whom it had been distributed.

PROV. INSOLV. ACT (1920), S. 51.

Held, (1) that the Court having, on 3rd July, 1933, accepted the insolvency petition as having been validly presented, the petition must be deemed to have been admitted on that date and not on 7th July, 1933, and therefore any assets realised after 3rd July, 1933, must go to the Official Receiver; (2) that the sale of three lots of property, though originating from a single proclamation of sale, was really equivalent to three sales, and the assets in respect of the first two lots must therefore be held to have been realised on 30th June, 1933, on which the full amount of Rs. 7,500 was deposited, and the Official Receiver could not therefore claim the same; (3) that the sale proceeds in respect of the third lot must be deemed to have been realised only on 4th July, 1933, when the full amount was paid in respect of that lot, and that being after the insolvency petition was admitted on 3rd July, 1933, the creditors including the appellant had no title to retain the same; (4) that "the benefit of execution" in S. 51 (1) meant the sum realised less the costs of execution, and the appellant and the other creditors could therefore deduct such costs of execution as were necessary to realise the Rs. 4,500 payable to the Official Receiver; (5) that the Official Receiver was entitled to interest on the amount as the matter was analogous to restitution. (*King. J.*) SAMBASIVA AYYAR *v.* OFFICIAL RECEIVER, WEST TANJORE.

1941 M.W.N. 852 = (1941) 2 M.L.J. 918.

——**S. 51 (3)**—Applicability—Execution sale of insolvent's property after adjudication—"In all cases", meaning of. *See* 1940 Dig., Col. 1062. MOTILAL *v.* NATHU. **192 I.C. 183 = 13 R.N. 225.**

——**S. 53**—Equitable mortgage obtained by creditor's agent—Latter in dominating position—Good faith—Onus. *See* 1940 Dig., Col. 1063. S.R.M.C.T.S.S P. A. CHETTYAR FIRM *v.* U ON MAUNG.

1941 Rang. L.R. 355 = 73 C.L.J. 179 = 43 Bom.L.R. 459 = 22 Pat.L.T 399 = 7 B R. 149 = 1941 A W.R (P.C.) 6 = 1941 O.A 124 = 45 C.W.N. 317 = 1941 P.W.N. 157 (P C).

——**S. 53**—*Fraudulent transfer—Transfer effected in order to put property beyond reach of son and for the benefit of mistress—If can be avoided.*

The fact that an insolvent and his fellow conspirators may not have had in mind that a transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the insolvent's son for the benefit of the insolvent's mistress does not make the transaction any the less a fraud on the creditors. In transferring the property the insolvent must be held to be really defeating his creditors. (*Leach, C.J. and Happell, J.*) SUBRAMANIAN CHETTIAR *v.* OFFICIAL RECEIVER, WEST TANJORE.

1941 M.W.N. 818 = 54 L.W. 173 = (1941) 2 M L.J. 212

——**S 53**—Insolvent owning property under contract to create wakf thereof—Invalid wakf created by him—If liable to be annulled—Rights of Receiver. *See* 1940 Dig., Col. 1064. MAHOMED ALI *v.* DINESH CHANDRA ROY. **193 I.C. 540 = 13 R.C. 413.**

——**S. 53**—*Transfer for valuable consideration—Absence of good faith—Effect—If voidable transfer.*

When there is want of good faith in respect of a transfer, the fact that valuable consideration has passed will not save the transaction. Such a transaction by an insolvent within two years of the presentation of the petition for adjudication is voidable as against the Official Receiver and may be annulled by the Court. (*Leach, C.J. and Happell, J.*) SUBRAMANIAN CHETTIAR *v.* OFFICIAL RECEIVER, WEST TANJORE.

1941 M.W.N. 818 = 54 L W. 173 = (1941) 2 M.L.J. 212.

PROV. INSOLV. ACT (1920), S. 54

——**S. 53**—Transfer not falling under—If can be questioned under S. 4 of the Act. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 53. **1941 O.W.N. 752.**

——**S. 53**—*Valuable consideration—Good faith and consideration, want of, if necessary for annulment of transfer.*

Where the value of the property is found to be about Rs. 10,000 and the sale sought to be impugned is for Rs. 5,000 the consideration for the transfer though valuable is not adequate. It is not necessary for the annulment of the transfer that it should be shown to be without good faith and without consideration. The transfer can be upheld only if both conditions are complied with. (*Ismail and Mulla, JJ.*) MAJIDUNNISA BIBI *v.* PURAN CHANDER ROY. **196 I.C. 132 = 1941 A L J. 387 = 1941 O A. (Supp.) 524 = 1941 A.L.W 794 = 14 R A. 127 = 1941 A.W.R. (H C.) 229 = A.I.R. 1941 All. 316.**

——**S. 54**—*Burden of proof—Transaction resulting in preference of creditor—If to be presumed fraudulent preference.*

It is well settled that the burden of proving that a transaction by the insolvent, which is impugned under S. 54 of the Provincial Insolvency Act, amounts to a fraudulent preference, is on the Official Receiver. It is enough for the Official Receiver to show that the transaction was voluntary in the sense that it was not induced by real or genuine pressure exerted on the insolvent and that it resulted in the preference of one creditor over other creditors. The fact that the creditor who is in fact preferred fails to give any other explanation for the transaction does not necessarily lead to the presumption that it was effected with the view or intent of preferring that creditor. The onus is on the Official Receiver to prove that the dominant or real intention of the insolvent was to prefer the creditor, and the Court must be satisfied upon the evidence before it that such intention was present. (*Patanjali Sastri, J.*) VENKYYA *v.* OFFICIAL RECEIVER, GUNTUR.

1941 M W N. 735 = 54 L W. 259 = A.I.R. 1941 Mad. 796 = (1941) 2 M.L.J. 810.

——**S. 54**—Fraudulent preference — Essentials—Burden of proof—Intention to defraud—Inference from consequence of act—If justified—Mortgage to creditor to deal with pressing claim *bona fide*—Validity. *See* 1940 Dig., Col. 1065. SUBRAMANIA SASTRULU *v.* OFFICIAL RECEIVER, CHITTOOR.

A.I.R. 1941 Mad. 274 = (1940) 2 M.L.J. 846.

——**S. 54**—*Fraudulent preference — Intention—Proof of—Evidence of similar contemporaneous acts of preference—Admissibility.*

Where a transaction between a debtor and his creditor is attacked as a fraudulent preference evidence of other or similar contemporaneous acts of preference in favour of other creditors, is admissible to show the debtor's intent. (*Stone, C.J. and Clarke, J.*) RAMGULZARILAL *v.* BHANUPRASAD. **195 I.C. 527 = 14 R.N. 55 = 1941 N L J 117 = A.I.R. 1941 Nag. 188.**

——**S. 54**—*Fraudulent preference—Shifting of onus of proof—Principles—Circumstances sufficient to shift onus.*

In the case of fraudulent preference, as regards the shifting of the onus of proof, some distinction should be made between debtors' and creditors' petitions. Those creditors' petitions which are the result of acts of insolvency which leave no doubt but that the creditor is contemplating insolvency have to be placed in the same class as debtor's petitions. In such cases it would take a smaller amount of evidence to shift the onus of proof on to the creditor who seeks to annul the transaction.

PROV. INSOLV. ACT (1920), S. 54.

Where however a creditor files a petition and puts forward as an act of insolvency the very transaction which he subsequently seeks to annul, then something more than the mere making of payment on the eve of insolvency is required. How much more would depend on the circumstances of the individual case. (*Stone, C. J. and Clarke, J.*) RAMGUI ZARILAL v. BHANU PRASAD. **195 I C. 527 = 14 R.N. 55 = 1941 N L.J 117 = A.I R. 1941 Nag 188.**

——**S. 54**—*If could operate on surrender of tenancy rights.*

A surrender of tenancy right is a transfer of an interest in property and S. 54 could operate on such a transaction. (*Stone, C.J and Clarke, J.*) RAMGUL-ZARILAL *v.* BHANUPRASAD. **195 I.C. 527 = 14 R.N. 55 = 1941 N L.J. 187 = A.I.R 1941 Nag 118.**

——**Ss. 56 and 4**—*Power of Court to direct delivery of possession—Person in possession claiming title thereto—Proper remedy—Claimant seeking to recover possession obtained by receiver or Court—Creditors, if necessary parties to such proceedings.*

The Court has no power under S. 56, Provincial Insolvency Act, summarily to direct a third person to deliver up possession of property of which he is in possession if he sets up a title, however flimsy, to it. The only power the Court has in such circumstances is to try the issue whether the insolvent is entitled to the property or not under S. 4. But before that can be done a proper application has to be presented by the receiver, when there is one, or by such one of the creditors or other person interested in preserving the insolvent's estate as the Court authorises to act when there is not. Where the Court or receiver enters into possession of such property without any obstruction from the claimant for some reason, then the latter's remedy to recover possession, whatever the nature of the proceedings, would have to be under S. 4 and should be against the person or authority in whom the property has vested. These could certainly not be a creditor or the body of creditors. Hence they are not necessary parties to such proceedings. (*Bose, J.*) JASODABAI *v.* SHRIKISHAN RADHAKISHAN. **I.L.R. (1941) Nag. 696.**

——**Ss. 56 and 77**—Power of Insolvency Court acting under S. 77—Direction to Official Receiver to take possession and sell property—Power to enquire into claims by third parties after sale and delivery to purchaser. *See* 1940 Dig., Col 1065. MUTHUPALANI APPA CHETTIAR *v.* RAMAN CHETTIAR. **A.I.R. 1941 Mad. 75.**

——**Ss. 57 and 80**—Official Receiver—Power to bind creditors—Proceeding by creditor to obtain personal decree against insolvent for debt due under mortgage—Official Receiver made party—Decree, if binds all creditors—Power of Official Receiver to order decree-holder to prove debt in insolvency. *See* 1939 Dig.. Col. 1066. ALLAHABAD BANK LTD., LAHORE *v.* SPECIAL OFFICIAL RECEIVER, PUNJAB. **192 I.C. 414 = 13 R.L. 373 = A.I.R 1941 Lah. 6.**

——**S. 59 (a)**—*Sale by receiver—Deposit of purchase money—Third party establishing title in Civil Court to property sold and obtaining possession—Purchaser's right to refund of money paid.*

Where prior to the execution of a formal conveyance in respect of a sale by the Official Receiver for which the entire consideration had been deposited by the purchaser, a third party establishes his title in a Civil Court to the property sold and obtains possession, then the purchaser from the receiver is entitled to a refund of price paid by him. (*Collister and Baipai, JJ.*) **RAGHUBIR SARAN DAS *v.* KUNJ BEHARI LAL.**

PROV. INSOLV ACT (1929), S. 68.

1941 A.W.R (H.C.) 362 = 1941 A.L.W. 1091.

——**S. 59 (a)**—*Sale by receiver—Nature of—Registered instrument—Necessity.*

The Provincial Insolvent Act does not provide for sales by the Court such as are provided for in the C. P. Code. A sale in insolvency proceedings, whether it be a sale at auction or a direct one by the Official Receiver to a particular person, is nothing more than a transfer by act of parties. Since the Official Receiver is an agent of the Court, it may be said that a sale effected by him is a sale under the Court, but it is certainly not a sale by the Court. Hence for title to pass to the vendee at such a sale a registered instrument is necessary as required by the Transfer of Property Act. (*Collister and Baipai, JJ.*) RAGHUBIR SARAN DAS *v.* KUNJ BEHARI LAL. **1941 A.W R. (H.C.) 362 = 1941 A L.W. 1091.**

——**S. 66 (2)**—Scope—Hindu insolvent—Application for payment of amount for meeting daughter's marriage expenses—Maintainability. *See* 1940 Dig., Col. 1067. APPA RAO *v.* RAMAMURTHI. **193 I.C. 521 = 13 R M. 675 = (1940) 1 M.L.J. 334.**

——**Ss. 68 and 75**—*Official Receiver—If representative of creditors—Receiver refusing to prefer second appeal—Right of individual creditor to prefer appeal—Leave to appeal granted without notice to opposite party—If sufficient to sustain appeal—Remedy of creditor.*

A right of appeal is not a mere matter of procedure. It is a substantive right and is primarily a creature of statute. As such, it can be exercised only by those in whom the power rests either expressly or by necessary implication. Where the Official Receiver in insolvency who fails in a suit to set aside a sale of the insolvent's property for arrears of income-tax, and on appeal, refuses to prefer to a second appeal to the High Court, it is not open to a creditor of the insolvent to prefer an appeal himself. The Official Receiver is not a representative of the creditors and the creditors cannot ignore him or act independently of him and prefer an appeal. The fact that leave had been granted to a creditor to appeal makes no difference when such leave is granted without notice to the opposite party, the grant of leave can only be regarded as having been made without prejudice to the interests of those against whom leave was granted. The proper remedy of the creditor would be to go to the Insolvency Court under S. 68 of the Provincial Insolvency Act and to apply for a reversal of the refusal by the Official Receiver to prefer a second appeal or in the alternative for permission to appeal himself in the name of the Official Receiver. (*Abdur Rahman, J.*) KASI CHETTIAR *v.* SECRETARY OF STATE FOR INDIA. **1941 M W.N. 366 = 53 L.W. 479 = A.I.R. 1941 Mad. 577 = (1941) 1 M.L.J. 531.**

——**S. 68**—*Right to apply under—"Aggrieved"—Sale by receiver*—Locus standi *of insolvent to impeach.*

An insolvent has no *locus standi* under S. 68 of the Provincial Insolvency Act to impeach a sale made by the Official Receiver, he is not a person aggrieved by the act of the receiver. Though S. 68 expressly gives the insolvent a right to apply to the Insolvency Court against any act of the receiver, he can apply only if he is aggrieved by the receiver's act He must have suffered a legal grievance, *i. e.* there must be a decision pronounced against him which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something, before he can be said to be aggrieved. The insolvent cannot be regarded as an aggrieved person in the sale proceedings conducted by the receiver, as he has not legal estate in the property vested in the receiver and

PROV. INSOLV. ACT (1920), S. 72.

his right to the surplus is a mere hope or expectation. (*Divatia, J.*) SIDRAM PANDHARNATH *v.* MAHALLYA. **43 Bom L.R. 805 = A.I.R. 1941 Bom. 415.**

——**Ss. 72 and 75**—Order directing prosecution of insolvent for offence under S. 72—Appeal—Maintainability by insolvent. *See* 1940 Dig., Col. 1067. SESHAYYA *v.* HIRACHAND CHUNNI LAL. **194 I.C. 33 = 13 R.M. 735 = A.I.R. 1941 Mad. 285 = (1940) 2 M.L.J. 72.**

——**S. 75**—*"Aggrieved"—Interpretation—Creditor's right of appeal—Order refusing to prosecute insolvent under S. 69.*

The word "aggrieved" in S. 75 of the Provincial Insolvency Act qualifies all the classes of persons previously mentioned in the sentence, and neither a creditor nor the receiver has any right of appeal under the section unless aggrieved. A person can only be aggrieved under the section if he has been wrongfully refused something which he has a right to demand, and inasmuch as neither the creditor nor the receiver has any right to demand the prosecution of the insolvent, they cannot be said to be aggrieved at an order refusing to prosecute the insolvent under S. 69 of the Act and as such have no right of appeal against that order. (*Dalip Singh and Sale, JJ.*) ACHHRU RAM *v.* PADAM PARSHAD. **195 I.C. 398 = 14 R.L. 66 = 43 P.L.R. 217 = A.I.R. 1941 Lah. 243.**

——**S. 75**—*Scope—If overrides O. 47, R. 7, C. P. Code—Order rejecting application for review—Appeal.*

S. 75 of the Provincial Insolvency Act must be taken to override the provisions of O. 47, R. 7, C. P. Code, in so far as it bars a right of appeal from an order rejecting an application for review. (*Patanjali Sastri, J.*) VEERAYYA *v.* KOTIREDDI. **1941 M.W.N. 350 = 53 L.W. 466 = A.I.R. 1941 Mad. 588 = (1941) 1 M.L.J. 537.**

——**S. 75 (1)**—*Construction—"Aggrieved by a decision, etc."—If qualify creditor—Refusal of leave to creditor under S. 70 to prosecute insolvent for fraudulent suppression of assets—Right of appeal.*

The words "aggrieved by a decision, etc." in S. 75 (1) of the Provincial Insolvency Act cannot be read as qualifying only the words "any other person" preceding them. They must be read as qualifying all the persons who are entitled to appeal, *viz*, "the debtor, any creditor receiver or any other person." There is no doubt that S. 75 (1) confers the right of appeal only on persons aggrieved by the order of a Subordinate Court. Hence a creditor who has been refused leave to prosecute the insolvent for fraudulent suppression of assets by an order under S. 70 of the Act made by a Subordinate Court is not aggrieved by the order within the meaning of S. 75 (1) of the Act, and hence not entitled to appeal to the District Court. (*Beaumont, C.J. and Sen, J.*) LALCHAND HIRACHAND *v.* TULJARAM RAOJI. **43 Rom.L.R. 964.**

——**S. 75 (1), proviso (2)**—Second appeal—District Judge dismissing in appeal petition for adjudication. *See* PROVINCIAL INSOLVENCY ACT, SS. 4, 25 (2) AND 75 (1), PROVISO (2). **1941 O W N 1218 = 1941 O.A. 913.**

——**S. 75 (2)**—Appeal—Competency—Disallowance of plea of *res judicata* with reference to a creditor's application to set aside a transfer. *See* 1940 Dig., Col. 1068. THAIVANAI ACHI *v.* RAMANATHAN CHETTIAR **192 I.C. 683 = 13 R.R. 188 = A.I.R. 1941 Rang. 24.**

——**S. 77**—*Jurisdiction—Sale of property by aiding Court—Claims to property sold—Jurisdiction to deal with—Absence of formal letter of request—Effect of.*

Where the Court which has adjudicated the insolvent has recognised the Court of the place where part of the property of the insolvent is situate as a Court having full jurisdiction to decide claims to that property, having previously requested that Court to aid it in the sale of that property, and the aiding Court has accepted jurisdiction, the proper Court to deal with claims to the property which is sold by the aiding Court is the latter Court. The fact that there is no special request by the Court which has adjudicated to the aiding Court in the matter of a particular claim makes no difference, because there is no necessity for it, when the adjudicating Court has previously requested that Court to aid it and has acknowledged that it had left the aiding Court to decide all matters relating to the property situate within the jurisdiction of the aiding or auxiliary Court. (*Leach, C. J. and Krishnaswami Aivangar, J.*) RAMAN CHETTIAR *v.* MUTHUPALANIAPPA CHETTIAR **1941 M.W.N. 246 = 53 L.W. 370 = A.I.R. 1941 Mad. 580 = (1941) 1 M.L.J. 423.**

PROV. S. C. C. ACT (1887), S. 15.

——**S. 78, Proviso**—"Proved"—Meaning of. *See* 1940 Dig., Col. 1069. JASSAWALA *v.* AMULYA CHANDRA DUTTA. **191 I.C. 799 = 13 R.A. 280.**

——**S. 78 (2)**—Construction—Exclusion of time under—Right to—Conditions—"Proved"—Meaning of. *See* 1940 Dig., Col. 1068. SOGMULL LACHIRAM *v.* PARANDHAMAYYA. **I.L.R. (1941) Mad. 136 = 193 I.C. 705 = 13 R.M. 707 = (1940) 2 M.L.J. 17.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887)—*Object of—Evidence heard by one Judge and judgment by another—Propriety.*

The object of the Small Cause Courts Act is to provide a speedy and cheap means of settling disputes. Short judgments are generally written as the understanding is that the case is heard and disposed of at one sitting, or if working hours are over, it is to be taken up and determined on the next working day. Where the whole evidence is heard by one Judge and judgment written by his successor, though there is no objection in law to such a procedure, it is opposed to the whole spirit of the Small Cause Courts Act. (*R. W. H. Davies.*) NAND LAL *v.* MOHAN LAL. **1940 A.M.L.J. 131.**

——*Substantial justice—Interference.*

Where the lower Court's order has done substantial justice the High Court will not interfere in revision under S. 25 of the Provincial Small Cause Courts Act. (*Clarke, J.*) DISTRICT COUNCIL, WARDHA *v.* ANNA DAULATRAO. **197 I.C. 76 = 1941 N.L.J. 371 = A.I.R. 1941 Nag. 273.**

——**S. 15**—*Applicability—Karachi Small Causes Court.*

S. 15 of the Provincial Small Cause Courts Act does not apply to the Karachi Small Causes Court constituted under the Karachi Small Cause Courts Act of 1929. (*Lobo, J.*) THAKURDAS NARUMAL *v.* GOVERNOR-GENERAL OF INDIA **I.L.R. (1941) Kar 238 = 195 I.C. 556 = 14 R.S. 32 = A.I.R. 1941 Sind 138.**

——**S. 15, Sch. II, Art. 8**—*'House'—Test—Rent in respect of Cinema Hall—If house rent.*

By S. 15 of the Provincial Small Cause Courts Act read with Sch. II, Art. 8, a Court of Small Cause cannot take cognizance of a suit for the recovery of rent other than house rent. A suit for rent in respect of a Cinema Hall is not cognizable by the Small Cause Court. The test to be applied to determine whether it is a 'house' is to look at the character of the building and the purpose to which it is or can be adapted; not the name by which it is called. 'House' has a much more restricted meaning than building. It is a structure of a permanent character, structurally severed from other tenements, that is used, or may be used for the habitation of man. It need not actually be used as a dwelling. (*Roberts, C.J. and*

PROV. S. C. C. ACT (1887), S. 16.

Mosely, J.) MITRA *v.* MAHOMED ISMAIL.
1940 Rang.L.R. 820 = 192 I.C. 127 =
13 R.R. 166 = A.I.R. 1941 Rang. 36.

——**S. 16**—*Scope and effect of—Suit of Small Cause nature—Filing and trial as original suit by District Munsif having no small cause jurisdiction to try same—Appeal—Competency—Second appeal.*

Where a suit which is of a small cause nature is filed and tried on the original side of a District Munsif's Court because the Munsif has no jurisdiction to try it as a small cause suit, the suit cannot be considered to be a small cause suit so as to bar an appeal. All that can be said is that the suit is of a small cause nature. There is nothing in the Provincial Small Cause Courts Act or the Civil Procedure Code which prohibits a first appeal in such a case. The former Act applies only to small cause suits ; and though S. 102, C. P. Code, would bar a second appeal in a suit of a small cause nature, there is nothing in the Act which prohibits a second appeal. A first appeal is competent, but no second appeal lies by virtue of S. 102, C. P. Code. (*Horwill, J.*) VENKATAKUMARA MAHIPATHI SURYARAO BAHADUR *v.* VENKATARAO. 196 I.C. 259 = 14 R.M 272 =
53 L.W. 690 = 1941 M.W.N. 535 =
A.I.R. 1941 Mad. 665 = (1941) 1 M.L.J. 635.

—— **S. 17**—Scope and intention of—Applicant neither obtaining prior permission to give security nor depositing decree amount—Maintainability of application. *See* 1940 Dig., Col. 1070. SHIKHANI *v.* BISHAMBAR NATH. 191 I.C. 736 = 13 R.O. 277 =
1941 O.L.R. 23 = A.I.R. 1941 Oudh 103.

——**S. 17**—*Sufficient compliance with—Simultaneous applications for permission to give security and to set aside* ex parte *decree.*

Where two applications are filed simultaneously, one for permission to give security and the other to set aside the *ex parte* decree and the Court entertained the former first and allowed it and thereafter proceeded with the setting aside application and directed notice, it was held that there was sufficient compliance with S. 17 of the Provincial Small Cause Courts Act. (*Collister, J.*) RAM DAYAL *v.* BHAGWAN DAS
I.L.R. (1941) All. 589 = 197 I.C. 35 =
1941 A.L.J. 340 = 1941 R.D. 471 =
1941 O.A. (Supp.) 418 = 1941 A.L.W. 558 =
1941 O.W.N. 750 = 1941 A.W.R. (H.C.) 193 =
A.I.R. 1941 All. 284.

——**S. 17 Proviso**—*Meaning of—Power to extend time for depositing money.*

The proviso to S. 17, Provincial Small Cause Courts Act means that the applicant for setting aside the *ex parte* decree must at the time of making his application either deposit the decretal amount or give security for the same as directed by the Court upon a previous application made by him in that behalf. The proviso clearly predicates the existence of an application to be made by an applicant. who is not prepared to deposit the decretal amount in cash, to ask for the filing of a security as a substitute therefor. The mandatory nature of the proviso shows that the Court has no jurisdiction to grant any extension of time either for making the deposit or for the filing of the security. (*Ghulam Hasan, J.*) JAGANNATH PRASAD *v.* SUKHDEO PRASAD.
195 I C. 103 = 1941 A.W.R. (C.C.) 79 =
1941 A.L.W. 191 = 1941 O.L.R. 539 = 14 R O 49 =
1941 O A. 151 = 1941 O.W N. 195.

——**S. 25**—Applicability—Decree of Small Cause Court executed on regular side of another Court—Orders in—Appeal—Revision—If open. *See* C. P. CODE, S. 42. 7 Cut.L.T. 33.

PROV. S. C. C. ACT (1887), S. 35.

——**S. 25**—*Exercise of discretion under—Principle governing.*

The High Court should not ordinarily exercise its discretionary powers in revision under S. 25 of the Provincial Small Cause Courts Act if no injustice has been done. The question whether interference should be made or not depends upon the facts and circumstances of each case. Where the question of limitation raised is even one of law, interference is not justified if the Court is satisfied that far from furthering any ends of justice, it would perpetuate an injustice in interfering with the decree of the lower Court. (*Ghulam Hasan, J.*) SAMPAT SHUKUL *v.* SUBKARAN TEWARI. 196 I.C. 511 =
14 R.O. 187 = 1941 A W.R (C.C). 319 =
1941 O L R. 699 = 1941 O.W.N. 1112 =
1941 A.L.W. 928 = 1941 O.A. 827.

——**S. 25**—Finding of fact—Interference—Powers of High Court. *See* 1940 Dig., Col. 1070. HINGORANI *v.* MANGHIRMALANI. 192 I C. 603 =
13 R.S. 196.

——**S. 25**—New plea—New ground of exemption from limitation—If can be raised during arguments. *See* 1940 Dig., Col. 1070. RAJ BAHADUR *v.* RAJA RAM. 191 I.C. 305 = 13 R O. 224 =
A.I.R 1941 Oudh 111.

——**S. 25**—Powers of revision—If wider than under S. 115, C. P. Code—Grounds of interference—Error of law. *See* 1940 Dig., Col. 1071. VITHALBAI MOTIBAI *v.* NADIAD ELECTRIC SUPPLY CO., LTD.
I.L.R (1941) Bom. 153 = 13 R.B. 300 =
193 I.C 35 = A.I.R. 1941 Bom. 67.

——**S. 25**—*Revision under—Competency—Order in execution application transferred to Original Side Court.*

Where an application for execution of a Small Cause Court decree is made to a Small Cause Court, and it is transferred to the Original Side Court for purposes of execution against immovable property, any order that may be passed thereon is not subject to revision as an appeal lies against it. (*Davies.*) NANUNDA *v.* MAHI PAL. 1940 A.M.L.J. 133.

——**S. 25**—*Revision—Competency—Other remedy by suit open.*

The existence of a remedy by way of suit does not preclude the Court from hearing a revision under S. 25, Provincial Small Cause Courts Act. (*Davies.*) AJMERI LAL *v.* BAL MUKAND. 1941 A M.L.J. 19.

—— **S. 34**—Scope and object of—Execution of decree of Small Cause Court against immovable property. *See* C. P. CODE, S. 42 AND PROVINCIAL SMALL CAUSE COURTS ACT, S. 34. 1940 A M.L.J. 133.

——**S. 35**—*Decree by Sub Judge in exercise of small cause powers—Execution by successor without such powers—Permissibility.*

Execution proceedings in respect of a decree passed by a Subordinate Judge in the exercise of Small Cause Court powers can be taken out in the Court of his successor although such Court may not have Small Cause Court powers, provided there is no other Court exercising such powers in the same area. But if there is such a Court, the proceedings should go to that Court. (*Beckett, J.*) SHIAM SUNDAR DASS *v.* PARSINNI.
43 P.L.R. 488 = A.I.R. 1941 Lah. 356.

——**S. 35**—*New Small Cause Court Judge having no pecuniary jurisdiction to execute decree passed by his predecessor—His right to transfer it to himself on regular side and deal with it as Sub-Judge.*

Where a new Small Cause Court Judge has no pecuniary jurisdiction to execute a decree passed by his predecessor, he can transfer it to himself on the ordinary side and deal with it as a Sub-Judge. Consequently,

PROV. S. C. C. ACT (1935), S 35.

attachment order by him in his latter capacity would be perfectly valid. (*Almond, J.C. and Mir Ahmad, J.*) SOHAN LAL GULAB RAI *v.* MOHAMMAD DIN MOHAMMAD YUNIS. **193 I.C. 712 = 13 R. Pesh. 65 = A.I.R. 1941 Pesh. 18.**

——**S. 35**—Scope and effect—Small cause suit in Subordinate Judge's Court—Court abolished—Transfer of suit to Court of District Munsif with limited small cause powers — Decree — Appeal —Competency. *See* 1940 Dig., Col. 1071. KAMALATHAMMAL *v* HARIHARA AYYAR. **A.I.R. 1941 Mad. 103 = (1940) 2 M L J. 700.**

——**Sch. II, Art. 8**—*Cognizability—Suit by assignee—Arrears of rent.*

A suit by an assignee of a landlord for arrears of rent after they had fallen due, for the recovery of the amount due, is one for rent and is excepted from the jurisdiction of the Court of Small Causes. (*Tekchand, J.*) JAGDISH CHANDER *v.* SALEHON. **196 I C. 393 = 14 R L. 152 = 43 P L.R. 432 = A.I.R 1941 Lah. 313.**

——**Sch. II, Art. 8**—*Suit for rent of site—Cognizability.*

A suit for rent of a site is different from a suit for house rent and is not cognizable by a Small Cause Court unless that Court has been expressly invested with jurisdiction in that behalf. (*Ghulam Hasan, J.*) MATA DIN *v.* IMDAD KHAN. **197 I.C. 158 = 1941 O.A. 886 = 1941 A W.R. (Rev) 1005 = 1941 O.W.N. 1179.**

——**Sch. II, Art. 11**—Power to create charge on mmovable property--Decree Construction. *See* 1939 Dig., Col. 1008. GANGA PRASAD *v.* RATAN CHAND. **I.L R. (1941) Nag. 356.**

——**Sch II, Art. 13**—*Applicability—Suit on pronote—Consideration, dues on account of a hereditary office—Maintainability in Small Cause Court.*

A suit on a promissory note which recites that it is executed 'on account of *rusum* of Deshpande-ship for two years', is not barred by Art. 13 of Sch. II of the Provincial Small Cause Courts Act, from cognizance by the Court of Small Causes, for the suit is not to recover the dues but to recover money on a negotiable instrument. (*Clarke, J.*) GOPAL MADHORAO *v.* ACHYUT SADASHEO. **196 I.C 493 = 14 R.N. 108 = 1941 N.L.J. 388 = A.I.R. 1941 Nag. 271.**

——**Sch. II, Art. 31**—Applicability—Suit by agent against principal for indemnity under S. 222, Contract Act – Jurisdiction of Small Cause Court. *See* 1940 Dig., Col. 1072. MAHADEVI *v.* SANKARA MENON. **191 I C. 598 = 13 R M 500 = (1940) 1 M.L J. 173.**

——**Sch. II, Art. 35 (b) (j)**—*Applicability—Damages for wrongful seizure of cattle.*

Art. 35 (*b*) (*j*) have clearly no application to a wrongful seizure of cattle proceeding on the highway and hence a suit for damages in respect of such seizure is not barred by Art. 35 (*b*) (*j*) of the Provincial Small Cause Courts Act. (*Bose, J.*) BABULAL *v.* KISHAN SINGH. **195 I.C. 365 = 14 R.N. 48 = 1941 N.L.J. 328.**

——**Sch. II, Art. 35 (j)**—*Applicability—Suit for price of property entrusted to* Supurdar—*Cognizability.*

Where a machine attached in execution of a decree and entrusted to a *Supurdar* is released from attachment on a claim by a third party and it is found that the machine had become useless owing to the acts of the decree-holder and the *Supurdar*, a suit by the owner of the machine for the price of the machine is really a suit for compensation for illegal and improper attachment and as such excluded from the cognizance of the Court of Small Causes by Art. 35 (*j*) of Sch. II to the Provincial Small Cause Courts Act. (*Agarwal, J.*) PIRTHI NATH *v.* M. H. NOWROJI. **193 I.C. 654 = 13 R.O. 484 = 1941 O.L.R. 313 = 1941 A.W.R. (C.C.) 136 = 1941 O A. 367 = 1941 A.L.W. 409 = 1941 O.W.N. 555 = A.I.R. 1941 Oudh 412.**

PUBLIC GAMBLING ACT (1867), S. 5.

——**Sch. II, Art. 41**—Applicability—Co-sharers in joint property—Payment of Government revenue by one —Suit against other for contribution—Jurisdiction of Small Cause Court. *See* 1940 Dig., Col. 1073. SAROOR FATIMA *v.* SHEIK MAHOMED SAFIUDDIN. **192 I.C. 757 = 13 R P. 516 = 7 B R. 409 = A.I.R. 1941 Pat 49.**

——**Sch. II, Art. 41**—*Cognizability—Suit by a co-sharer against other co-sharers to recover rent paid on their account—Nature of.*

A suit by a co-sharer against the other co-sharers to recover the rent paid by him to the superior proprietor in respect of the latter's shares is a suit for contribution and not reimbursement inasmuch as the liability is a joint liability and the paying co-sharer remains liable for the balance even after payment of his own share. Hence its cognizance by Court of Small Causes is barred by Art. 41 of Sch. II of the Provincial Small Cause Courts Act. (*Bennett and Ghulam Hasan, JJ.*) SHEO SARAN *v.* MST. SUKHRANI. **195 I.C. 498 = 1941 O.W.N. 963 = 1941 O.A. 675 = 1941 A.L.W. 813 = 1941 A.W R. (Rev) 645 = 1941 O.L.R. 593 = 14 R.O. 93 = A.I.R. 1941 Oudh 578.**

PUBLIC GAMBLING ACT (III OF 1867), Ss. 1, 3 and 6—*'Dara' gambling—Nature of—Prosecution, if should prove commodity concerned—Betting slips found on search—Presumption as to common gaming house.*

Dara gambling is a specified form of *Satta* gambling and in such a case the omission on the part of the prosecution to prove the commodity concerned is not a fatal defect. Where betting slips are recovered in a house searched under a warrant under S. 5 of the Public Gambling Act, they constitute instruments of gaming within the meaning of the Act and give rise to a presumption under S. 6 of the Act that the house is a common gaming house. (*Ismail and Mulla, JJ.*) EMPEROR *v.* BASANT LAL. **I.L.R. (1941) All. 576 = 196 I.C 434 = I941 A.W.R (H.C.) 220 = 1941 O.A. (Supp.) 515 = 1941 A.L.J. 421 = 1941 A.L W. 608 = 42 Cr L J. 864 = 1941 O.W N. 794 = 1941 A.Cr.C. 138 = A.I.R. 1941 All 330.**

——**S. 4**—'Common gaming house'—Open space in front of pansall *See* 1940 Dig., Col. 1074 EMPEROR *v.* GOVIND PRASAD. **42 Cr.L.J. 32 = A.I.R. 1941 Nag. 16.**

——**S. 5**—*Guilt or innocence of accused—If affected by legality of arrest.*

Under S. 5 of the Public Gambling Act the District Superintendent of Police may arrest without a warrant. In order that an offence may be cognizable offence it is not necessary that every police officer should have the power to arrest without a warrant. The fact that District Superintendent of Police has such power makes it a cognizable offence. The question whether the arrest was valid or not would not affect the question of the guilt or otherwise of the accused, because even if it was illegal, the Court would still have jurisdiction under S. 190, Cr. P. Code, to take cognizance of the offence. (*Pollock, J.*) NAGARMAL *v.* EMPEROR. **196 I.C. 869 = 1941 N.L.J. 465 = A.I.R. 1941 Nag. 338.**

——**S. 5**—Search warrant—Legality—Boundaries of place to be searched not given. *See* 1940 Dig., Col.

PUNJAB ACTS.

1074. EMPEROR *v.* GOVINDPRASAD.
42 Cr.L.J. 32=A.I.R. 1941 Nag. 16.

PUNJAB ACTS, ETC.

Alienation of Land Act (XIII of 1900).
Alienation of Land (Second Amendment Act) (X of 1938).
Civil Service Rules.
Colonisation of Government Land Act (V of 1912).
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Court of Wards Act (II of 1903).
Debtors Protection Act (II of 1936).
Kanungo Service Rules (1935).
Land Records Manual.
Land Revenue Act (XVII of 1887)
Limitation (Custom) Act (I of 1920).
Municipal Act (III of 1911)
Pre-emption Act (I of 1913).
Pure Food Act (VIII of 1929).
Registration of Money-Lenders Act (III of 1938).
Regulation of Accounts Act (I of 1930).
Relief of Indebtedness Act (VII of 1934).
Restitution of Mortgaged Lands Act (IV of 1938).
Sikh Gurdwara Act (VIII of 1925).
Subordinate Services.
Tenancy Act (XVI of 1887).
Village Panchayat Act (III of 1922).

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 2 (3)—Agricultural land—Test—Presumption from circumstances. *See* 1940 Dig., Col. 1074.
KHAZANCHI SHAH *v.* NIAZ ALI. 191 I.C 417=13 R.L. 291.

——**S. 3**—*Alienation by person declared member of agricultural tribe subsequently—Validity—Sanction—If can be accorded.*

An alienation made by a person who is declared to be a member of an agricultural tribe subsequently is neither void nor voidable. The effect of the Alienation of Land Act is merely to alter its character. The alienation in any case can be validated by the sanction of the Collector and such sanction should be accorded where both parties exercised good faith at the time of the alienation and the transaction was completed in the open market with no intention of defrauding the vendor or his tribe and at full value and many years have passed since it was completed. (*Garbett, F.C.*) FATTA *v.* BHIKAM SAIN.
20 Lah.L.T. 19.

——**S. 3**—*Order refusing sanction—Right of would-be vendee to appeal.*

It is certainly true that in ordinary cases where a member of an agricultural tribe applies for sanction to sell a portion of his land to a non-agriculturist, the non-agriculturist is not a necessary party to the proceedings, but it is not correct to lay down an inflexible rule that in no circumstances may a would-be vendee appeal to a higher authority against the order of the Deputy Commissioner refusing sanction in cases where there is reason to suppose that a vendor is dishonestly endeavouring to use the provisions of the Alienation of Land Act to defraud a *bona fide* purchaser for value. (*Alan Mitchell, F.C.*) MOHAMMAD DIN *v.* HAFIZ MEHDI SHAH. 20 Lah.L.T. 169.

——**S 3**—*Sanction of Deputy Commissioner—Right of would be alienee to apply for.*

If a person comes forward and states that an alienation of certain land in his favour has been completed in all other essentials except the grant of sanction by the Deputy Commissioner, it should be open to him in such cases to ask for an adjudication on the question whether

PUN. ALIEN. OF LAND ACT (1900), S. 7.

sanction should or should not be accorded to the particular transaction in question (*Alan Mitchell, F.C.*) MOHAMMAD DIN *v.* HAFIZ MEHDI SHAH.
20 Lah.L.T. 169.

——**S 3**—*Succession of widow to life interest in her husband's estate—Mutation—Sanction of Deputy Commissioner—If necessary.*

The succession of a widow to a life-interest in her husband's estate is not a case of permanent alienation. Therefore, the sanction of the Deputy Commissioner for mutation of such succession is not necessary under S. 3 of the Alienation of Land Act. (*Mitchell, F.C.*) MAHOMED ASLAM KHAN *v.* IRSHAD BEGAM.
20 Lah.L.T. 104.

——**S. 3 (2)**—*Grant of occupancy rights without Deputy Commissioner's sanction—Validity—Government of India Act* (1935), *Ss.* 298 (1) *and* (2) *and* 292.

In view of the fact that S. 292 maintains in force all existing law till repealed or amended; and S. 298 (2) excepts the main features of the Punjab Alienation of Land Act from the general declaration in S. 298 (1), it cannot be said that the general words of that declaration can be taken as overriding and rendering invalid the other provisions of the Alienation of Land Act as in force in 1935 which are not expressly mentioned. Consequently a grant of occupancy rights in agricultural land without the Deputy Commissioner's sanction is invalid under S. 3 (2), Punjab Land Alienation Act. (*Skemp, J.*) DEPUTY COMMISSIONER, AMRITSAR *v.* RAI LA RAM. 192 I.C 303=13 R.L. 368=A.I.R. 1941 Lah 27.

——**S. 6**—*Mortgage*—Benami *transaction—Test.*

A transaction is *benami* if the beneficial interest passes not to *soi disant* mortgagee but to the non-agriculturis usually a banker or money-lender concerned. Th "beneficial interest" includes certainly the rents and profits of the land, and in most if not in all cases the control of the land. But a transaction between two agriculturists is not *benami* only because a money lender has derived some benefit from the transaction. If that benefit is short of the full beneficial interest, the transaction can still subsist as a genuine mortgage. In certain circumstances one agriculturist may find a profitable investment in taking over a mortgage which is cripplin another, who has not the capital or resources of his better-equipped fellow agriculturist. The former may conceivably have the same banker as the latter, and that banker may profit by the transaction; but unless substantially the beneficial interest in land passes from the mortgagee to the money-lender or banker, the transaction is not *benami*. A very important detail of evidence in all such cases is the payment of land revenue. In a completely *benami* transaction revenue is collected by the lambardar from the money-lender, to whom the beneficial interest has passed; in a genuine transaction the land remains with the mortgagee who pays the land revenue. (*Garbett, F.C.*) MULA *v.* SOHAN SINGH.
20 Lah.L.T. 1.

——**S. 6 (3)**—*Initiation of other proceedings by mortgagee—If bars action by Deputy Commissioner.*

Where the mortgage is one in form (*b*) of S. 6 (1) of the Alienation of Land Act, the mere fact that the mortgagee has initiated proceedings of another kind to obtain payment of the debt does not prevent the Deputy Commissioner from taking action under S. 6 (3) of the Act. (*Alan Mitchell, F.C.*) CO-OPERATIVE LAND MORTGAGE BANK, SONEPET *v.* THAMBU. 20 Lah L.T. 178.

——**Ss 7 and 11**—*Usufructuary mortgage or lease—Test.*

If there is a contention between the parties as to whether a particular temporary alienation entered into

PUN. ALIEN. OF LAND ACT (1900), S. 7.

by two private individuals is a usufructuary mortgage redeemable under S. 7 of the Alienation of Land Act or a lease for a stipulated period which cannot be determined before the expiry of that period, the criterion must be whether the debt or loan is the real basis of the transaction or whether the real basis is the need of the second party to obtain the use and occupation of the land for a particular purpose for an extended period. (*Mitchell, F.C.*) QADIR BAKHSH *v.* ARURA MAL.
20 Lah.L.T. 80

——**Ss. 7 and 11**—*Usufructuary mortgage or lease —Test.*

In order to determine whether a particular temporary alienation entered into by two private individuals is a usufructuary mortgage or a lease, the criterion must be whether the debt or loan is the real basis of the transaction or whether the real basis is the need of the second party to obtain the use and occupation of the land for a particular purpose for an extended period. Where the so-called lessee has not obtained the use and occupation of the land for any period and the so-called lessors have remained in cultivating occupation of the land binding themselves to pay half *batai* rent to the so-called lessee every year, the transaction is a usufructuary mortgage. (*Alan Mitchell, F C.*) ABDULLA *v.* VIR BHAN.
20 Lah.L.T. 159.

——**Ss. 7 (3), 11 and 16 (2 A)**—*Mortgages, farms and leases by agriculturist, or Official Receiver or by order of Court—If determinable before stipulated period.*

If an alienation made by an agriculturist or by an Official Receiver on his behalf in favour of a non-agriculturist is described in the document in which it is embodied as a usufructuary mortgage in form (*a*) of S. 6 (1) of the Alienation of Land Act, it can at any time be redeemed under S. 7 (3) of that Act on payment of such proportion of the mortgage debt as the Deputy Commissioner determines to be equitable. If the alienation is a lease, farm or mortgage made by order of a Court under S. 16 of the Act, it would be terminable by the Deputy Commissioner under sub S. (2 A) of that section on payment of an amount which shall bear to the original consideration the same proportion as the unexpired period of transfer bears to the total period for which the transfer has been made But if the alienation is a lease entered into by the agriculturist or by the Official Receiver on his behalf under S. 11 of the Act, the Act contains no provision for its premature termination. (*Mitchell, F. C.*) QADIR BAKHSH *v.* ARURA LAL.
20 Lah.L.T 80

——**S. 9**—*Conversion of mortgage—Delay in application—Effect of.*

When a member of an agricultural tribe has mortgaged his land for an unlimited period to a person who is not a member of the same agricultural tribe or group of tribes, no delay however long on the part of the mortgagor in applying to the Deputy Commissioner under S. 9 of the Alienation of Land Act can operate to defeat the right of the mortgagor to have the transaction converted into a mortgage in one of the forms permitted by S. 6 of the Act. (*Alan Mitchell, F C.*) KISHEN SINGH *v.* GHARIB SINGH.
20 Lah.L.T. 28.

——**S. 9**—*Order by Deputy Commissioner refusing to take action—Appeal.*

An order passed by the Deputy Commissioner under S. 9 of the Alienation of Land Act is clearly appealable to the Commissioner, whether the Deputy Commissioner takes action under that section or refuses to do so. It is immaterial that he has erroneously described himself below his signature at the end of the order as

PUNJ. ALIEN. OF LAND (SEC. AM.) ACT (1938),

Collector and not as Deputy Commissioner. (*Mitchell, F.C.*) HIMMAT ALI *v.* BHAG MAL.
20 Lah.L.T. 43.

——**S. 13-A**—*Person ejected--If can invoke Ss. 3 and 28—Limitation Act.*

When once a Deputy Commissioner has duly satisfied himself after proper enquiry under S. 13-A (2) of the Punjab Alienation of Land Act that an alienation is void under sub-S. (1) and thereupon after complying with other provisions of sub-S. (2) ejects the occupier neither S. 3 nor S. 28 of the Limitation Act can be invoked to help the person so ejected. (*Garbet F.C.*) DATA RAM *v.* JAG RAM.
20 Lah.L.T. 23.

——**S. 16**—Applicability—Land subject to mortgage acquired by agriculturist. *See* 1940 Dig, Col. 1075. PUNJAB NATIONAL BANK, LTD. *v.* RAM KARAN RAMJI LAL.
I.L.R. (1941) Lah. 1 (F.B.).

——**S. 16**—Applicability—Liability of land to be sold already determined by decree. *See* 1940 Dig. Col. 1075. PUNJAB NATIONAL BANK, LTD. *v.* RAM KARAN RAMJI LAL.
I.L.R. (1941) Lah. 1 (F.B.).

——**S. 16**—*Compromise decree regarding land—When amounts to alienation.*

M, a member of a notified agricultural tribe, sold some lands to *G*, a non-agriculturist. Thirteen years later, the Deputy Commissioner passed an order declaring that the aforesaid sale was in contravention of the provisions of the Punjab Alienation of Land Act and that the alienation would take effect as a usufructuary mortgage for a period of 20 years from the date of the alienation. Two years later *G* instituted a suit against *M* for a declaration that he had become owner of the land by adverse possession and that the defendant had no connection with it. The parties compromised the suit whereby *G* was to be the owner of certain plots of land out of the land in dispute, while the remaining land was to become the property of the defendant without any encumbrance, and a decree was passed in terms of the compromise.

Held, that the compromise on being incorporated in the decree of the Court was nothing else but an alienation. (*Tek Chand, J.*) DEPUTY COMMISSIONER, GUJARAT *v.* GIAN SINGH.
197 I.C. 65 = 43 P.L.R 464 = A.I.R. 1941 Lah. 369.

——**S. 16**—*Mortgagor declared member of agricultural tribe after passing of mortgage decree—Subsequent execution of decree—If barred.*

A mortgage decree passed against a non agriculturist before a notification was issued under S. 4 of the Punjab Alienation of Land Act declaring the tribe of the mortgagor as an agricultural tribe, is saved from the operation of that notification, and the executing Court is not barred by S. 16 of the Act from subsequently selling the mortgaged land. (*Tek Chand and Blacker, JJ.*) RAJU *v.* MANGLA.
43 P.L.R. 646.

PUNJAB ALIENATION OF LAND (SECOND AMENDMENT) ACT (X OF 1938)—*Ultra vires—Government of India Act, S.* 298.

The Punjab Alienation of Land (Second Amendment) Act (X of 1938) offends against S. 298 (1) of the Government of India Act and is not saved by S. 298 (2) (*a*) of that Act *qua* sales or mortgages which had been effected before the commencement of the Act. The result is that the Act is *intra vires qua* sales or mortgages of agricultural land effected by agriculturists in favour of agriculturists who are *benamidars* for non-agriculturists after the commencement of this Act, that is, from 1st June, 1939; but it is *ultra vires qua* transactions affecting rights in agricultural land whether sales or

PUNJ CIVIL SERVICE RULES, Vol. I, R 14.

mortgages effected before the passing of the Act or with respect to transactions which are not sales or mortgages of agricultural land effected either before or after the commencement of this Act. (*Dalip Singh, Monroe and Sale, JJ.*) PUNJAB PROVINCE *v* DAULAT SINGH.

195 I C. 17=14 R.L. 19=4 F.L.J. (H C.) 83= = 43 P.L.R. 198=A.I.R. 1941 Lah. 182 (F.B.).

PUNJAB CIVIL SERVICE RULES, Vol I, R. 14 14, Cl. (d)—*Order of Commissioner refusing horse allowance to Kanungo during period of suspension —Appeal.*

An appeal is competent from an order of the Commissioner rejecting an application of a Kanungo for the grant of horse allowance during the period that he had been absent from duty owing to his having first been suspended and then dismissed from the post of Kanungo and finally reinstated by an order of the Commissioner on appeal. (*Alan Mitchell, F.C.*) M. MATWALA RAM *v.* EMPEROR.

20 Lah L T. 176.

PUNJAB CIVIL SERVICE SUBSIDIARY RULES, R. 18 (2)—*Horse allowance drawn by Kanungo—If compensatory allowance.*

The horse allowance drawn by a Kanungo is clearly a compensatory allowance and if a Kanungo proceeds on long leave he may be permitted to draw this allowance up to a period not exceeding four months. (*Alan Mitchell, F.C.*) M. MATWALA RAM *v.* EMPEROR.

20 Lah L.T, 176

——R. 73—*Kanungo reinstated after dismissal—If entitled to horse allowance for period of absence from duty.*

The Commissioner has complete discretion to allow or disallow the horse allowance to a Kanungo who has been reinstated after dismissal for the period of his absence from duty. There is clearly no obligation on the Kanungo to maintain a horse after he has been suspended and while the departmental enquiry against him is being held Still less is there any obligation on him to maintain a horse after he has been dismissed. (*Alan Mitchell, F.C.*) M. MATWALA RAM *v.* EMPEROR.

20 Lah L T. 176

PUNJAB COLONISATION OF GOVERNMENT LANDS ACT (V OF 1912), S. 10 (2)—*Lower Chenab Colony—Acquisition of proprietary rights—Right of widow with life interest.*

In the Lower Chenab Colony, where the acquisition of proprietary rights is governed by executive orders issued in 1910 and not by a formal statement of conditions issued under S. 10 (2) of the Colony Act, a widow with a life interest has no right to acquire proprietary rights. (*Mitchell, F.C.*) GHULAM NABI *v.* AISHAN BIBI.

20 Lah L. T. 118

——Ss. 10 (3) and 32—*Allotment by Collector contrary to Government instructions—If void—Collector if can resume possession—Power of Financial Commissioner to set aside allotment—Procedure.*

An allotment of land made by the Collector in disregard of the instructions of Government to a person who had no shadow of a claim to such an allotment under those instructions, cannot be treated as being *ipso facto* void so as to justify the Collector in resuming possession of the land under S. 32 of the Colony Act on the ground that the grantee was in possession of land to which he had no right or title. The allotment made by the Collector can, however, be set aside by the Financial Commissioner in exercise of the power of control conferred by S 10 (3) of the Colony Act. This power of control is to be exercised in the course of regular revenue proceedings under Chapter II of the Land Revenue Act which by S. 7 of the Colony Act has been made applicable to the proceedings of Revenue Officers under the Colony Act.

PUNJ. COURT OF WARDS ACT (1903), S. 13.

(*Mitchell, F.C.*) EMPEROR *v.* MAHOMED YAQUB KHAN.

20 Lah. L. T. 86.

——S. 20 (d)—*Nomination of successor by Collector —Persons not selected—If can appeal to Commissioner.*

If a Collector who had to make a nomination of a successor under S. 20 (*d*) of the Colony Act chose to summon before him all the persons mentioned in Cl. (*d*) as persons from among whom a successor may be chosen, and called upon them to represent their respective claims before him, and then made his decision in a quasi-judicial order, any one of such persons who was not selected would be a party to the proceedings and entitled to present an appeal to the Commissioner. (*Mitchell, F.C.*) INDER SINGH *v.* LACHMAN SINGH.

20 Lah L.T. 188.

——S. 21 (b)—*Interpretation.*

S. 21 (*b*) of the Colony Act means that when any male tenant, who is not an original tenant, dies, the succession to the tenancy left by the said male tenant shall devolve on the person or persons who would succeed to any property left by the said male tenant if such property were agricultural land acquired by the original tenant from whom it had passed by succession to the tenant recently deceased. It does not mean that whenever any male tenant died, however many generations after the original tenant, the succession on each occasion would have to be treated as succession to the original tenant. S. 21 (*b*) does not refer only to the death of a male tenant without male issue, but to the death in any circumstances. (*Mitchell, F.C.*) ALAM KHATUN *v.* MEHR WALI MAHOMED.

20 Lah L T. 130.

PUNJAB COURTS ACT (VI OF 1918), S. 39—*Original plaint amended with Court's permission—Nature and forum of suit and appeal—How determined.*

Where the original plaint has, with the permission of the Court, been amended the valuation as given in the original plaint is no longer the valuation of the suit, but it is the relief asked for and the value fixed in the amended plaint which determine the nature and forum of the suit as well as of appeal under S. 39. (*Tek Chand, J.*) ABDUL HAMID *v.* MT. KHATOON ZAMAN BEGAM.

43 P.L.R. 628=A.I.R. 1941 Lah. 397.

——S. 41—*Plea of local custom in second appeal—Certificate—If required.*

Where the lower Court has held that reversioners in the position of plaintiffs would ordinarily have no right to contest an alienation made by a widow with the assent of the next reversioner and the plaintiff wishes to establish in second appeal a local custom to the contrary, a certificate is required permitting an appeal on the question of custom. (*Beckett, J.*) SUNDAR *v.* MT. TABO.

194 I.C. 310=13 R.L. 530=42 P.L.R. 819= = A.I.R. 1941 Lah. 43.

PUNJAB COURT OF WARDS ACT (II OF 1903), S. 13—*Court of Wards taking possession of property of joint proprietor—Right of latter to sue for partition.*

The Court of Wards Act does not expressly bar the right of a joint proprietor to bring a suit for partition of his share in joint property, though the Court of Wards is entitled to take possession of the property of a joint proprietor along with a ward of the Court of Wards and can execute leases of such property, but there is nothing in the Act which specifically bars the right of the co-proprietor to bring a suit for partition which is a statutory right conferred on him by the Partition Act and there is no reason, either in law or in equity, that the Court of Wards Act contemplated that the joint proprietor should not bring such a suit to partition his share and thereby avoid the need of superintendence of his property by the Court of Wards. (*Dalip Singh and*

PUNJ. COURT OF WARDS ACT (1903), S. 32

Sale, JJ.) QAISAR JAHAN BEGAM *v.* COURT OF WARDS. **193 I.C. 829 = 13 R.L. 489 = A.I.R. 1941 Lah. 88.**

——**S. 32**—Modification of order—Awarding of additional and future interest—If amounts to. *See* 1940 Dig., Col. 1077. COURT OF WARDS *v.* TEHLA RAM. **93 I.C. 149 = 13 R.L. 432**

PUNJAB DEBTORS' PROTECTION ACT (II OF 1936), S. 4—*Collector and executing Court—Position and powers of.*

Under the Punjab Debtors' Protection Act, the Collector is only given jurisdiction to decide two things. After the executing Court has attached the land and has decided that it should be temporarily alienated, it is for the Collector to determine the period of alleuation and decide how much of the land, if any, should be exempt for purposes of maintenance. These are obviously matters which can only be determined by him if the land is found liable to attachment by the executing Court in the first instance and the actual alienation of the land derives its force from the authority of the executing Court. (*Tek Chand and Beckett, JJ.*) ANNU MAL HAR NARAIN *v.* BRIJ LAL. **196 I.C. 611 = 14 R.L. 164 = 43 P.L.R. 479 = A.I.R. 1941 Lah. 327.**

——**S. 4**—*Lease granted before Act set aside—Court subsequently ordering re-sale of lease—Fresh lease, if governed by section.*

An order as regards attachment and temporary alienation was originally passed before the Punjab Debtors' Protection Act, 1936, came into force. It was held by the Court that the provisions of S. 4 were not applicable to the auction of the lease (mustajiri) which had taken place before the commencement of the Act. After the case had been remanded on this ground the judgment debtors' objections were accepted and the lease of the land which had been originally granted was set aside When the Court ordered re-sale of the lease the judgment-debtors again objected that the proceedings must be transferred to the Collector under S. 4,

Held, that the fresh lease of the land was governed by the provisions of S. 4. (*Bhide, J.*) MEHR ABDULLA *v.* DASU RAM. **A.I.R. 1941 Lah. 464.**

——**S. 6**—*Order of Collector in execution proceedings transferred to him by Civil Court—Decree-holder being Co-operative Society—Appeal.*

Under S. 6 of the Debtors' Protection Act, an appeal lies to the Commissioner from an order of Collector passed in the execution proceedings transferred to him by a Civil Court, although the decree-holder is a Co-operative Society. (*Garbett, F.C.*) KARAM SINGH *v* ZAMINDAR BANK OF JABBOWAL. **20 Lah.L.T. 47**

——**S. 9**—*Objection regarding attachability of land—If can be raised before Collector.*

An objection that the land is not liable to attachment on the ground that it is ancestral, cannot be raised before the Collector in the course of proceedings which relate only to the amount of land which should be alienated and the period of alienation. The Act contemplates that in normal circumstances the liability of the land to attachment would be decided before the proceedings are transferred to the Collector. (*Tek Chand and Beckett, JJ.*) LAKHMI CHAND *v.* AULIA KHAN. **194 I.C. 634 = 14 R.L. 4 = 43 P.L.R. 246 = A.I.R. 1941 Lah. 225.**

——**S. 9**—*Objection regarding attachability of land raised after alienation—Power of executing Court to decide.*

The executing Court has no power to deal with an objection regarding attachability of the land after it has actually been alienated in full satisfaction of the decree. (*Tek Chand and Beckett, JJ.*) LAKHMI *v.* CHAND

PUNJ LAND REVENUE ACT (1903) S. 12,

AULIA KHAN. **194 I.C. 634 = 14 R.L. 4 = 43 P.L.R. 246 = A.I.R. 1941 Lah. 225.**

——**S. 12**—*Promissory note—Holder in due course being money lender—Obligation to prove consideration—Negotiable Instruments Act, S. 43.*

All that S. 12 of the Punjab Debtors' Protection Act can be taken to lay down is that when a question of consideration arises, the burden of proving consideration shall be on the money-lender. The Act has left untouched, S. 43 of the Negotiable Instruments Act, and a "holder in due course" of a promissory note, even though he be a "money lender" as defined in the Punjab Act, is entitled to recover from the maker of the note, without being under any obligation to prove that the promissory note had been executed by the maker in favour of the original obligee for valuable consideration. (*Tek Chand and Beckett, JJ.*) NARA *v.* BAQR KHAN. **43 P.L.R. 651.**

PUNJAB EXCISE ACT (I OF 1914), S 58—*N.-W. F. P. Government Notification that rules in Punjab Excise Manual shall apply to N.-W. F. P.—Rules, if* ultra vires.

There was a notification of the N.-W. F. P. Government that the rules in the Punjab Excise Manual shall apply to N.-W. F. Province until separate rules were framed by that Government. Accused who was convicted for violation of one of such rules contended that the rule was *ultra vires* as it had not been framed by the N. W. F. P. Government as required by S. 58.

Held, that in view of the Notification the rule was not *ultra vires*. (*Sooft, J.*) SHER SINGH *v.* EMPEROR. **A.I.R. 1941 Pesh. 102.**

PUNJAB KANUNGO SERVICE RULES (1935), R. 17 (b)—*Order dismissing Kanungo—Revision.*

Under R. 17 (*b*) of the Punjab Kanungo Service Rules, 1935, the power of revision may be exercised against an order dismissing a Kanungo only (1) on the ground of material irregularity in the proceedings of the enquiring or appellate authority; (2) on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by him when the order was passed against him; or (3) on account of some mistake or error apparent on the face of the record. (*Mitchell, F.C.*) NUR AHMAD *v.* EMPEROR. **20 Lah.L.T. 141.**

PUNJAB LAND RECORDS MANUAL Chap. III App. F—*Order of retirement for physical incapacity—Appeal—Practice.*

The rules in Appendix F of Chapter 3 of the Land Records Manual do not provide for an appeal against an order of retirement for physical incapacity as it is not technically a penalty, but as it is the duty of superior officers to see that the rules are properly administered and as an order of retirement not technically justified under the rule would amount to removal, it is in practice customary for Commissioners to entertain appeals against such orders. (*Mitchell, F.C.*) RAM SARUP *v* EMPEROR. **20 Lah.L.T. 140.**

PUNJAB LAND REVENUE ACT (XVII OF 1887) Ss. 14 and 118 (2)—*Appeal to Commissioner against appellate order of Collector.*

The limitation for an appeal to the Commissioner against an appellate order of the Collector under S. 118 (2) of Punjab Land Revenue Act is the usual period of 60 days laid down under S 14 of that Act. (*Mitchell F. C.*) MAHOMED SHAFI *v.* WASTI RAM. **20 Lah.L.T. 110.**

——**S. 13**—*Appeal—Dismissal for default—Procedure to be followed—C. P. Code, O. 41, Rr. 17 and 19.*

PUNJAB LAND REVENUE ACT (1887), S. 14.

In Land Revenue Rule 36, it is laid down that in regard to various matters including dismissing applications on default a revenue officer will be guided generally by the principles of procedure for the time being in force in Revenue Courts. The procedure in force in Revenue Courts is that laid down in C. P. Code and therefore the provisions of that Code are to be applied by analogy. If, therefore, the Commissioner dismisses for default an appeal arising out of partition proceedings, his order must be regarded as one passed under S. 41 R. 17, C. P. Code and the only course open to the appellant is an application under R. 19 to the appellate Court for the re-admission of the appeal. (*Mitchell, F.C.*) ALI MAHOMED *v.* FAZAL DAD. **20 Lah.L.T. 150.**

——**S. 14**—*Limitation for appeal—When begins to run.*

Under S. 14 of the Land Revenue Act, limitation for an appeal runs from the date of the order appealed against and not from the date on which the order was communicated to him. (*Mitchell, F.C.*) TAJ MAHOMED *v.* MUKH RAM. **20 Lah L.T. 115.**

——**S. 16**—*Concurrent findings—Interference.*

Where the findings of the Collector have been accepted on appeal by the Commissioner, it is not normally open to a revising authority to interfere. (*Mitchell, F.C.*) RAM SARUP *v.* EMPEROR. **20 Lah.L.T. 140.**

——**S. 16**—*Concurrent findings of fact—Revision.*

It is not normally open to a revising authority to examine the material on which the officers below have reached their concurrent findings of fact. But where the case is one of considerable importance and it appears to the Financial Commissioner desirable that he should examine the case on the merits, he can do so. (*Mitchell, F.C.*) LAL CHAND *v.* EMPFROR. **20 Lah.L T. 51.**

——**S. 16**—*Delay in filing petition—Effect of.*

A person who desires the exceptional powers of revision to be exercised in his favour must show due diligence in prosecuting his case, and a revision petition submitted after inordinate delay cannot be entertained. (*Mitchell, F.C.*) RAM SARUP *v.* EMPEROR. **20 Lah L T. 140.**

——**S. 16**—*Mutation proceedings—Interpretation of judgment of High Court—Duty of Financial Commissioner.*

The Financial Commissioner is ultimately responsible for the correctness of the revenue records, and when there has been an adjudication on the claims of the parties by the High Court, he has a particular responsibility to satisfy himself that the revenue records are brought into conformity with the decision of the High Court. It is, therefore, necessary for him in revision to examine the merits of the case in order to satisfy himself whether the revenue officers below have correctly interpreted the decision of the High Court. (*Alan Mitchell, F.C.*) IBRAHIM *v.* MADHO SINGH. **20 Lah L.T. 57.**

——**S. 16**—*Mutation proceedings—Question of disputed succession—Revision—Interference.*

In cases of judicial nature between parties to mutation proceedings such as the question of a disputed succession, the Financial Commissioner should only exercise his powers of revision in cases where such interference would be justified under S. 115, C. P. Code. (*Alan Mitchell, F. C.*) GOBIND SINGH *v.* VISHAMBAR PARSHAD SINGH. **20 Lah L.T. 39.**

——**S. 16**—*Non-appealable case—Powers of revision—When may be used.*

In normal circumstances the Financial Commissioner will be opposed on principle to entertaining in the guise of a revision petition what is to all intents and purposes an appeal in cases where the Legislature has decreed that no appeal shall lie. The wide powers of revision given to him, however, are clearly intended to be used in exceptional cases when failure to interfere at a preliminary stage would result in prolonged proceedings which must be infructuous in the long run. (*Alan Mitchell, F.C.*) AZIZ ULLAH *v.* GHULAMAN. **20 Lah.L.T. 54.**

PUNJ. LIMI. (CUSTOM) ACT (1920), Sch. Art. 1

——**S. 16**—*Order refusing to entertain appeal erroneously holding it to be time-barred—Revision.*

If the Commissioner rufuses to entertain an appeal on its merits on the erroneous ground that it is barred by limitation, he refuses to exercise the jurisdiction vested in him, and it is necessary for the Financial Commissioner to interfere with his order on revision. *Mitchell, F.C.*) MAHOMED SHAFI *v.* WASTI RAM. **20 Lah.L.T. 110.**

——**S. 16**—*Petitioner not resorting to prescribed procedure—Interference.*

The Financial Commissioner will not interfere on revision in a case where the petitioner has deliberately refrained from having recourse to the procedure prescribed. (*Mitchell, F.C.*) ALI MAHOMED *v.* FAZAL DAD. **20 Lah.L.T. 150.**

—— **Ss 115 and 158**—Collector disallowing partition—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1081. DOST MAHOMED *v.* HABIB SULTAN. **I.L.R. (1941) Lah. 531 = 191 I.C. 268 = 13 R.L. 274.**

——**S. 115**—Partition of part of land—If can be disallowed. *See* 1940 Dig., Col. 1081. DOST MAHOMED *v.* HABIB SULTAN. **I.L.R. (1941) Lah. 536 = 191 I.C. 268 = 13 R.L. 274.**

——**S. 117**—*Disposal of question as to title in summary manner—Jurisdiction of Civil Court.*

If a question as to title in property is raised before the Revenue Officer in the course of partition proceedings, that officer should either (*a*) constitute himself into a Civil Court and try the question in accordance with the procedure laid down in S. 117 (2) of the Land Revenue Act or (*b*) he should stay the partition proceedings and refer the parties to have this question also determined by a Civil Court. If, instead of adopting either of these courses, he, in a summary manner, expresses the opinion that the objectors have failed to establish their title, his finding cannot bar the cognisance of the question by Civil Courts (*Tek Chand and Din Mahomad, JJ.*) JAWALA SINGH *v.* JAGDISH SINGH. **195 I.C. 244 = 14 R.L. 49 = 43 P.L.R. 41 = A.I.R. 1941 Lah. 144.**

PUNJAB LIMITATION (CUSTOM) ACT (I OF 1920), Art. 2 and S. 7—*Alienation by widow—Suit for possession by collaterals—Limitation Act, Art. 141.*

Where a widow had alienated her husband's ancestral land, a suit for possession by the collaterals instituted on the widow's death is governed not by Art. 141 of the Limitation Act but by Art. 2 and S. 7 of the Punjab Act I of 1920, although there is no mention of the alienation in the plaint and the suit, on the face of it, is not for possession on the ground that the alienation is void under custom. (*Tek Chand and Beckett, JJ.*) BARKAT *v.* MAHOMED SHAFI. **43 P.L.R 181.**

——**Sch., Art. 1**—*Applicability—Suit against subsequent transferees—Limitation Act, Art. 120.*

Art. 1 of the Schedule to the Punjab Limitation (Custom) Act is obviously intended to apply only to suits brought by a reversioner against the original alienor and not to suits against the subsequent transferees. A suit against the subsequent transferees is governed by Art. 120 of the Limitation Act, and the time begins to run only from the date of the subsequent

PUNJAB MUNICIPAL ACT (1911), S. 61.

transfer. (*Beckett J.*) SANTI *v.* MURTU.
195 I.C. 592=14 R.L 82=43 P.L.R. 419=
A.I R. 1941 Lah. 304.

PUNJAB MUNICIPAL ACT (III OF 1911), S. 61 (3)—Tax on salt—Imposition of—Power of Committee and of administrator—Government of India Act, Ss. 100 and 140 (1)—Federal Legislative List, Item 47. *See* 1940 Dig., Col. 1081. DAULAT RAM *v.* MUNICIPAL COMMITTEE, LAHORE. 193 I.C. 72=13 R L 426=
4 F.L J. (H.C.) 47=A.I.R. 1941 Lah. 40.

——**S. 62 (12)**—Legality of tax—It can be questioned. *See* 1940 Dig, Col. 1082. DAULAT RAM *v.* MUNICIPAL COMMITTEE, LAHORE
193 I C. 72=13 R.L. 426=4 F L J. (H.C) 47=
A.I.R. 1941 Lah. 40.

——**S. 86**—Illegal assessment by committee—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1082. MUNICIPAL COMMITTEE, MONTGOMERY *v.* SANT SINGH. I.L R. (1940) Lah. 707.

——**S. 93**—*Fire Brigade—If agent of committee.*

The Fire Brigade maintained by the Peshawar Municipal Committee is not its agent. The Fire Brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Municipal Committee pays for it does not make it liable for its acts or omissions. (*Mir Ahmad J.*) MUNICIPAL COMMITTEE, PESHAWAR *v.* ABDULLA JAN. 193 I C. 593=
13 R Pesh. 62=A.I.R. 1941 Pesh. 20.

——**Ss. 121 (5) and 188**—*Conviction for using place for trade without licence—Legality—No bye-law for regulating such trade framed by Committee.*

A person can be convicted under S. 121 (5) of the Punjab Municipal Act for using a place without a licence for any one of the trades referred to in the section although no bye-law has been framed by the Municipal Committee for regulating such trades. S. 121 of the Act does not *per se* contemplate any bye-laws. S. 188, Cl. (*e*) (i) provides only for bye laws for the inspection and proper regulation of places already licensed under S. 121. It does not say that bye-laws are necessary to regulate the grant of a licence under S. 121. The power to impose conditions is given in S. 121 itself. Sub-S. (5) of this section creates the offence of using a place for certain trades without a licence; and it would be contrary to the plain wording of this section to hold that the penalty provided by sub S (5) can only be imposed if the Committee have enforced bye laws, for which the section does not provide and which the Committee are under no statutory obligation to frame. (*Sale, J.*) RAM LAL *v.* EMPEROR. 196 I.C. 225=14 R.L. 149=
42 Cr.L.J. 825=43 P L R. 341=
A.I.R. 1941 Lah. 305.

——**S. 169 (g)**—"*No longer required therefor*"—*Discretion of committee.*

The words "no longer required therefor" in S. 169 (*g*) of the Punjab Municipal Act are a qualification on the power conferred to lease by the Municipal Committee and are not a further power conferred on them to decide at their discretion whether a street is or is not needed any longer for the public. (*Dalip Singh and Bhide, JJ.*) JOHRI LAL *v.* DHANI RAM. 43 P.L.R. 667.

——**S. 193 (4)**—*Applicability—Scheme sanctioned under U. P. Town Improvement Act as applied to Delhi.*

S. 193 (4) refers to a town planning scheme sanctioned only under S. 192 and has no application to a scheme sanctioned by the trust under U. P. Town Improvement Act as applied to Delhi. (*Bhide, J.*) MAHOMED ISHAQ *v.* EMPEROR. 197 I.C. 67=
A.I.R. 1941 Lah. 431.

PUNJAB PURE FOOD ACT (1929) S. 13.

——**S. 195-A**—Contents of notice. *See* 1940 Dig. Col. 1083. SURAIN SINGH *v.* EMPEROR.
193 I C. 317=13 R.L. 454=
42 Cr.L.J. 389=A.I R. 1941 Lah. 90.

——**S 195-A**—Delivery of notice—Meaning of. *See* 1940 Dig., Col 1083. SURAIN SINGH *v.* EMPEROR. 193 I.C 317=13 R.L. 454=
42 Cr.L.J. 389=A.I R 1941 Lah. 90.

——**S. 195 A**—Notice signed "for" Executive Officer—Regularity—Presumption. *See* 1940 Dig , Col. 1083. SURAIN SINGH *v.* EMPEROR. 193 I.C. 317=
13 R.L 454=42 Cr.L J. 389=A.I.R. 1941 Lah. 90.

——**S 225**—Committee doing unauthorised Act—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1083. MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY.
192 I C. 729=13 R.L. 401.

——**Ss. 225 and 193**—*Orders of Committee—Jurisdiction of Civil Court.*

Civil Courts can interfere even with the discretionary orders of public bodies if those orders are an abuse of the power vested in them, or, in other words, are in any way unreasonable, arbitrary, capricious, oppressive or partial. S. 225 of the Punjab Municipal Act does not bar the jurisdiction of the Civil Court to entertain a suit for a perpetual injunction directing the Municipal Committee not to object to the construction of a house in accordance with the plan submitted to it on the allegations that the Committee's order rejecting the plan is *ultra vires*, illegal and capricious. (*Dalip Singh and Din Mahomed, JJ.*) ADMINISTRATOR, LAHORE MUNICIPALITY *v.* MUNIRUDDIN.
I L R. (1941) Lah. 278=196 I.C. 70=
14 R.L. 117=43 P.L.R. 18=A.I.R. 1941 Lah. 200.

——**S. 225**—Suit against Committee involving question of title—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1083. MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY. 192 I C 729=13 R L. 401.

—— **S 228**—*Sanction given without mentioning any section but after reciting facts constituting offence—Section, if complied with.*

The sanction of the Municipal Committee for a prosecution was given in general terms without mentioning any section but after reciting the facts which the Committee considered to constitute an offence and which were found to constitute an offence under S. 172. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts.

Held, that in the circumstances the Committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them and therefore the provisions of S. 228 were sufficiently complied with. (*Almond, J.C.*) DOST MOHAMMAD *v.* HARIPUR EAZARA MUNICIPALITY. 193 I C. 365=
13 R.Pesh. 60=42 Cr.L.J. 420=
A.I.R. 1941 Pesh 9.

——**S. 232**—Resolution of Committee acted upon—Subsequent suspension—Legality. *See* 1940 Dig., Col. 1084. MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY.
192 I.C. 729=13 R.L. 401.

PUNJAB PRE-EMPTION ACT (I OF 1913). S. 15 (c)—Owners of estate—Members of joint Hindu family whose names are not recorded in revenue papers. *See* 1940 Dig., Col. 1085. KARTAR SINGH *v* COURT OF WARDS. I.L.R. (1940) Lah. 673=191 I.C. 174=
13 R L. 265.

PUNJAB PURE FOOD ACT (VIII OF 1929), S. 13—*Two samples taken at same time—Two convictions—Permissibility.*

PUNJAB PURE FOOD ACT (1929), S. 1 .

There cannot be two prosecutions and two convictions based on two samples of adulterated food taken from two tins at the same time. (*Skemp, J.*) SAT PAL *v.* LAHORE MUNICIPALITY. **194 I.C. 160 = 13 R.L. 519 = 42 Cr.L J. 523 = 43 P.L.R. 93 = A.I.R 1941 Lah. 158.**

——**S. 13 (1) (a)**—*Conviction under—Proof required.*

For a conviction under S. 13 (1) (*a*) of the Pure Food Act, it is necessary to prove *inter alia* that the adulterated food was *sold* and not merely exposed for sale. (*Skemp, J.*) SAT PAL *v.* LAHORE MUNICIPALITY. **194 I.C 160 = 13 R.L 519 = 42 Cr.L.J. 523 = 43 P.L.R. 93 = A.I.R. 1941 Lah. 158.**

PUNJAB REGISTRATION OF MONEY-LENDERS ACT (III OF 1938), S. 2 (8)—*"Loan"—Advance without interest.*

In order to be a "loan", it is essential that the advance should be "at interest". (*Tek Chand, J.*) GANDU MAL CHARANJI LAL *v.* MATU. **43 P.L.R. 670**

——**S. 3**—*Applicability—Conditions.*

In order to make S. 3 of Act III of 1938 applicable it is essential (1) that the plaintiff is a money-lender and (2) that the suit is for recovery of a "loan" as defined in S. 2 (8). (*Tek Chand, J.*) GANDU MAL CHARANJI LAL *v.* MATU. **43 P.L.R. 670.**

PUNJAB REGULATION OF ACCOUNTS ACT (I OF 1930), S. 2 (9)—Definition of trade—Scope. *See* 1940 Dig., Col. 1085. ATMA RAM *v.* UMAR ALI. **I.L.R. (1941) Lah. 39.**

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), S 5—*Interest on secured debt—Power of Court to reduce below 12 per cent.*

The Court has power to reduce the interest on secured debt below 12 per cent. per annum, if the circumstances of the case justify a lower rate being allowed. (*Bhide, J.*) JIWAN DAS *v.* RAKHMAT DIN. **195 I.C. 157 = 14 R.L. 37 = 43 P.L R 88 = A I.R. 1941 Lah. 212.**

——**Ss. 5 and 6**—*Preliminary mortgage decree passed before Amending Act of 1940—Interest, if can be reduced so as to conform to latter Act—Usurious Loans Act, S. 3 (1), proviso (ii).*

A preliminary mortgage decree passed in conformity with S. 5 of the Punjab Relief of Indebtedness Act, 1934, before the Amending Act XII of 1940 came into force, cannot be modified so as to reduce the rate of interest to the maximum permissible under the Amending Act. It cannot be argued that as a final decree in the mortgage suit has not yet been passed the suit is still pending within the meaning of S.6 of the Act and, therefore, the provisions of S. 5 of the Act which has further amended S. 3 of the Usurious Loans Act, reducing the maximum rate of interest, apply. This argument overlooks proviso (*ii*) to sub-S. (1) of S. 3 of the Usurious Loans Act which prohibits the Court from doing anything which affects any decree of a Court. This proviso in the Usurious Loans Act has not been repealed by the Punjab Relief of Indebtedness Act of 1934 or the Amending Act of 1940. It is still a part of that Act and it must be given effect to. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* RAJESHWAR. **43 P.L.R. 457 = A.I.R 1941 Lah. 364.**

——**S. 7**—Usufructuary mortgage—If creates "debt". *See* 1940 Dig. Col. 1085. LACHHMAN SINGH *v.* MATHA SINGH. **I.L.R. (1941) Lah. 71 = 191 I.C. 583 = 13 R L. 300.**

——**S. 7 (2)**—Order of Board—Finality—Extent. *See* 1940 Dig., Col. 1086. LACHHMAN SINGH *v.* NATHA SINGH. **I L R (1941) Lah. 71 = 191 I.C. 583 = 13 R.L. 300.**

PUNJAB REL. OF INDEB. ACT (1934), S. 30.

——**S. 13 (2)**—Order of Board *ultra vires*—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1086. LACHHMAN SINGH *v.* NATHA SINGH. **I.L.R. (1941) Lah. 71 = 191 I.C. 583 = 13 R.L. 300.**

——**Ss. 14 and 15-A**—*Question of enforceability of decree—Determination of—If determines question of debt.*

The determination of the question whether the decree is enforceable or not, cannot determine the question of the existence of the debt. The fact that the execution of a decree is barred does not mean that the debt has ceased to exist. It means that the remedy to enforce the decree is barred. (*Dalip Singh, Monroe and Sale, JJ.*) K. L GAUBA *v.* PUNJAB COTTON PRESS CO., LTD. **I.L.R. (1941) Lah 524. 43 P.L.R. 383 = A.I.R. 1941 Lah. 234 (F.B.).**

——**Ss 21 and 13 (2)**—Order of Board under S. 13 (2) *ultra vires*—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1086. GHULAM AKBAR SHAH *v.* RAM CHAND. **192 I C. 702 = 13 R.L. 399 = A.I.R. 1941 Lah. 8.**

——**S 25**—*Jurisdiction of Civil Court—Enquiry into nature and value of debts.*

On receipt of an 'intimation' under S. 25 of the Punjab Relief of Indebtedness Act to stay proceedings it is open to the Civil Court to consider the nature of the debts mentioned in the application to the Debt Conciliation Board and whether their value exceeds the pecuniary jurisdiction of the Board. The question whether the proceedings should or should not be suspended is not a mere question of procedure but also involves substantive rights and therefore the Court is bound to decide immediately whether the intimation received comes from a body which is acting within the jurisdiction conferred on it by statute or is from a body which is not empowered by the statute to send the intimation. If the Court finds that the debts exceed the pecuniary jurisdiction of the Debt Conciliation Board or the nature of the debts is such as to be outside the jurisdiction of the Debt Conciliation Board then the intimation sent by such a Board about the existence of an application concerning such debts is not an intimation in the eye of the law at all and therefore the Civil Court is bound to ignore it on the short ground that no intimation has been received by it. I.L.R. (1938) Lah. 720, overruled. (*Dalip Singh, Monroe and Sale, JJ.*) K. L. GAUBA *v.* PUNJAB COTTON PRESS CO. LTD. **I.L.R. (1941) Lah 524 = 43 P.L R. 383 = A.I R. 1941 Lah. 234 (F.B.).**

——**S 26**—Decision of Board as to competency of application—If affects question of extension of time. *See* 1940 Dig, Col. 1086. SHANKARDASS *v.* LADHARAM GANESH DAS. **I L.R. (1941) Lah. 647 = 191 I.C. 164 = 13 R.L. 266.**

——**S. 30 (as amended)**—*Application under—Nature of—Court-fee payable.*

S. 30 of the Punjab Relief of Indebtedness Act, as amended by Act XII of 1940, gives a party the right to move the Court by an application to have a decree set aside, if certain conditions are shown to exist. This application is not one for review on which *ad valorem* Court-fee is payable; it is a miscellaneous application on which a fee of Rs. 2 only is required to be paid. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* RAJESHWAR. **43 P.L R. 457 = A.I.R 1941 Lah. 364.**

——**(as amended by Act XII of 1940), S. 30**—*Application under—Proof of capacity or status of applicant—If need be apparent on record.*

In an application under S. 30 it is not necessary that proof of the capacity or status of the applicant to make

PUNJAB REL. OF INDEB. ACT (1934), S. 35.

the application should be apparent on the application or on the record of the case itself. If his capacity to make the application is challenged by the opposite party, an issue should be framed on the point, and the parties given opportunity to produce evidence. (*Tek Chand, Dalip Singh and Din Mohammad, JJ.*) JANKI NATH *v.* BISHAN SINGH. **A.I.R. 1941 Lah. 380 (F.B.)**

——**S. 35** —*House let out—Length of period—Onus.*

The house of an agriculturist judgment-debtor is exempt under S. 35 unless it has been let out on rent for a period of a year or more. The mere negative form of S. 35 does not shift the onus of proving the length of occupation from the judgment-debtor. Especially when it is proved that the property had been let on rent the period for which it had been rented being a matter specifically within the knowledge of the judgment-debtor, the onus lies on him to show the length of the period. (*Tek Chand and Dalip Singh, JJ.*) BHOLA SINGH *v.* RAMAN MAL. **193 I.C. 312=13 R.L. 446= 43 P.L.R 352=A.I.R. 1941 Lah 28**

PUNJAB RESTITUTION OF MORTGAGED LANDS ACT (IV OF 1938)—*If* ultra vires

The Punjab Restitution of Mortgaged Lands Act is *intra vires* the Provincial Legislature (*Dalip Singh, Monroe and Sale, JJ.*) MEGH RAJ *v* ALLAH RAKHIA. **194 I C. 413=13 R.L. 536=4 F.L J.(H.C.) 99= 43 P.L.R. 226=A.I.R. 1941 Lah. 177 (F B.).**

——**S. 12**—*If* ultra vires—*Government of India Act, Sch. VII, Provincial List, Item* 21.

The restriction on the jurisdiction and powers of Civil Courts provided by S. 12 of the Restitution of Mortgaged Lands Act is within the authority of the Provincial Legislature. The subject-matter of the Act falls within the expression used in Item 21 of the Provincial List in Sch. VII of the Government of India Act, "Land, that is to say, rights in or over land". (*Dalip Singh, Monroe and Sale, JJ*) MEGH RAJ *v.* ALLAH RAKHIA.1 **94 I.C. 413=13 R.L. 536= 4 F.L.J. (H.C.) 99=43 P.L.R. 226= A.I.R. 1941 Lah. 177 (F.B.).**

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925), S. 8—*Scope of enquiry.*

In proceedings on a petition under S. 8 of the Sikh Gurdwaras Act, all that the Tribunal has to decide is whether the institution is a Sikh Gurdwara as defined in the Act. It has at that stage only to determine the nature and character of the institution and not to adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the consolidated list, inclusive of the Gurdwara building. The remarks of the Tribunal in its judgment on the petition defining the extent of the Gurdwara building have no legal effect. (*Tek Chand and Din Mohammad, JJ.*) AMAR JIT SINGH *v* COMMISSIONER OF MANAGEMENT FOR GURDWARA THAMJI SAHIB PANCHVIN PADSHAHI. **194 I.C. 883=14 R.L. 16=43 P.L.R. 55= A.I.R. 1941 Lah. 161.**

——**Ss. 12, 7, 10 and 14 (1)**—Jurisdiction of tribunal—Scope of—Claim under S. 7. *See* 1940 Dig., Col. 1087. GURDIT SINGH *v.* COMMITTEE OF MANAGEMENT, GURDWARA NAVIN PADSHAHI. **I.L.R. (1940) Lah. 649.**

——**S. 25 A**—*Petition in respect of property under Court of Wards—Notice to it—Necessity for—Punjab Court of Wards Act*, S. 19.

A petition under S. 25-A of the Sikh Gurdwaras Act is triable as a suit, and if under S. 19 of the Court of Wards Act notice is necessary for institution of a suit for the same relief against the Court of Wards, it would be equally necessary for institution of proceedings under S. 25-A. (*Tek Chand and Din Mohammad, JJ.*) AMAR JIT SINGH *v* COMMISSIONER OF MANAGEMENT FOR GURDWARA THAMJI SAHIB PANCHVIN PADSHAHI. **194 I.C. 883=14 R.L. 16=43 P.L.R. 55= A.I.R. 1941 Lah. 161.**

PUNJAB TENANCY ACT (1887), S. 50-A.

AMAR JIT SINGH *v.* COMMISSIONER OF MANAGEMENT FOR GURDWARA THAMJI SAHIB PANCHVIN PADSHAHI. **194 I.C. 883=14 R L 16= 43 P L.R. 55=A.I.R. 1941 Lah. 161.**

——**S. 99**—If directory. *See* 1940 Dig., Col. 1088. GURDIT SINGH *v.* COMMITTEE OF MANAGEMENT, GURDWARA NAVIN PADSHAHI. **I.L R (1940) Lah. 649.**

PUNJAB SUBORDINATE SERVICES—*Dismissal of sufedposh with retrospective effect—Legality of order.*

An order of Deputy Commissioner dismissing a sufedposh with effect from three years previously is wrong. It takes effect from the date of the order. (*Garbett, F.C.*) AMARJIT SINGH *v.* INDAR SINGH. **20 Lah.L.T. 8.**

——*Seniority—How determined.*

Seniority in service is not determined by length of service. It counts from the date of confirmation in the superior grade. (*Garbett, F.C.*) GANDA SINGH *v.* NARAIN SINGH. **20 Lah L.T. 10.**

PUNJAB TENANCY ACT (XVI OF 1887), Ss. 22 and 24—*Enhancement of rent—Rule and rate as to.*

Without any regard to a possible increase in productivity a Revenue Court with due regard to the restriction imposed by S. 24 (3) of the Tenancy Act is justified at any time, other than a time of universal agricultural calamity, in granting an enhancement of rent amounting to an increase of two annas per rupee of the land revenue over the rent paid prior to the institution of the suit in the case of tenants under S. 5 and of two, three or four annas per rupee in the case of tenants under Ss. 6 and 8, provided always that the rents after such enhancement are not greatly in excess of rents paid by other tenants of similar status in the neighbourhood. (*Alan Mitchell, F.C.*) HARSARUP *v.* BHARTU. **20 Lah L.T. 161.**

——**S. 22**—*Enhancement of rent—Rule as to.*

If the rents paid by the various classes of occupancy tenants fall short of the standards laid down in S. 22 of the Tenancy Act, enhancement should be allowed almost as a matter of course without regard to any increase in productivity or otherwise, provided that the enhancement allowed is granted by gradual stages. In the case of tenants under Ss. 6 and 8 the normal rate of increase to be allowed should be four annas per rupee of the land revenue. 20 L.L.T. 161, Ref. to. (*Alan Mitchell, F.C.*) MATHRA DAS *v.* COURT OF WARDS, KARTARPUR. **20 Lah L.T. 180.**

——**S. 38**—*Submergence of land—Right of tenant—If lost.*

The general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. (*Mitchell, F.C.*) RIRKU *v.* JASWANT SINGH. **20 Lah.L.T. 65.**

——**S. 50**—*Suit for possession in Civil Court—Limitation.*

If a tenant is dispossessed, he can bring a suit in a Revenue Court under S. 50 of the Tenancy Act within one year from the date of dispossession. If he fails to do so, his only remedy is to institute a suit for possession in a Civil Court. The limitation for such a suit is 12 years from the date of dispossession. (*Mitchell, F. C.*) RIRKU *v* JASWANT SINGH. **20 Lah.L.T. 65.**

——**S. 50-A**—*Scope—Suit by tenant under title other than that of tenant—If barred.*

The meaning of S. 50-A of the Punjab Tenancy Act is that a disappointed tenant whose ejectment has been ordered by a Revenue Court under S. 45 or whose suit has been dismissed under S. 50, cannot institute a suit in a Civil Court to contest his liability or to recover possession as a tenant or to recover occupancy rights or to recover compensation. In other words, the section bars

PUNJAB TENANCY ACT (1887), S. 58.

a person from re-agitating in a Civil Court the question of his status as a tenant which he has lost by the action of the Revenue Court; but it does not prevent the person so ejected from instituting a suit for recovery of possession by establishing a title other than that of a tenant, (*e.g.*) by adverse possession or, as in the present case, as a mortgagee with possession. (*Dalip Singh, Monroe and Sale, JJ.*) ILAM DIN *v.* MANGAL SINGH.

I.L.R. (1941) Lah. 499 = 194 I.C. 852 = 14 R.L. 12 = 43 P.L.R. 233 = A.I.R. 1941 Lah. 189 (F.B.).

——**S. 58 (2)**—*Suit for rent—Sub-tenants, if can be impleaded defendants with occupancy tenants.*

Under S. 58 (2) of the Tenancy Act, sub-tenants under occupancy tenants are, so far as regards the landlord, subject jointly with the occupancy tenants to all the liabilities of a tenant. It is, therefore, open to the landlord to implead the sub-tenants as defendants in a suit for rent along with the occupancy tenants. (*Mitchell, F.C.*) RAHMAT-ULLAH *v.* KARIMU. **20 Lah.L.T. 145.**

——**S. 59**—*Adopted son—Right to succeed.*

An adopted son can only succeed to occupancy rights left by his adoptive father if the adoption has been a formal adoption under Hindu Law and not merely the customary appointment of an heir. (*Mitchell, F. C.*) RIRKU *v.* JASWANT SINGH. **20 Lah.L.T. 65.**

——**Ss 59 (3) and 60**—Alienation by widow—If void or voidable—Right of reversioners to contest alienation. *See* 1940 Dig., Col. 1089. LABH SINGH *v.* HASSU. **I.L.R. (1941) Lah. 212.**

——**S. 77**—*Jurisdiction of Revenue Court—Suit to declare partition proceedings void on account of fraud.*

The Revenue Court has no jurisdiction to entertain a suit praying that partition proceedings be declared void on account of fraud and the whole partition proceedings annulled. The jurisdiction of Revenue Courts is not governed by general principles applicable to Civil Courts but is created by and solely governed by the provisions of S. 77 of the Tenancy Act. If a suit does not fall within any of the descriptions in that section a Revenue Court has no jurisdiction to entertain it, save in the exceptional circumstances dealt with in proviso (1) to S. 77 (3). (*Alan Mitchell, F.C.*) RURA *v.* RAMZAN. **20 Lah.L.T. 173.**

——**S. 77 (3)**—*Jurisdiction of Revenue Court—Suit seeking decision as to liability to pay 'haq.'*

When a suit is clearly one which is not brought to dispute the question as to whether a particular 'haq' is or is not a village cess but is one which is brought with a view to having a decision given as to whether the plaintiff individually is liable to pay that 'haq,' it is one which is triable exclusively by a Revenue Court. (*Almond, J.C. and Mir Ahmad, J.*) QAMAR DIN *v.* ABDUL HAMID KHAN. **195 I.C. 540 = 14 R. Pesh. 17 = A.I.R. 1941 Pesh. 62.**

——**S. 77 (3) (j)**—*Person seeking declaration as to his liability to village cess—If can sue in Revenue Court.*

It is doubtful whether a person can bring a suit for declaration in the Revenue Court, to the effect that he is not liable to a village cess. It appears to be contemplated by the Legislature that the plaintiff's remedy in such a case is limited to a defence in an action brought by the village proprietor who is suing for such cess. (*Almond, J.C. and Mir Ahmad, J.*) QAMAR DIN *v.* ABDUL HAMID KHAN. **195 I.C. 540 = 14 R. Pesh. 17 = A.I.R. 1941 Pesh. 62.**

——**S. 77 (3), Proviso**—*Plaint returned by Civil Court for presentation to Revenue Court—Nature of suit—If altered—Suit for possession—Limitation.*

PUNJ. VIL. PANCHAYAT ACT (1922), S. 30.

If a plaint is returned by a Civil Court under the proviso to S. 77 (3) of the Punjab Tenancy Act for presentation to the Collector for decision by a Revenue Court, the nature of the suit remains unchanged, but under this special provision of the law the Revenue Court has to decide a civil suit. If it is a suit for possession, the limitation is 12 years under Art. 142 or 144 of the Limitation Act. (*Mitchell, F.C.*) RIRKU *v.* JASWANT SINGH. **20 Lah L.T. 65.**

——**S. 80, Proviso (ii)**—*Appeal partially successful—Further appeal against confirmed part—If lies.*

A partially successful appellant in the Collector's Court is not entitled to institute a further appeal in the Court of the Commissioner against that portion of the Collector's order which confirmed on appeal the decision reached by the trial Court. (*Mitchell, F. C.*) SAT PARKASH *v.* NAWAB. **20 Lah L.T. 76.**

——**S. 84**—*Ground for revision—Appeal decided on ground of limitation without examining law.*

If an appellate Court decides an appeal on the ground of limitation without basing its finding on any examination of the law of limitation governing the case, it commits a material irregularity in the exercise of its jurisdiction calling for interference in revision. (*Mitchell, F.C.*) RIRKU *v.* JASWANT SINGH. **20 Lah.L.T. 65.**

——**S. 84**—*Order of Revenue Officer contrary to decree of Civil Court—Revision—Competency.*

Where the order of the Revenue Court is based on the presumption of correctness of the entries in the revenue records in spite of the decree of the Civil Court to the contrary, it is a material irregularity and an illegal exercise of the jurisdiction of the Revenue Officer, who is bound by law to respect the orders of the Civil Courts, which alone are competent to decide finally questions of title. A revision petition against the order is, therefore, competent. (*Garbett, F.C.*) HAKIM *v.* MOHAMMAD BAKHSH. **20 Lah.L T. 17.**

——**S. 84**—*Powers of revision—If confined to points on which Commissioner has referred case.*

When the Financial Commissioner admits a case on revision, he has power to consider and revise the whole of the proceedings of the lower Courts. He is entitled to consider not only the points on which the Commissioner has referred the case but also other possible demerits of the proceedings. (*Garbett, F.C.*) MULA *v.* SOHAN SINGH. **20 Lah.L.T. 1.**

——**S. 111**—*Agreement limited to term of settlement—Duration of.*

An agreement under S. 111 of the Punjab Tenancy Act expressly limited to the term of a settlement, cannot be held to persist through a later settlement in which the agreement is not renewed. (*Tek Chand and Beckett, JJ.*) CHATTER SINGH *v.* MST. SHUGNI.

195 I.C. 519 = 14 R.L. 75 = 43 P.L.R. 188 = A.I.R. 1941 Lah. 239.

PUNJAB VILLAGE PANCHAYAT ACT (III OF 1922), Ss. 30 and 31—*Orders not passed under Ch. IV—Revision—Cr. P. Code, Ss.* 439 *and* 561-*A—Government of India Act, S.* 224 (2).

Since S. 224 (2), Government of India Act, bars the High Court from questioning a judgment, provided it is by an inferior Court and provided it is "not otherwise subject to appeal or revision," and since the panchayat acting in the exercise of the criminal judicial powers under S. 22 is a Court, if the Panchayat acts within the jurisdiction conferred upon it by Ch. IV the High Court would have no power of interference. There is however no finality in the case of orders which are not passed under Ch. IV and consequently Cr. P. Code applies and the High Court can interfere in revision with such orders under Ss. 439 and 561-A, Cr. P. Code,

RAILWAYS.

Where the Panchayat arrogates to keep a jurisdiction, contrary to the provisions of the Panchayat Act, and the case tried by it does not relate to an offence under S. 379 read with S. 426, Penal Code, but is one which falls under S. 406, Penal Code, it cannot be said that the proceedings were under Ch. IV and consequently Ss. 30 and 31 would not bar the jurisdiction of the High Court to interfere under Ss. 439 and 561-A, Cr. P. Code. (*Young, C.J. and Sale, J.*) SARBULAND *v.* EMPEROR.

I.L.R. (1941) Lah. 121 = 192 I.C. 128 = 42 Cr.L.J. 248 = 13 R.L. 365 = A.I.R. 1941 Lah. 5.

RAILWAYS — *Criminal prosecution—Liability to—State Railway—Prosecution of general manager in representative capacity — Legality — Sanction under S. 197, Cr. P. Code and S. 270, Government of India Act—Whether necessary.*

There would ordinarily be no difficulty in prosecuting a railway company in a suitable case in respect of a breach of a statutory provision for which a penalty had been povided, and a State Railway does not occupy a more favourable position with reference to such matters. The general manager of a state railway is a legal entity in the same degree as a railway company is such an entity and it would be legal to prosecute him in his representative capacity in suitable cases. To such a prosecution no sanction under S. 197, Cr. P. Code, and S. 270 of the Government of India Act is necessary, as it is not sought to enforce against him personally any criminal liability which he has incurred in his personal capacity but merely to prosecute the railway administration for breach of statutory provision. (*Edgley, J.*) MARRIOTT *v.* MUNICIPALITY OF HOWRAH.

I.L.R. (1941) 1 Cal. 345 = 196 I.C. 394 = 42 Cr.L.J. 855 = 45 C.W.N. 347 = A.I.R. 1941 Cal. 319.

RAILWAYS ACT (IX OF 1890), S. 3 (7)— *Cabinman—If railway servant.*

A cabinman is a railway servant within the meaning of S. 3 (7). (*Davis, C. J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR.

195 I.C 883 = 14 R.S. 47 = 42 Cr.L.J. 786 = A.I.R. 1941 Sind 117.

——**S. 72**—*Misconduct—Risk Note Form H—Meaning of—What Court has to do in such cases—Burden of proof.*

"Improper conduct" would be perhaps the simplest and the most non-committal definition of the word 'misconduct' in Risk Note Form H. In such cases the Court has to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the Railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. Where packets of yarn delivered to the company for transit are found soiled at the place of destination, if it is established that the railway employees in defiance of the ordinary practice, placed tins of molasses in a wagon which contained the plaintiff's packets or alternatively placed the plaintiff's packets in a wagon which contained tins of molasses, it must be held that they acted recklessly knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves indifferent to such results. It is for the plaintiff to prove all the above which would go to constitute misconduct, and where he fails to elicit from witnesses for the defence, what was the act or what were the acts of the railway employees which resulted in the damage, he cannot get any relief at the hands of the Court. (*Collister, J.*) WAJID ALI MAHOMED RAFIQ *v.* B. AND N. W. RY. CO.

I.L.R. (1941) All. 160 = 194 I.C. 113 = 13 R.A. 472 = 1941 O.W.N. 234 =

RANBIR PENAL CODE, S. 240.

1941 O.A. (Supp.) 279 = 1941 A.L.W. 167 = 1941 A.W.R. (H.C.) 5 = 1941 A.L.J. 29 = A.I.R. 1941 All. 164.

——**S. 77**—*Suit for compensation against railway—Preferring of claim to railway administration—If part of cause of action.*

"Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. Under S. 77 of the Railways Act, a person is not entitled to compensation for loss from the railway unless he has preferred his claim in writing to the agent of the Railway at its head office. Consequently this is a fact which it is necessary to prove in a suit against the railway for compensation and is part of the cause of action for the suit. (*Lort Williams, J.*) GOLAB RAI PALIRAM *v.* SECRETARY OF STATE.

I.L.R. (1941) 2 Cal. 160.

——**S 132**—*Construction—What should be proved.*

S. 132 does not require that both the name and address should be believed to be incorrect but either the name or address. Nor does the section require that either the name or the address should be in fact incorrect. (*Davis, C.J. and Tyabji, J.*) MOTIRAM *v.* EMPEROR.

195 I.C. 883 = 14 R S. 47 = 42 Cr.L.J. 786 = A.I.R. 1941 Sind 117.

——**S. 135**—Notification under—If imposes liability to pay tax. *See* 1940 Dig., Col. 1091. CORPORATION OF CALCUTTA *v.* BENGAL DOOARS RY., CO.

191 I C. 184 = 13 R.C. 225 = 42 Cr.L.J. 100.

——**S. 137 (3) (b)**—*'Engage in trade'—Money-lending—Isolated investment on security of property—If amounts to.*

An isolated investment made on the security of property by a Railway employee does not amount to engaging in trade' under S. 137 (3) (*b*), Railways Act. There must be more than occasional disconnected loans. There must be a business of money-lending. (*Ismail, J.*) RAM LAL *v.* RAM DIN KILEDAR.

195 I.C. 695 = 14 R.A. 75 = 1941 O.A. (Supp.) 519 = 1941 A.L.W. 791 = 1941 A.L.J. 370 = 1941 A.W.R. (H.C.) 224 = A.I.R. 1941 All. 318.

RANBIR PENAL CODE, S. 75—*Charge under, added at time of judgment—Irregularity.*

The addition of a further charge under S. 75 of the Ranbir Penal Code at the time when the judgment is delivered is irregular. No addition should be made in the charge at the time when the judgment is delivered. (*Abdul Qayoom, C.J.*) ISMAIL BUT *v.* STATE.

43 P.L.R. J. & K. 82.

——**Ss. 149 and 325**—*Charge under S. 149—Conviction under S. 325—Legality.*

Where the charge of rioting fails as well as charges under S. 149, Ranbir Penal Code, the accused cannot be convicted under S. 325 unless he is specially charged with that offence. (*Rachhpal Singh, C.J.*) MUSTFA *v.* STATE.

43 P.L.R. J. & K. 269.

——**S. 149**—*Conviction under — Offence committed in prosecution of common object.*

Where the accused persons went to the land in dispute with the common object of turning out the complainant and his party from it and an offence under S. 326 of the Ranbir Penal Code was committed in prosecution of that common object, all of them are liable to be convicted under S. 326/149 of that Code. (*Abdul Qayoom, C.J.*) MUSLIM *v.* STATE.

43 P.L.R. J. & K. 48.

——**S. 240**—*Offence under—Mental condition of accused—Proof of.*

The mental condition of a person accused of an offence under S. 240 of the Ranbir Penal Code can only be judged by his conduct and by the attending circum-

RANBIR PENAL CODE, S. 300.

stances. (*Abdul Qayoom, C.J.*) BHAGWAN DAS *v.* STATE. 43 P.L.R. J. & K. 77.

——**S. 300, Exception I**—*Grave and sudden provocation—Plea, when available.*

The defence of grave and sudden provocation is only available to those accused who commit a crime when they have lost all control over themselves because of sudden and grave provocation. A plea of this kind is not open to any man who takes into his head to kill his wife over a very ordinary difference between himself and his wife. If a person suspects his wife of being of loose character and has plenty of time to think over that matter for months and months, it is no defence for him to say that as he had been suspecting his wife for a long time of being faithless to him so he was justified in killing her. Such a case would not come within the definition of a grave and sudden provocation. (*Rachhpal Singh, C.J. and J.N. Wazir, J.*) FEROZ KHAN *v.* STATE. 43 P.L.R. J. & K. 1.

——**S. 302**—*Proof of offence—Evidence of absconding—Value of.*

No satisfactory conclusion can be drawn from the fact of the accused having run away from the village after the occurrence. It is very dangerous to find support for a conviction from this circumstance. There might be a hundred and one reasons for the accused to run away. If a person finds that a serious crime has been committed and that he is suspected of that crime it is not difficult to see that he will lose nerve and his first instinct will be to run away. (*Rachhpal Singh, C. J. and Kazi Masud Hasan, J.*) RAMUN *v.* STATE. 43 P.L.R. J. & K. 114.

——**S. 304, Part II**—*Conviction under — When justified.*

Where the accused caused the death of the deceased by hurling a stone towards him which hit him on the head and caused a fracture of the skull, he can be properly convicted under S. 304, Part II of the Ranbir Penal Code. (*Abdul Qayoom, C.J.*) HABIB ULLAH *v.* STATE. 43 P.L.R. J. & K. 79.

——**S. 304, Part II**—*Offence under—Injuries on head—Death due to complications resulting therefrom.*

If a person causes serious injuries on the head of another person and the latter subsequently dies of complications due to the head injuries, the former is responsible for the death of the latter. (*Abdul Qayoom, C.J. and Kichlu, J.*) LAL *v.* STATE. 43 P.L.R. J. & K. 90.

——**S. 366**—*Offence under—Forcibly taking divorced wife.*

Once a man divorces a woman, he has no further claim upon her and he will be guilty of abduction if he forcibly takes her away while she is the wife of another person. (*Abdul Qayoom, C.J.*) RAHMATULLAH *v.* STATE. 43 P.L.R. J. & K. 32

RANGOON CITY MUNICIPAL ACT (VI OF 1922), S. 12—If impliedly repeals S. 103-A, Presidency Towns Insolvency Act—Effect of combined construction of the two sections. *See* PRESIDENCY TOWNS INSOLVENCY ACT (RANGOON), S. 103-A AND RANGOON CITY MUNICIPAL ACT, S. 12. 1941 Rang.L.R. 615.

——**S. 12 (b)**—*Public service—Meaning—President of Municipal Committee—If employed in public service—His removal, on ground of danger to public peace—If amounts to a declaration of being unfit for employment in public service.*

A relationship of employer and employee is necessarily intended by the words used in S. 12 (*b*) of the Rangoon City Municipal Act which contemplates an employment from which a person is capable of being dismissed. Hence a President of a Municipal Committee in Burma,

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is not one in 'the public service' in the sense in which the words are used in S. 12 (*b*) of Municipal Act. When such a person is removed on the ground that his continuance in office is dangerous to public peace, it does not amount either to his being declared unfit for employment in or being dismissed from, the public service, within the meaning of S. 12 (*b*) of the Rangoon City Municipal Act. (*Sharpe, J.*) WILCOX *v.* PATEL. 1941 Rang.L.R. 638.

——**S. 15 (1)**—*'Corruption'—Meaning—Holding out as Barrister after being disbarred—If amounts to corruption.*

The word 'corruption' in S. 15 (1) of the Rangoon City Municipal Act means something different from and additional to bribery, personation, treating and undue influence. It means the doing of an act, with a motive or intention by means of it to produce an effect upon the election, not going so far as bribery, but with the motive of influencing the election. It was held that a person who posed himself as Barrister after being disbarred for misconduct with a view to influence his election as a Muncipal Councillor was guilty of 'corruption' within the meaning of S. 15 (1). (*Sharpe, J.*) WILCOX *v.* PATEL. 1941 Rang.L.R. 638.

——**S. 15 (1) and (3)**—*Construction—'Any election'.*

The words 'any election' in S. 15 of the Rangoon City Municipal Act are intended to cover both the case of a whole election being invalid and also the case of the election of one of two or more candidates being invalid in a constituency returning two or more candidates. (*Sharpe, J.*) WILCOX *v.* PATEL. 1941 Rang. L.R. 638

——**S. 194**—*Applicability — Condition precedent—Existence of arrears—Jurisdiction of Civil Court to decide.*

Before S. 194 comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court has jurisdiction to enquire whether a person is in arrear with payment of a municipal tax, for if he is not, the Land Revenue Acts have no application. (*Roberts, C.J., Mosely and Dunkley, JJ.*) AH TWE *v.* MA MAI SEIN. 1941 Rang.L.R. 7 = 193 I.C. 372 = 13 R.R. 248 = A.I.R. 1941 Rang. 97 (F.B.).

——**Sch. I, Ch. III, R. 2 (2) (b)**—*Qualification to be elected a councillor—Monthly value of building occupied—Test—Occupation of portion not separately assessed—Effect.*

The test to be applied to see whether a person is qualified to be elected as a councillor according to R. 2, Cl. (2) (*b*) of Ch. III of Sch. I to the Rangoon City Municipal Act is not the rent which that person pays for the occupation of a building. The test is the monthly value for purposes of assessment to municipal taxation of the building or portion of the building occupied by the candidate. Hence if a person occupies a portion of a building the value of which portion for purposes of assessment is less than Rs. 100 he is not entitled under the rule to stand for election though the whole building of which he is occupying a portion, may be valued for assessment purposes at very much more than Rs. 100. In the same way if he is occupying several portions, if all their values for purposes of assessment taken together is not less than Rs. 100, he is entitled to stand as a candidate. But though a person pays rent and occupies a portion of a building, the total assessment of which is more than Rs. 100, if the portion occupied by him has

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not been assigned a separate or special assessment value, then that occupied portion cannot be taken into account to decide the question of the qualification to stand as a councillor. (*Sharpe, J.*) NARAYANA *v.* DR. DUGAL. **1941 Rang.L.R. 603.**

RANGOON HIGH COURT (APPELLATE SIDE) RULES, Rr. 5 and 57—*Leave to appeal to Privy Council—Copy of judgment not filed till after expiry of limitation—Effect.*

A petition for leave to appeal to His Majesty in Council is clearly an application of the kind contemplated by R. 5 the Appellete Side Rules of the Rangoon High Court, for it is an application for the very purpose of calling a decree of the High Court into question. In ascertaining whether it is an order within the meaning of R. 57 the Deputy Registrar, who receives the petition, must see whether it complies with the provisions of R. 5, which requires that certified copies of decree and judgment appealed against should be filed. Where a petition for leave is not so accompanied by a copy of the decree and judgment and which are not filed till after the expiry of limitation, it must be held that the original petition for leave is inchoate and therefore there is no petition before the Court upon which leave could be granted. (*Roberts, C.J. and Dunkley, J.*) DAW SAW NYUN *v.* DAW PWA. **1941 Rang.L.R. 391 = A.I.R. 1941 Rang. 299.**

RANGOON INSOLVENCY ACT (1909), S. 7, Proviso—*Scope and applicability of section and proviso—Transfer by insolvent's creditors to wife of insolvent—Wife claiming the property as hers—Jurisdiction of Insolvency Court to decide question.*

S. 7 of the Rangoon Insolvency Act is very wide in its language. It gives the Insolvency Court jurisdiction to decide all questions whatsoever, whether of law or of fact which may arise in any case of insolvency or 'which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case'; that is, the jurisdiction is discretionary. The section is not limited in its scope to matters in which the Official Assignee by the operation of the insolvency law claims a higher title than what the insolvent himself would have had. Where a number of transfers made by the creditors of the insolvent in favour of the wife of the insolvent were sought to be questioned by the Official Assignee and the wife pleaded that the transfer was in respect of her *stridhanam* and it was found that in fact the consideration moved from the insolvent and the wife was only a nominee, it was held that the question was one of title and not possession and that jurisdiction of the Insolvency Court was not ousted by the proviso to S. 7 of the Act—and that the properties vested in the Official Assignee of the property of the insolvent. (*Robert, C.J. and Dunkley, J.*) VISALAKSHI ACHI *v.* OFFICIAL ASSIGNEE. **1941 Rang.L.R. 268 = A.I.R. 1941 Rang. 250.**

——**Ss. 8 (2) (b) and 36 and Letters Patent (Rangoon), Cl. 13**—*Appeal—Order refusing further examination under S. 36—If a 'judgment'.*

Where a Judge sitting in insolvency refuses to permit the further examination of a witness under S. 36 of the Rangoon Insolvency Act, an appeal lies against it under S. 8 (2) (*b*) of the Act. For this purpose, the various proceedings in an insolvency should be regarded as a series of 'suits' arising out of one failure, and a 'judgment' for this purpose is that which finally determines the subtantive rights of those concerned in any one such 'suit'. (*Roberts, C.J. and Blagden, J.*) EBRAHIM BODI *v.* K. BA GYI. **1940 Rang.L.R. 702 = 194 I.C. 250 = 13 R.R. 288 = A.I.R. 1941 Rang. 69.**

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——**S. 36**—Order refusing further examination under —Appeal, if lies. *See* RANGOON INSOLVENCY ACT, SS. 8 (2) (*b*), 36 AND LETTERS PATENT (RANGOON), CL. 13. **1940 Rang.L.R. 702.**

——**S. 36**—*Private examination—Scope of—Discretion under—Interference in appeal—Grounds.*

S. 36 of the Rangoon Insolvency Act confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined. The section should not be used for purposes of what is sometimes termed a 'roving commission' or 'fishing enquiry'. It is impossible to lay down any hard and fast rule limiting the scope of a private examination. Though a Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons, there is certainly no rule that only those matters themselves may be put to the witness. The Court ought not to make an order under this section unless there is ground for thinking that the order is likely to be of some use. To justify interference with the discretion of a Judge in such matters, it is not enough to show that the discretion was wrongly exercised but it must be further shown either that it was not exercised at all, or, if exercised, was exercised either unjudicially or on a wrong principle of law or on a wrong appreciation of facts. (*Roberts, C.J. and Blagden, J.*) EBRAHIM BODI *v.* K. BA GYI. **1940 Rang.L.R. 702 = 194 I.C. 250 = 13 R.R. 288 = A.I.R. 1941 Rang. 69.**

——**S. 36 (5)**—*Scope of.*

S. 36 (5) of the Rangoon Insolvency Act affords a summary means of enabling the Official Assignee to obtain an order of the Court when the admitted property of the insolvent has been traced to the possession of a third party, for its delivery to him. It has no reference to cases in which there is a dispute as to whether certain property belongs to the insolvent or not. Such a question of title is not within the scope of S. 36 at all. (*Roberts, C.J. and Dunkley, J.*) VISALAKSHI ACHI *v.* OFFICIAL ASSIGNEE. **1941 Rang L R. 268 = A.I.R. 1941 Rang. 250.**

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See (*i*) C. P. CODE, O. 40.

(*ii*) PROVINCIAL INSOLVENCY ACT.

——Administration suit — Leave to defend money suit by creditor—Application by Receiver—Practice—Forum—Notice to creditor—If necessary—Opinion of counsel—Receiver, if may be required to obtain. *See* 1940 Dig., Col 1094. SYED ABBAS *v.* ABID JEHAN BEGUM. **195 I.C. 240 = 14 R.C. 61 = A.I.R. 1941 Cal. 267.**

——*Debts borrowed on personal credit for payment of Government* peishkush—*Right of creditor to decree against assets of estate—Right to first charge in respect of* peishkush.

A creditor who advances loans to a receiver appointed by Court to manage an estate, without taking a charge on the estate, is not entitled to be paid out of the assets of the estate irrespective of the receiver's right of indemnity. All he can get is a decree against the receiver and against the assets of the estate to the extent to which the receiver has a right of indemnity as receiver against that estate. The fact that the amount advanced was utilised for payment of the *peishkush* due to the Government on the estate, would not entitle the creditor to be subrogated to the statutory first charge which the Government held on the estate in respect of the *peishkush*. When the creditor advances the money on the

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personal credit of the receiver, and he does not make the payment to the Government himself, he cannot have such a right. (*King and Patanjali Sastri, JJ.*) SUBRAMANIA AIYAR *v.* ULAGALUMPERUMAL SETHURAYAR. **I.L.R. (1941) Mad. 675 = 1941 M.W.N. 395 = 53 L.W. 536 = A.I.R. 1941 Mad. 593 = (1941) 1 M.L.J. 586.**

——Powers of—Dealing with property—Sanction of Court—Necessity—Transaction without leave—Validity—Right to challenge. *See* 1940 Dig., Col 1094. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **192 I.C. 17 = 13 R.P. 362 = 7 B.R. 283.**

RECORD OF RIGHTS—Entry in—Presumption of correctness—Inconsistent entries in different columns—Effect of—If one rebutted by the other. *See* 1940 Dig., Col. 1095. SANKAR MALIK *v.* RAJA BRAJA SUNDER DEB. **7 B.R. 141 = 22 Pat L.T. 216.**

——*Entries in—Presumption of correctness—Value of—Tenancy beginning with written document.*

If a tenancy begins with a written document, the rights of the parties must be determined by reference to the terms of the document. The record-of-rights, no doubt, affords a presumption but that presumption is of little importance in such a case. (*R. C. Mitter and Latifur Rahman, JJ.*) SYED UDDIN AHAMMED *v.* HEMANTA KUMARI DEVI. **72 C.L.J. 402.**

——*Entries in—Value of—Entry of land as* belagan *—If implies rent-free tenure—Finding of fact that land is not rent-free but only not paying rent—Interference by High Court in Letters Patent appeal.*

Merely because a holding is described in the record-of-rights as *belagan*, it cannot be held to be established that the holding is a rent-free holding. Where all the lower Courts have found that "*belagan*" in a particular district only means "not paying rent," the High Court in Letters Patent appeal will not take a different view. Even if the record-of-rights states that a particular land is rent-free, it would still be open to a Court of fact to accept evidence as to the terms of the letting as rebutting the entry in the record-of-rights. (*Harries, C. J. and Fazl Ali, J.*) CHINTI KAHARIN *v.* KRIPA SHANKAR WARRAH. **194 I.C. 300 = 13 R.P. 698 = 7 B.R. 750 = 1941 P.W.N. 513 = A.I.R. 1941 Pat. 488.**

——Entries in—Value of—If supersede Civil Court's decision. *See* 1940 Dig., Col. 1095. BHOLA NATH DUTTA *v.* NARAYAN KUMARI DASSI. **192 I.C. 44 = 13 R.C. 300.**

REGISTRATION ACT (XVI OF 1908), Ss. 17 and 49—Compromise based upon family settlement—Right to remain in possession of property for life, conferred—If compulsorily registrable. *See* 1940 Dig., Col. 1095. RAM NARAIN SINGH *v.* RAJ BAHADUR SINGH. **16 Luck. 266 = 191 I.C. 402 = 13 R.O. 227 = A.I.R. 1941 Oudh 150.**

——**S. 17**—Equitable mortgage—Letter accompanying deposit of title deeds on date of loan—If constitutes the bargain between the parties—Registration—Necessity. *See* 1940 Dig., Col. 1096. VISALAKSHI AMMAL *v.* KRISHNAVENI AMMAL. **193 I.C. 152 = 13 R.M. 629 = (1940) 1 M.L.J. 561.**

——**S. 17**—Lease for more than a year—Patta under Madras Estates Land Act for one year—No exchange of fresh patta and muchilika—Continuance of tenant in occupation—Patta—If requires registration as being for more than a year. *See* MADRAS ESTATES LAND ACT, S. 52 (3). **53 L.W. 303 = (1941) 1 M.L.J. 384.**

——**S. 17**—*Partition — Registration —Necessity—Lists of property—Test.*

Mere lists of property allotted to different members at a partition, do not form an instrument of partition re-

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quiring registration. But the question in each case would be whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relationship contemplated. Where a document recited among other things that 'you and I are real brothers and were all joint till up to this day. But *to day* you and I have separated. And the undermentioned movables and immovable property *is* allotted to your share' and after setting out the property allotted, it continued: 'The aforesaid movables and immovable property *has been allotted* to your share and is *delivered* into your share *therefore* neither I nor my heirs have left any right and interest therein, it was *held*, that there was no doubt the document was meant to embody the expression of will necessary to effect the change in the legal relation contemplated and that the idea was that the whole thing should be reduced to writing and that the change should be effected by a written instrument and that hence it required registration. (*Stone, C. J. and Bose, J.*) GANPAT GANGAJI *v.* NAMDEO. **196 I.C. 278 = 14 R.N. 94 = 1941 N. L. J. 266 = A.I.R. 1941 Nag. 209.**

——**Ss. 17 and 28**—*Requirements as to registration —Compliance—Test—Intention of parties—Fraud—Collusion—Necessity.*

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. Where it could not be said that there was no intention on the part of a donor to vest the property in the donee, the inclusion of a particular plot in the gift, though the title of the donor with reference to it was doubtful, cannot lead to the inference that the donor was guilty of any fraud, in so including it. In the absence of collusion between the donor and donee, the registration of such a deed cannot be challenged as being defective. (*Ghulam Hasan, J.*) MAHOMED KAZIM HUSSAIN *v.* NADRI BEGAM. **194 I.C. 87 = 13 R.O. 537 = 1941 A.W.R. (C.C.) 129 = 1941 A.L.W. 385 = 1941 O.L.R. 395 = 1941 O.A. 338 = 1941 O.W.N. 532 = A.I.R. 1941 Oudh 348.**

——**S. 17**—*Security bond—Need for registration.*

A security bond charging immovable property executed by a receiver for the due discharge of his functions requires to be registered under the Registration Act. (*Mitter and Akram, JJ.*) BENOY KRISHNA CHOUDHURY *v.* BHOLANATH CHOWDHURY. **45 C.W.N. 298.**

——**S 17 (1)**—*Construction—Pattas of* 1867 *not requiring registration under Registration Act of* 1866 *—If compulsorily registrable under Act of* 1908*—If inadmissible for want of registration.*

S. 17 (1) of the Registration Act of 1908 should not be construed in its most literal sense so as to involve the conclusion that a document which did not require registration when it was executed and which could not now be registered owing to lapse of time would be shut out of evidence. The more reasonable view is to hold that S. 17 (1), when read along with S. 6 of the Indian General Clauses Act does not destroy the validity or admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. In a suit for rent of lands held under a tenure known as *Arakandacharam*, the feature of which was that in addition to the ordinary rent payable by an ordinary ryot the tenant was also required to pay a quarter of the produce to the landholder, two old pattas of the year 1867, one providing for an annual rent and the other providing for a perpetua lease were

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relied upon to show the origin of the tenure. Both the pattas were unregistered.

Held, that the two pattas which did not require registration under the terms of the Registration Act of 1866 which prevailed at the time they were executed, were not inadmissible in evidence to prove the nature of the transaction under Ss. 17 (1) and 49 of the Registration Act of 1908. (*Wadsworth, J.*) NAGARAJA RAO *v.* KOOTHAPPAN. **53 L.W. 634 = 1941 M.W.N. 518 = A.I.R. 1941 Mad. 602 = (1941) 1 M.L.J. 759.**

——**S. 17 (1) Proviso and S. 17 (1) (d)**—"*Reserve*" —*Meaning of.*

The word "reserve" in S. 17 (1) (*d*), in S. 17 (1) Proviso and also in the Punjab Government Notification No. 29 of 4th July, 1888, is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee, and in common parlance it is equivalent to the word "fix." (*Almond, J.C. and Mir Ahmad, J.*) ISLAMUDDIN *v.* FIRM JIWA SHAH. **193 I.C. 786 = 13 R.Pesh. 67 = A.I.R. 1941 Pesh. 30.**

——**S. 17 (1) (b)**—Applicability—Award—Construction. *See* 1940 Dig., Col. 1098. UPENDRA NATH BOSE *v.* LALL. **I.L.R. (1940) Kar. (P.C.) 460 = 191 I.C. 7 = 13 R.P.C. 110 = 7 B.R. 198 = 45 C.W.N. 204 = 73 C.L.J. 145 = 43 Bom. L.R. 381.**

——**S. 17 (1) (b)**—*Applicability—Co-sharers—Deed purporting to divide properties—Allotment intended to be final—Registration—Necessity—Parties contemplating later comprehensive deed—Effect—Suit in ejectment against co-sharer on basis of deed—Competency—T. P. Act, S. 53-A.*

Where a document described as a list of shares of immovable properties equally divided between co-sharers purports to effect a partition of the properties comprised therein between the co-sharers and the allotment thereunder is intended to be final, the document clearly falls within S. 17 (1) (*b*) of the Registration Act requiring registration ; and if unregistered, must be held to be inadmissible in evidence. The mere fact that the parties contemplate the execution of a more comprehensive partition deed later on does not make the document purporting to effect a division any the less operative to create interests in the immovable properties comprised therein so as to justify the view that it does not require registration. In such a case even if a co-sharer happens to be in sole enjoyment of a particular piece of property, he cannot sue in ejectment, basing his title on such a document, if another co-sharer disturbs such enjoyment. He can only bring a suit for partition of all the properties owned in common for joint possession with his co-owners. A possessory title, that is to say, mere previous possession cannot be made the basis of a decree in ejectment against co-owners. Nor can the doctrine of part performance be invoked to support a decree for possession ; the doctrine as embodied in S. 53-A, T. P. Act (as amended in 1929) only entitles a person in possession to invoke the same as a shield to protect such possession, and does not enable a person who has lost possession to sue for recovery of it. (*Patanjali Sastri, J.*) VEERARAGHAVA RAO *v.* GOPAL RAO. **54 L.W. 499 = 1941 M.W.N. 944 = (1941) 2 M.L.J. 707.**

——**S. 17 (1) (b)**—*Applicability—Dwitantaka deed.*

A deed by the owner of poggalika property declaring the property to be dwitantaka property of himself and another person amounts to creation of an interest in immovable property and therefore it must be registered under the provisions of S. 17 (1) (*b*), Registration Act. (*Roberts. C.J. and Dunkley, J.*) U ZAWTIPALA *v.* U THATDAMA **194 I.C. 597 = 14 R.R. 1 = 1941 Rang. L.R. 204 = A.I.R. 1941 Rang. 159.**

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——**S. 17 (1) (b)**—Lessee from Government of right to collect toll on public road—Assignment of rights—Registration—Necessity — "Immovable property." *See* 1940 Dig., Col. 1098. BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. **I.L.R. (1941) Bom. 71 = 13 R.B. 202 = 191 I.C. 806.**

——**Ss. 17 (1) (b) and (2) (v) and 49**—Memorandum or agreement in respect of house in suit as well as other houses — Provision for obtaining compromise decree later on in terms of agreement—Registration—Necessity—Admissibility for purpose of obtaining decree in terms. *See* 1940 Dig., Col. 1098. RANGANAYAKI AMMAL *v.* SAMPATHKUMARAN. **192 I.C. 859 = 13 R.M. 598 = (1940) 2 M.L.J. 319.**

——**S. 17 (1) (b)**—Mortgage by deposit of title deeds —Contemporaneous memorandum— If requires registration. *See* 1940 Dig., Col. 1099. WALI REHMOO & SONS, *In re.* **191 I.C. 861 = 13 R.S. 175.**

——**S. 17 (1) (b) and (2) (xi)**—*Mortgage—Endorsement and receipt—Reference only to over-paid interest—Registration, necessity.*

Where both the endorsement on the back of a mortgage deed and a receipt relate solely to interest found to have been paid in excess and the receipt does not purport to extinguish the mortgage, either in whole or in part, but only limits the liability of the mortgagor thereunder as regards interest, it is nothing more than a receipt, to which the provisions of exception (*xi*) would apply and hence it is not necessary for the endorsement and receipt to be registered. (*Bennett and Ghulam Hassan, JJ.*) MAHOMED HUSAIN *v.* BABA DIN. **16 Luck. 538 = 192 I.C. 434 = 13 R.O. 362 = 1941 O.L.R. 152 = 1940 R.D. 616 = 1941 A.W.R. (Rev.) 8 = 1940 O.A. 1231 = 1940 O.W.N. 1293 = A.I.R. 1941 Oudh 193.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Memorandum relating to deposit of title deeds—When requires registration.*

A memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which S. 17 of the Registration Act requires to be registered, even though it does not embody all the particulars of the transaction, but registration is not so required unless the memorandum on its face embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties. If the document is not the operative instrument and it does not contain the conditions of the transaction and it is merely a record of the title deeds that had been deposited as collateral security for the amount agreed to be advanced, it need not be registered. (*Tek Chand and Beckett, JJ.*) BISHEN DAS GOBIND RAM *v.* SAHUKARA BANK, LTD., LUDHIANA. **195 I.C. 343 = 14 R.L. 64 = 43 P.L.R. 177 = A.I.R. 1941 Lah. 224.**

——**Ss. 171 (b) and 49**—*Partition of Hindu joint family—What constitutes — Registration—Necessity—Absence—Effect.*

Under Hindu Law the intention to separate and the declaration of that intention are necessary ingredients in the matter of effecting severance. This declaration need not be reduced to the form of a document. But if reduced to writing, it becomes an instrument contemplated by S. 17 (1) (*b*) of the Registration Act and it is struck at by S. 49. It would consequently be inadmissible in evidence not only as regards that aspect of partition which relates to a division of property by metes and bounds but also as to that which relates to a severance

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of title. (*Stone, C.J. and Bose, J.*) GANPAT GANGAJI *v.* NAMDEO. **196 I.C. 278=14 R N 94= 1941 N.L.J. 266=A.I.R. 1941 Nag. 209.**

——**Ss. 17 (1) (b) and 2 (xi)**—Scope—Receipt by mortgagee—Mortgagee agreeing to accept less than due amount—Receipt reciting agreement to waive balance amounting to over Rs. 100—Registration—Necessity—Non-registration — Effect on admissibility. *See* 1940 Dig., Col. 1100. SRINIVASA AYYANGAR *v.* AKAYYA NAIDU. **A.I.R. 1941 Mad. 197.**

——**S. 17 (1) (d)**—*Agreement as to meaning of lease —If amounts to new lease.*

An agreement as to the meaning of a lease does not by itself amount to the creation of a new lease. In the case of a dispute between the parties as to their respective rights under the lease a compromise petition fixing the rate of rent and prohibiting the lessee from constructing pucca roofs without the lessor's permission was filed.

Held, that the compromise petition did nothing more than express an agreement that the lease would be interpreted in a particular way and did not create a new lease. (*Henderson, J.*) MANIK CHANDRA SADHU KHAN *v.* GOUR KRISHNA PRAMANIK. **A.I.R. 1941 Cal. 536.**

——**S. 17 (1) (d) and (2) (v)**—*Applicability—Agreement to lease—Provision for execution of formal lease and for registration thereof—Possession delivered under agreement and parties acting as if tenancy existed —Effect—Registration.*

An agreement to lease, in order to be compulsorily registrable under S. 17 (1) (*d*) of the Registration Act must be one which effects an actual demise or creates a present and immediate interest in the land which is the subject of the agreement. Although the parties to an agreement might intend that a formal lease should be executed and registered, if possession of the property is given under the agreement and parties act as though the tenancy is in force, it must be held that there is a present demise and the agreement to lease requires registration, and not merely an agreement to execute a lease at a later date under S. 17 (2) (*v*) of the Act. The fact that the tenancy is to commence at a date subsequent to the agreement would not prevent there being a present demise. (*Broomfield and Macklin, JJ.*) BECHARDAS DAMODARDAS *v.* AHMEDABAD BOROUGH MUNICIPALITY. **43 Bom.L.R. 603= A.I.R. 1941 Bom. 346.**

——**Ss. 17 (1) (d) and 49**—Compromise decree creating lease—Non-registration—Effect—Rate of rent —If can be proved *aliunde*—Evidence Act, S. 91. *See* 1940 Dig., Col. 1102. ATUL KRISHNA BOSE *v.* ZAHED MONDAL. **193 I.C. 635=13 R.C 445= A.I.R. 1941 Cal. 102.**

——**S. 17 (1) (d) and (2) (vi)**—*Scope—Compromise decree embodying lease for term—Registration.*

All decrees and orders are not excluded from compulsory registration by reason of the provisions of S. 17 (2) (*vi*) of the Registration Act, but only those are excluded which partake of the character of documents mentioned in Cls. (*b*) and (*c*) of S. 17 (1); a decree embodying a compromise purporting to grant a lease within the meaning of Cl. (*d*) of S. 17 (1) is not exempt from registration. (*Agarwala, J.*) JAGDISH CHANDRA DEO DHOBAL *v.* BISESWAR LAL. **194 I.C. 428=13 R.P. 715=7 B.R. 767= A.I.R. 1941 Pat. 536.**

——**S. 17 (1) (e) (as amended in 1929)**—Applicability—Decree on award directing payments by instalments—Charge created on immovable property—Default clause giving right to decree-holder to recover amount

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from out of the property charged—Assignment of decree —Deed not registered—Validity—Construction of decree —Personal liability. *See* 1940 Dig., Col. 1103. RAYCHAND JIVAJI *v.* BASAPPA. **I L R. (1941) Bom. 136=193 I.C. 740= 13 R B 337=A. I. R. 1941 Bom 71.**

——**S. 17 (2) (vi)**—Applicability—"Proceeding"—Money suit—Attachment of land before judgment—Effect of—Compromise decree creating charge on land attached—Registration—Necessity—Land attached—If subject matter of suit. *See* 1940 Dig., Col. 1104. CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ. **I.L R. (1941) Bom. 34=13 R.B 266= 192 I.C. 597=A.I.R. 1941 Bom. 1.**

——**S. 17 (2) (vi)**—Compromise embodied in decree —Registration—Necessity. *See* HINDU LAW—FAMILY SETTLEMENT. **1941 A.L J. 587.**

——**S. 17 (2) (vi)**—*Property which is subject-matter of suit —Meaning of.*

There must be a claim or right in or to the specific immovable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject matter of a suit within the meaning of S. 17 (2) (*vi*) of the Registration Act. Where in a suit for interest due on a mortgage, the plaintiff confines his claim to the recovery of money and does not claim that the amount may be recovered by the sale of the mortgaged property, that property cannot be considered to be the subject matter of the suit. (*Bhide, J.*) PARTAB SINGH *v.* ISHAR SINGH. **195 I C. 227=14 R L. 42= 43 P.L.R. 9=A.I R. 1941 Lah. 164.**

——**S. 17 (2) (xi)**—Applicability. *See* REGISTRATION ACT, SS. 17 (1) (*b*) AND (2) (*xi*). **1940 O.A. 1231.**

——**S. 17 (2) (xi)**—*Endorsement on mortgage deed of payment extinguishing mortgage—If exempt from registration.*

An endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money is exempt from registration under S. 17 (2) (xi) of the Registration Act, even if it purports to extinguish the mortgage. It is only an independent receipt for payment of mortgage money that requires registration when it purports to extinguish the mortgage. (*Tek Chand and Beckett, JJ.*) NAMAN *v.* HARI SINGH. **195 I.C. 581=14 R.L. 80=43 P.L.R. 214= A.I.R. 1941 Lah. 246.**

——**S. 23**—*Award—Re-writing of original award —Registration—Limitation.*

Where an original award is merely re-written by the arbitrators, the award comes within the mischief of S. 23 of the Registration Act, and must be presented for registration within four months from the date of execution. (*Wort and Meredith, JJ.*) CHHATI LAL *v.* RAM CHARITER SAHU. **195 I.C. 87=14 R.P. 83= 7 B R. 864=A.I.R. 1941 Pat. 215.**

——**S 28**—Fraud on registration—Test—Collusion —Necessity. *See* REGISTRATION ACT, SS. 17 AND 28. **1941 O.W.N. 532.**

——**S. 28**—*Place for registration—Requirements— Violation when renders registration invalid—Failure to prove title of transferor—If renders registration invalid.*

Where the property is not in existence at all and has been included in an instrument for the purposes of registration, the registration would be invalid. Similarly, if the property exists and the parties did not intend it to be affected by the document, the registration would be invalid. But if the property actually exists and the parties intended to transfer it, the registration would not be affected merely because the mortgagee or

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transferee fails to prove the title of the mortgagor or transferor. (*Ismail, J.*) IRSHAD ALI *v.* NADRI BEGAM. I.L.R. (1941) All. 320 = 195 I.C. 25 = 14 R.A. 11 = 1941 A.W.R. (H.C.) 83 = 1941 A.L.J. 168 = 1941 O.A. (Supp.) 143 = 1941 A.L.W. 198 = 1941 O.W.N. 295 = A.I.R. 1941 All. 179.

——S. 32—Presentation — Validity — Conditions—Presence of obligor—Sufficiency. *See* 1940 Dig., Col. 1105. MAUNG MYA MAUNG *v.* MEYAPPA CHETTYAR. 191 I.C. 656 = 13 R.R. 153.

——S. 47—*Scope and effect—Sale-deed of immovable property executed but not registered immediately—Second sale executed after but registered earlier than first—Priority—Second purchaser—Title of.*

A document which has been registered dates back to the date of its execution. S. 47 of the Registration Act is clear in this respect. A sale-deed of immovable property operates immediately after its registration not from the date of registration of the deed but from the date of its execution. A subsequent sale-deed in respect of the same property executed after the first but registered earlier than the first can give to the purchaser under the second deed no title. (*Harries, C.J. and Manohar Lall, J.*) JEO NARAYAN MAHTO *v.* BUDHAN MAHTO. 192 I.C. 812 = 13 R.P. 519 = 7 B.R. 417 = 22 Pat.L.T. 116 = A.I.R. 1941 Pat. 247.

——S. 49—*Admission to registration—Effect—It renders valid transaction otherwise invalid under different laws.*

When a Registrar admits a document to registration he does so with jurisdiction. Hence the resulting registration cannot be regarded as void though at the same time the fact that it is registered does not in the least cure the defects in the deed so that if it deals with a prohibited subject, the ordinary law should be applied and the question whether it is good or bad should be determined with reference to that law. (*Stone, C.J. and Niyogi, J.*) MAHOMED KHUDABUX *v.* RAMCHANDRA RAO. I.L.R. (1941) Nag. 743 = 1941 N.L.J. 497 = A.I.R. 1941 Nag. 328.

——S. 49—*Lease—Plea of inadmissibility though lease admitted—Power of Court to decide validity of lease.*

Where the lessees admit the lease but plead that the lease deed is inadmissible in evidence for want of registration the Court is fully entitled to go behind the lease and determine its validity. (*Mya Bu and Mosely, JJ.*) U MIN SIN *v.* KO KYE. 194 I.C. 31 = 13 R.R. 274 = A.I.R. 1941 Rang. 117.

——S. 49—Partition—List of shares of properties divided—Allotment intended to be final—Admissibility to prove sole possession without registration. *See* REGISTRATION ACT, S. 17 (1) (*b*).

(1941) 2 M.L.J. 707.

——S. 49—*Partition papers—Admissibility without registration for proving division in status.*

Although documents or papers connected with a partition of immovable properties which are unregistered cannot be admitted in evidence to prove actual partition and to prove what was allotted to any person by that partition, yet they are clearly admissible to establish the status of a party or to establish separation in the family, and to rebut any case that that party died in a state of jointness. (*Harries, C.J. and Manohar Lall, J.*) BESAR KUAR *v.* RAMHIT SINGH. 193 I.C. 538 = 13 R.P. 599 = 7 B.R. 557 = 21 Pat.L.T. 1063 = A.I.R. 1941 Pat. 167.

——S. 49—*Unregistered document—Creation of title—Operation of equitable doctrine.*

REGISTRATION ACT (1908), S. 49.

No equitable doctrine can override the specific provisions of S. 49 and operate so as to make an unregistered document create title if it requires registration. (*Tek Chand, Monroe and Beckett, JJ.*) SHANKRI *v.* MILKHA SINGH. 43 P.L.R. 656 = A.I.R. 1941 Lah. 407 (F.B.).

——S. 49—Unregistered mortgage bond—Proof of personal covenant—Admissibility. *See* 1940 Dig., Col. 1107. OM PARKASH *v.* MUKHTAR AHMAD. I.L.R. (1941) Lah 601 = 13 R.L. 482 = 193 I.C. 789.

——Ss. 49 and 17—*Unregistered sale-deed—Purchaser let into possession by vendor—Whole of consideration made good—Position of purchaser.*

The position of a purchaser who has been let into possession by his vendor under an unregistered and consequently inoperative sale-deed after there has first been an oral agreement to sell and after the whole of the consideration has been made good, under the mistaken belief on both sides that the transaction is complete, whereas in fact it has remained incomplete for want of registration of the instrument purporting to effect the transfer, must be regarded as that of a purchaser under a contract for sale which has not yet been completed or rescinded with the consent of both parties and the purchaser cannot claim any title as owner in the property, whether as legal or as equitable owner. The purchaser, however, has a charge on the property for the amount paid by him in advance as purchase-money. The lien is not created by any agreement between the parties, but arises by operation of law, on payment of the purchase-money independently of the sale-deed. Though the unregistered instrument is not admissible to prove transfer of title it can be used in evidence for the purposes of showing that the purchaser entered upon the property under a contract of sale. The unregistered document is also admissible for the purpose of showing that the purchaser obtained a lien by passing of the consideration. (*Tek Chand, Monroe and Beckett, JJ.*) SHANKRI *v.* MILKHA SINGH. 43 P.L.R. 656 = A.I.R. 1941 Lah. 407 (F.B.).

——S. 49—Unregistered sale—Use to which it can be put. *See* 1940 Dig., Col. 1107. UMAR HAJI *v.* BADRIDAS. 193 I.C. 306 = 13 R.N. 304 = A.I.R. 1941 Nag. 72.

——S. 49, Proviso — *Applicability — Partition of joint Hindu family—Nature and scope of—Unregistered document—Admissibility.*

Under Hindu Law partition is only a change in the mode of enjoying the joint property coupled with an alteration in status, the joint title being divided into a number of separate ones. No formality is required. A document by which parties had intended to have this division effected may in the result prove ineffective for that purpose. But their common desire to act upon it, and their action in doing so would amount to a confirmation of the original agreement. If that becomes unprovable, such confirmation would itself constitute a fresh and subsequent agreement which would be provable like any other agreement. This is 'a collateral transaction not required to be effected by a registered instrument' within the meaning of S. 49 of the Registration Act. Therefore the unregistered document can be used as material in proof of it. It could be used to corroborate other evidence or facts. It could be used to show the character of the possession and the nature of the title, provided there is other evidence to establish separate possession. (*Stone, C.J. and Bose, J.*) GANPAT GANGAJI *v.* NAMDEO. 196 I.C. 278 = 14 R.N. 94 = 1941 N.L.J. 266 = A.I.R. 1941 Nag. 209.

——S. 49, Proviso—"*Collateral transaction*"—*Meaning of—Partnership — Dissolution — Suit for*

REGISTRATION ACT (1908), S. 49.

accounts—Partnership deed referring to leases of immovable property—Deed not registered—Admissability to prove partnership.

A "collateral transaction" within the meaning of the proviso to S. 49 of the Registration Act is a transaction other than the transaction affecting the immovable property but which is in some way connected with it. A distinction must be drawn between the use of an unregistered document *as* evidence of a transaction affecting immovable property and the use of such document *in* evidence; the proviso permits the use in evidence of an unregistered document, though that document affects immovable property, if the purpose of its use is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. An unregistered deed of partnership which, among others, makes reference to leases of immovable properties, may therefore be admitted and used in evidence in a suit for accounts of the partnership after its dissolution to prove the partnership and profits and losses arising from the same, which is only a collateraal transaction.

Per *Weston, J.*—A 'collateral transaction" is to be taken as one collateral transaction affecting immovable property by reason of which registration is necessary, rather than one collateral to the document. The proviso speaks not of collateral purpose but of collateral transaction. (*Davis, C.J. and Weston, J.*) RADHOMAL ALUMAL *v.* ALLAH BAKHSH KHAN.

I.L.R. (1941) Kar. 483.

——**S. 49, Proviso**—Effect of—Mortgage—Subsequent registered agreement to sell—Unregistered sale deed in pursuance thereof—Admissibility. *See* 1940 Dig., Col. 1107. TAUQIR ALI *v.* RAM RATTAN SINGH. **16 Luck. 99 = A.I.R. 1941 Oudh 41.**

——**S. 57 (5) and Evidence Act (1872), S. 35**—Copy—Registrar's endorsements—Admissibility. *See* 1940 Dig., Col. 1108. GANPATRAO *v.* NAGORAO.

193 I.C. 41 = 13 R.N. 287.

——**S. 60**—*Sub-Registrar's endorsement—If relevant for proving execution of document.*

A Sub-Registrar's endorsement, duly made under S. 60 is relevant evidence for proving the execution of the document. (*Beckett, J.*) HARNAM SINGH *v.* DISTRICT OFFICIAL RECEIVER.

A.I.R. 1941 Lah. 400.

——**S. 60 (2) and Evidence Act (1872), S. 67**—*Registrar's endorsement of admission of execution—Effect of—If can displace proof of execution.*

If the contention that the Sub-Registrar's endorsement proving admission of execution is sufficient proof of execution is accepted, in a large majority of cases proof of execution such as is contemplated by S. 67 of the Evidence Act would become unnecessary. The effect of the registration endorsement is not to prove execution as is required by S. 67 of the Evidence Act but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances, and the certificate of the Sub-Registrar is admissible not to prove execution of the deed but merely to prove the admission of execution. The effect of the admission is in every case a separate question. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. **196 I.C. 787 = 1941 A.W.R. (C.C) 274 = 1941 O.L.R. 764 = 1941 O.A. 621 = 1941 O.W.N. 996 = A.I.R. 1941 Oudh 529.**

RELIGIOUS ENDOWMENTS.

See too (*i*) HINDU LAW—RELIGIOUS ENDOWMENTS.

(*ii*) MAHOMEDAN LAW—WAKFS.

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(*iii*) RELIGIOUS ENDOWMENTS ACT (XX OF 1863).

(*iv*) MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927).

——*Acquisitions by individual members of religious fraternity—If becomes property of institution*—Udasis—*Governing rule.*

There is no legal presumption that all property acquired by individual members of a religious fraternity belongs to the religious institution to which they are attached. Ascetics and religious institutions exhibit great diversity of character and *Udasis* in particular conform to no single type. In any case to presume that a particular *Udasi* shrine followed a certain practice because on account of all religious institutions throughout the province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. It was held that their Lordships would be very slow to apply to the *dehri* in suit a rule not collected from its constitution or practice as proved in evidence. (*Sir George Rankin.*) COMMITTEE OF MANAGEMENT OF GURDWARA PENJA SAHIB *v.* MOHAMMAD NAWAZ KHAN. **195 I.C. 721 = 14 R.P.C. 16 = 1941 A.L.W. 819 = 1941 O.A. 794 = 1941 A.W.R. (Rev.) 845 = 7 B.R. 997 = 1941 O.L.R 635 = 1941 P.W.N. 606 = 43 P.L.R. 631 = 1941 A.L.J. 610 = 43 Bom.L.R. 998 = 1941 O.W.N. 970 = A I R. 1941 P C. 56 (P.C.).**

——*Dedication—Onus.*

Where it appears unreasonable on the evidence to doubt that the original right in the land in suit was with the proprietary body, the burden lies heavily on those who assert it, to prove a dedication by user of the whole of the area to the purposes of the shrine and it is beside the point to show that the opposite party's evidence does not exclude the theory of dedication. The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly exacted by the proprietor from persons held in general esteem. (*Sir George Rankin.*) COMMITTEE OF MANAGEMENT OF GURDWARA PENJA SAHIB *v.* MOHAMMAD NAWAZ KHAN. **195 I.C 721 = 14 R.P.C. 16 = 1941 A L.W 819 = 1941 O.A. 794 = 1941 A.W.R. (Rev.) 845 = 7 B.R. 997 = 1941 O.L.R. 635 = 1941 P,W.N. 606 = 43 P L.R. 631 = 1941 A.L.J. 610 = 43 Bom.L R. 998 = 1941 O.W.N. 970 = A.I.R. 1941 P.C. 56 (P.C.).**

——Management—Village temple—Villagers allowing archakas to manage property of temple for some years—If lose right of management. *See* 1940 Dig., Col. 1109. MUNIRATNA GURUKKAL, *In re.*

193 I.C. 696 = 13 R.M. 709 = A.I.R. 1941 Mad. 312 = (1940) 1 M.L.J. 935.

——*Manager—Power of—Property of idol managed by Court of Wards—Compromise by manager—Validity.*

A compromise by the manager of Court of Wards, in whose hands the management of the idol's property is placed, which is not for the benefit of the idol, is bad. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO.

195 I C. 313 = 14 R.P. 100 = 7 B R. 897 = 22 P.L.T. 699 = A.I.R. 1941 Pat. 260.

——*Mutt or asthal—Endowment—Dedication—Proof—Registered deed—Necessity—Gift to idol—If falls under S. 123, T. P. Act.*

Although in order to hold that a particular property is an asthal or endowed property there must be proof either of dedication or that the usufruct of the property

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has always been used for the purposes of the asthal, where there is no need of dedication, dedication may be inferred from circumstances. In the case of a dedication made before the passing of the Transfer of Property Act, no registered deed of dedication, is necessary even assuming that a gift to an idol is a gift within the meaning of S. 123, T. P. Act. (*Chatterji and Meredith, JJ.*) SRI THAKURJEE *v.* MATHURA PRASAD.

192 I.C. 789 = 7 B.R. 569 = 13 R P. 535 = 1941 PW.N. 75 = 22 Pat.L T. 239 = A.I R 1941 Pat. 354.

——*Public or private — Inference from facts—Dedication to family idol absolute—Part of income to be spent for casual visitors—Relations of founder given option to select outsider as* mutawalli.

Where with a view to make provision for the worship of a family idol, a person who is childless dedicates his properties to that idol, a dedication to the public cannot be inferred from the facts that the dedication to the idol is absolute, that part of the income is intended to be spent for casual visitors and that the relations of the founder are given the option to select an outsider as *mutawalli* (*Harries, C.J. and Chatterji, J.*) TETAR KUAR *v.* CHHOTU DAS. **195 I.C. 848 = 7 B.R. 977 = 14 R.P. 167 = A.I.R. 1941 Pat. 601.**

——*Religious office – Alienation—Validity—Office of trusteeship—Relinquishment in favour of one in line of succession but not next heir—Validity of.*

An alienation or relinquishment of the office of trustee of a religious endowment in favour of a person who is not the next heir would be invalid as contravening the intention of the founder if there is a deed which says that the office should be enjoyed by a trustee and his heirs. An alienation of the office of trustee, in order to be valid, must be in favour of the immediate heir. An alienation or release or relinquishment of an office of trustee not for value in favour of the next or immediate heir would be valid; otherwise, it is invalid, even though the person in whose favour it is alienated or released or relinquished is in the line of heirs *e.g.*, a brother. (*Venkataramana Rao, J.*) JANAKI AMMAL *v.* SANJEEVI CHETTIAR.

53 L W. 290 = 1941 M.W.N. 211 = A.I.R. 1941 Mad. 552 = (1941) 1 M.L J. 510.

RELIGIOUS ENDOWMENTS ACT (XX OF 1863)—*Applicability—If confined to public endowments.*

The Religious Endowments Act does not apply to an endowment which is not a public one. (*Fazl Ali and Chatterji, JJ.*) RAJA BRAJASUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **195 I C. 313 = 14 R.P. 100 = 7 B R. 897 = 22 P.L T. 699 = A I.R. 1941 Pat 260.**

——**S. 12**—*Devasthanam Committee — Power to appoint trustee for term of years—Position of trustee—If servant of committee.*

There is no warrant for holding that the Madras Hindu Devasthanam Committee can only appoint trustees for life. The committee has an unfettered discretion, subject to the special conditions of a particular endowment to make an appointment for a term of years. If it considers that it is better in the interests of a particular trust that an appointment for life should not be made, the committee has in the absence of some overriding factor, the right of making the appointment for a term of years. So far as Madras is concerned, it must be held that a trustee is not a servant of the committee. (*Leach, C. J., Krishnaswami Aiyangar and Somayya, JJ.*) THIRUVENGADA MUDALIAR *v.* RAJABATHAR MUDALIAR. **I L R. 1941 Mad. 942 = 196 I.C. 335 = 1941 M.W.N. 647 = 14 R.M. 285 = 54 L.W. 12 = A.I.R. 1941 Mad. 546 = (1941) 2 M.L.J. 35 (F.B.).**

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——**S. 12**—Powers of Devastanam Committee—Dismissal of temple trustee—Grounds—Status of trustee—Power of Committee to appoint trustee for limited period. *See* 1940 Dig., Col. 1111. THIRUVENGADA MUDALIAR *v.* RAJABADAR MUDALIAR.

191 I.C. 410 = 13 R.M. 489 = (1940) 2 M.L.J. 5.

RES JUDICATA. *See* C. P. CODE, S. 11.

REVENUE COURTS—*Appeal—Limitation—Presentation on day following last day—No application under S. 5 Limitation Act.*

Where a memorandum of appeal filed in the Commissioner's Court shows that it was prepared a day after the last day of limitation and the stamp and mukhtarnama also go to show that it was ready only on the day following the last day of limitation, it could not have been presented on the last day after the time for receiving appeals was over, and when there is no application to excuse the delay under S. 5, Limitation Act, the appeal is clearly barred. (*Sathe, J.M.*) RAM LOCHAN NAIK *v.* BASDEO BARGAH. **1941 R.D. 720 = 1941 O A. (Supp.) 628 = 1941 A.W.R. (Rev.) 688.**

REVENUE RECORDS—Khewat—*Entries as to rent—Evidentiary value.*

The *khewat* is not a document creating title though it is good evidence to show to what extent the agreement in the *kabuliyat* is valid and to what extent it is not enforceable. (*Rowland, J.*) HUMAYUN REZA CHAUDHURY *v.* TARINI CHARAN TEWARI.

196 I.C. 466 = 14 R.P. 200 = 8 B.R. 24.

——*Patwari papers—Entry in—Value—If conclusive—Presumption.*

Entries in patwari papers are not conclusive evidence and no presumption attaches to them regarding their correctness unless the entries are of long standing. (*Sathe, A.M.*) VIDHYA SAGAR *v.* SHAMSHUDDIN.

1941 O.A. (Supp.) 807 = 1941 A.W.R. (Rev.) 933 = 1941 R.D. 920.

——*Settlement records—Entry in—Presumption of correctness.*

A settlement entry must be presumed to be true until it is shown to be wrong. The mere fact that the entry in the year previous to the settlement is inconsistent with the settlement entry is not enough to show that the settlement entry is wrong. On the other hand the presumption is that the settlement entry is more correct than the previous entry, because all settlement entries are verified by the parties concerned. (*Shirreff, J M. and Sathe, J.M.*) SAHDEO SINGH *v.* GHISIAWAN KURMI.

1941 A.W.R. (Rev.) 810 = 1941 O.A. (Supp.) 721 = 1941 R.D. 831.

——*Vocational and tribal designations.*

Vocational designations such as "ulma" are not in fact tribal designations and a person whose family has been described at some time in the revenue records as ulma or other vocational title must in addition belong to some tribe. (*Mitchell, F.C.*) KARTAR SINGH *v.* FAIZ AHMAD. **20 Lah.L.T. 191.**

REVIEW. *See* C. P. CODE, O. 47.

REVISION.

(1) CIVIL. *See* C. P. CODE, S. 115.

(2) CRIMINAL. *See* CR. P. CODE, S. 439.

RIPARIAN RIGHTS—Extent and limits—Waterway not being a public navigable one. *See* 1940 Dig., Col. 1111. U KYAN *v.* MUN SHEIN. **192 I C. 401 = 13 R.R. 173.**

——Natural water-course—Partition of estate—Agreement between sharers to keep water-courses joint and not to interfere with supply channels—One party erecting bund interfering with water-course—Right of action of other—Proof of damage—Necessity. *See* 1940 Dig., Col. 1112. SEETHARAMACHANDRA RAO *v.* SATYANARAYANARAO. **194 I.C. 774 = 14 R.M. 73.**

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———Nature of—Natural channel used as channel for taking water from another river—If becomes artificial channel—Riparian rights—If destroyed by diversion or non-user. *See* 1940 Dig., Col. 1112. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275 = 7 B.R. 153 = A.I.R. 1941 Pat. 118.**

———*Riparian owner—Meaning—Water flowing from stagnant collection of rain water in a depression—Right to—Nature of.*

'Riparian owners' are those whose land abuts on, and is part of, the bank of a river or stream, whether tidal or non tidal. Where a person uses for his cultivation water flowing from a stagnant collection of rain water in a depression in a certain land belonging to the Government, there is no question of riparian rights involved. It is purely a question of easement. (*Roberts, C. J. and Dunkley, J.*) MAUNG MAN *v.* MAUNG SAI GYI. **1941 Rang.L.R. 306 = 196 I.C. 382 = 14 R.R. 77 = A.I.R. 1941 Rang. 208.**

RIWAJ-I-AM—*Presumptions raised by—Judicial decisions—Effect and value of*

A judicial decision though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption raised by a riwaj-i-am. In such a case, the value of the decision arises from the fact not that it is relevant under Ss. 13 and 42 of the Evidence Act as forming in itself a 'transaction by which the custom in question was recognised, etc.,' but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the riwaj-i-am would add greatly to the perplexities and difficulties of proving a custom. (*M. R. Jayakar.*) SUBHANI *v.* NAWAB. **I.L.R. (1941) Lah. 154 = 193 I.C. 436 = 1941 O.L.R. 343 = 7 B.R. 665 = 43 P.L.R. 318 = 13 R.P.C. 154 = I.L.R. (1941) Kar. (P.C.) 22 = 1941 A.L.J. 530 = 43 Bom.L.R. 432 = 1941 O.A. 347 = 1941 A.W.R. (Rev.) 314 = A.I.R. 1941 P.C. 21 (P.C.).**

SALE OF GOODS—*C. I. F. contract—Printed form with typewritten portion—Conflict—Construction—Contract for sale of goods to be delivered in two instalments—Wrongful refusal by buyer to take delivery of first instalment—Right of seller to cancel contract and claim damages.*

If the typewritten and printed portions of a contract can be read together effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion the typewritten portion must prevail. In deciding whether there has been a repudiation of the contract regard must be had to the ratio quantitatively which the breach bears to the contract and the degree of probability or improbability that the breach will be repeated. When there is a contract for the sale of goods to be delivered in two equal instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. (*Leach, C.J. and Venkataramana Rao, J.*) SHA MOOLCHAND KESARIMULL *v.* ASSOCIATED AGENCIES. **54 L.W. 217 = 1941 M.W.N. 769 = (1941) 2 M.L.J. 281.**

———*Tender for goods made of "mild steel"—Stipulation that misdescription would not invalidate tender and sale—Goods delivered found to be of "wrought iron"—Liability for damages.*

The defendant Railway Company invited tenders for certain goods which they wanted to dispose of. These goods included "mild steel special wheels". The plaintiff sent a tender for these goods, which was accepted. One of the conditions of tender and sale was to the effect that "the quantities and descriptions of the materials to be purchased are believed to be correct and appropriate." It was also stipulated that "the tender and sale shall not be invalidated and no compensation for misdescription of the whole or any portion of the lots or items shall be admissible because of any divergence from the particulars entered in the schedule". The plaintiff had the option of inspecting the goods before taking delivery but he did not do so. On delivery the plaintiff discovered that the goods were of wrought iron and not of steel,

Held, that although the company believed the goods to be of mild steel they did not give any guarantee and that the conditions of sale made it clear that if it turned out to be a case of misdescription they would not be liable for any damages and that in the circumstances the plaintiff took delivery of the goods at his own risk. (*Bhide, J.*) B. B. & C. I. RAILWAY *v.* FIRM NIHAL CHAND JAGAN NATH. **192 I C. 175 = 13 R.L. 363.**

SALE OF GOODS ACT (III OF 1930), Ss. 18 and 19—*Transfer of shares in company—When complete—Title—When passes—Agreement to transfer and delivery of share certificate—Effect of.*

A promissory note was executed for cash paid, and it was agreed that the note should be returned duly cancelled on the promisor getting 20 shares of a company standing in the name of his father-in law, *R*, transferred to the payee or his nominee. *R* executed an agreement in which he undertook to transfer the shares to the payee and further stated "I herewith hand over to you duly endorsed the share certificates." This agreement was signed by *R* and counter-signed by the payee. The actual share certificate contained an endorsement of transfer signed by *R*, transferring the shares to the payee, but the space for the signature of the transferee and the company's officials was not filled up. Nothing further was done in the matter of the transfer until the company got into difficulties and went into liquidation after some months. In a suit on the promissory note for the amount thereunder,

Held, that it could not be said that the agreement executed by *R*, by itself would amount to a transfer deed sufficient to cause title to pass; it purported to be an agreement of transfer accompanying the actual instrument of transfer, and if the instrument of transfer had not been completed so far as the transferor could complete it, the agreement by itself would be nothing more than an enforceable agreement to convey, and until the transfer endorsement was signed, the shares would be unascertained goods and they would not be in a deliverable state. But if *R* signed both the agreement and the transfer endorsement on the share certificate and communicated the fact to the payee who counter-signed the agreement in token of acceptance of the transfer, then it would be the payee's fault that he did not cancel the note and get the formalities of the transfer completed. In such circumstances the title in the shares would pass to the transferee and the payee would be disentitled to sue on the note. (*Wadsworth, J.*) KUPPIAH CHETTY *v.* SARASWATHI AMMAL. **1941 Comp. C. 334 = 1941 M.W.N. 919 = A.I.R. 1941 Mad. 769 = (1941) 2 M.L.J. 571.**

———**Ss. 21 and 23**—*Applicability—Contract of sale of small quantity of liquor stored in bulk in shop of licensed vendor—Order canvassed by servant of vendor—Liquor measured and bottled at shop and taken and delivered by vendor's servant to house of buyer—Sale when complete—If completed at house of buyer—Bombay Abkari Act, S.* 45 (c).

SALE OF GOODS ACT (1930), S. 54.

A contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, cannot be held to be a contract of sale of specific goods within the meaning of S. 21 of the Sale of Goods Act. The expression "Specific goods" necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest.* A sale of some specified quantity of liquor out of a store house or cask would not be capable of ascertainment until it was removed or separated. "Specific goods" would, according to their natural interpretation, mean goods whose delivery can be demanded *in specie.* A contract of sale of a small quantity of liquor stored in bulk would more appropriately be regarded as a contract for sale of unascertained goods and would fall under S. 23 of the Sale of Goods Act. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the quantity of liquor ordered would be an act of ascertainment and appropriation. Where the servant of a licensed vendor of liquor goes about canvassing order for liquors and gets orders from customers and thereafter gets the quantities so canvassed measured off at the shop of the vendor and carries the quantities to the respective houses of the customers, it cannot be held that the sale is completed at the houses of buyers upon delivery of liquor and not before. Under S. 23 (2), the servant of the seller can very well be treated as a bailee for the purpose of transmission to the buyer, and delivery to such servant at the place of the licensed vendor would be effective delivery to the buyer himself. It is immaterial whether the price of the liquor is paid at the shop of the vendor or at the house of the buyer, for the completion of the sale does not depend upon payment of the price of the goods sold. The sale must be taken to be completed within the premises of the licensed vendor and the latter cannot therefore be convicted under S. 45 (*c*) of the Bombay Abkari Act for contravention of a clause in his licence prohibiting sale of liquor at any place except the licensed premises. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* KUNVERJI KAVASJI

194 I C. 302 = 13 R.B. 368 = 42 Cr.L.J 552 = 43 Bom.L.R. 95 = A I.R. 1941 Bom. 106

——**S 54 (4)**—*Contract rescinded by exercise of right of re sale by seller—Arbitration clause in contract—If wiped out.*

The contract for sale of goods gave a right of re sale to the seller in case of default on the part of the buyer and provided that any dispute arising out of the contract whatever its nature shall, unless amicably settled, be referred to arbitration :

Held, that the arbitration clause being an integral part of the contract was also wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be made in pursuance of the arbitration clause.

Held, further, that the fact that S. 54 (4) kept alive the seller's right to damages arising out of buyer's default did not entitle the seller to enforce that claim by reference to arbitration under the arbitration clause which was no longer subsisting. The only way of enforcing the claim for damages was by way of a suit in a Court of law. (*Tek Chand and Beckett, JJ.*) CHANDU LAL PARMA NAND *v.* G AHAMS TRADING CO. (INDIA), LTD. **43 P.L.R. 693 = A.I.R. 1941 Lah. 427.**

——**S. 83 (1)**—*Document of title—Delivery chit—Nature and incidents of.*

Apart from any established trade custom a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of the price of the goods is not a document of title within the meaning of S. 2 (4), Sale of Goods Act. The delivery chit does not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller. Irrespective of whether he had received the purchase price of the goods the original seller is entitled to refuse delivery to the holder of the chit in the exercise of his right of lien as unpaid vendor. The delivery chit therefore does not fall within the purview of S. 53 (1), Sale of Goods Act. (*Davis, C.J. and Lobo, J.*) HUKUMATRAI ARJANDAS *v.* NANDU VIRUMAL.

I.L.R. (1941) Kar. 89 = 195 I.C. 137 = 14 R.S. 10 = A.I R. 1941 Sind 78.

SALE OF LAND.

See (*i*) VENDOR AND PURCHASER.
(*ii*) T. P. ACT.

SALVAGE LIEN—Applicability —Person making payment for his own benefit and to save his property—Payment incidentally benefiting another also—Right to equitable charge. *See* 1940 Dig., Col. 1114. LANKARAM *v.* SUNDARAGOPALA AYYAR. **195 I.C. 212 = 14 R.M. 152 = 1941 M.W.N. 66 = A.I.R. 1941 Mad. 208 = (1940) 2 M.L J. 1038.**

SATYADHIKARI OH DAHHOIKAR—Meaning *See* HINDU LAW—WILLS—CONSTRUCTION.

72 C.L.J. 348.

SARAIS ACT (XXII OF 1867), S. 3—Order of District Magistrate—Revision. *See* 1940 Dig., Col. 1114. GHULAM SADID-UD-DIN *v.* EMPEROR.

193 I.C. 564 = 13 R.L. 480 = 42 Cr.L J. 448 = A.I.R. 1941 Lah. 71.

SEA CUSTOMS ACT (VIII OF 1878), S. 167. (17)—Construction—"Found on board of the vessel"—'So found is short"—Meaning of "found"—Measurement—Time and place of—If to be on board vessel at once. *See* 1940 Dig., Col. 1114. BRUUSGAARD KIOSTERUDS DAMPSKIBS AKTIESELSKAB *v.* SECRETARY OF STATE. **191 I.C. 867 = 13 R B 211 = 4 F.L.J. (H.C.) 60.**

——**S. 188**— 'Any decision or order"—Meaning of—Appellate order as to rate of duty confirmed under S. 191—Jurisdiction of Civil Court. *See* 1940 Dig., Col. 1115. SECRETARY OF STATE *v.* MASK & CO.

I.L.R. (1940) Kar. (P.C.) 194 = (1940) 2 M.L J. 140 (P.C.).

SECURITIES ACT (X OF 1920), Ss. 12 and 13—*It must be read together.*

Per *Panckridge, J.*—Ss. 12 and 13 of the Securities Act must be read together. The mere fact that there has been a dispute to which S. 13 applies, does not deprive S. 12 of its operation. It would be absurd to suppose that the existence of a dispute relieves the applicant from the obligation to deliver the promissory note and pay the prescribed fee. (*Derbyshire, C.J. and Panckridge, J.*) PURSOTTOME *v.* DWARKA PROSAD.

I L.R. (1941) 1 Cal. 328 = 196 I.C. 48 = 14 R.C. 156 = 45 C.W.N. 449 = A.I.R. 1941 Cal 458.

——**S. 13**—*Effect of—Right of prescribed authority.*

Per *Panckridge, J.*—The effect of S. 13 of the Securites Act is this: it relieves the prescribed authority of deciding on the merits of the dispute *inter partes* in a case to which the section applies. But the prescribed authority is still entitled to call upon the applicant to satisfy it of the justice of his claim from other points of view. (*Derbyshire, C.J. and Panckridge, J.*)

SECURITIES ACT (1920), S. 13.

PURSOTTOME *v.* DWARKA PROSAD.
I.L.R. (1941) 1 Cal. 328 = 196 I.C. 48 = 14 R.C. 156 = 45 C.W.N. 449 = A.I.R. 1941 Cal. 458.

——S. 13—*Final "decision"—Trial Court declaring applicant entitled to promissory note for life only—Applicant appealing against it claiming absolute ownership—If entitled to renewal of note.*

Where a Court of first instance has declared that the applicant is entitled to the Government Promissory note for life only and the applicant is appealing against it claiming absolute ownership of the note, there is no "final decision" that the applicant is "entitled to" the note within the meaning of S. 13 of the Securities Act. The prescribed authority is therefore entitled to refuse to renew the note in the applicant's favour. (*Derbyshire, C.J. and Panckridge, J.*) PURSOTTOME *v.* DWARKA PROSAD. **I.L.R. (1941) 1 Cal. 328 = 196 I.C. 48 = 14 R.C. 156 = 45 C.W.N. 449 = A.I.R. 1941 Cal. 458.**

——S. 13—*Person declared entitled to promissory note for life—If one "entitled to" the note.*

Per *Derbyshire, C. J.*—A person who is declared entitled to a Government Promissory note for life only is not one "entitled to" the note within the meaning of S. 13 of the Securities Act. (*Derbyshire, C.J. and Panckridge, J.*) PURSOTTOME *v.* DWARKA PROSAD.
I.L.R. (1941) 1 Cal. 328 = 196 I.C. 48 = 14 R.C. 156 = 45 C.W.N. 449 = A.I.R 1941 Cal. 458.

SECURITY BOND. *See* SURETY.

SIND COURTS ACT (VII OF 1926)—Jurisdiction—Reference under Land Acquisition Act—Dispute as to apportionment of compensation money—Subject-matter not exceeding Rs. 5,000—Order of Assistant Judge—Appeal—Forum—Jurisdiction of High Court. *See* LAND ACQUISITION ACT, S. 54.
I.L.R. (1941) Kar. 133.

——(as amended by the Government of India Adaptation of Indian Laws Order, 1937), S. 37—*Applicability—Suit against Governor-General in respect of contractual obligation of Government Railway—Jurisdiction of Small Cause Court—Forum—Bombay Civil Courts Act, S 32—Karachi Small Cause Courts Act, S.* 14.

A suit against the Governor-General of India in Council for the recovery of an amount overcharged by a Government Railway on a consignment of goods and a suit for recovery of expenses incurred in clearing and forwarding goods imported for the Government Railway, are suits of the description falling under S. 32 (1) of the Bombay Civil Courts Act and S. 37 of the Sind Courts Act, and are therefore excepted from the jurisdiction of the Small Causes Court, Karachi. S. 14 of the Karachi Small Cause Courts Act clearly excludes such suits from the jurisdiction of the Small Cause Courts. No distinction can be drawn in this respect between suits against a Government Railway arising out of ordinary contractual relations and suits relating to acts done by a Railway official under the authority of the Governor-General of India in Council. Such suits can now be instituted only in the Chief Court of Sind and could formerly be filed only in the Court of the Judicial Commissioner of Sind. (*Lobo, J.*) THAKARDAS NARUMAL *v.* GOVERNOR-GENERAL OF INDIA.
I.L.R. (1941) Kar. 238 = 195 I C. 556 = 14 R.S. 32 = A.I.R. 1941 Sind 138.

SIND ENCUMBERED ESTATES ACT (XX OF 1896), S. 32—Scope—Commissioner's power to cancel liquidation scheme—Effect of cancellation—Proceedings, processes, executions and attachments—Revival of. *See* 1940 Dig., Col. 1116. RUPCHAND AMRITLAL *v.* JAMALUDIN.
192 I C 454 = 13 R.S. 186.

SPECIFIC RELIEF ACT (1877), S. 9.

SIND FRONTIER REGULATIONS (III OF 1892), Ss. 8, 12 and 13—*If governs section.*

Offence of any kind cannot be withdrawn from a Court of Session and referred to a Council of Elders. S. 8 governs Ss. 12 and 13. (*Davis, C. J. and Tyabji, J.*) EMPEROR *v.* SHEROO. **195 I.C. 14 = 14 R.S. 4 = 42 Cr.L J. 645 = A.I.R. 1941 Sind 97.**

——Ss. 20 to 26—Scope—If controlled by S. 397, proviso (2), Cr. P. Code. *See* CR. P. CODE, S. 397, PROVISO 2.
A.I.R. 1941 Sind 29.

SOCIETIES REGISTRATION ACT (XXI OF 1860)—*Society registered under—Position of—Status and rights of members—Suit on behalf of Society—Frame of—Right of individual members to maintain action.*

The position of a society registered under the Societies Registration Act is more like that of a club or a joint stock company. The position of members of the society is similar to that of the shareholders of a company. In order to redress a wrong done to the society or to recover moneys due to it, the action must *prima facie* be brought by the Society itself. Where the persons against whom the relief is sought themselves hold and control the majority and will not permit an action to be brought in the name of the society, the Courts will allow the members complaining to bring an action in their own-names. But in such an action the plaintiffs cannot have a larger right to relief than the society itself would have if it were the plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the members or are capable of being confined by the majority. The cases in which the minority can maintain an action are confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the society. (*Kania, J.*) KRISHNAN *v.* SUNDARAM.
43 Bom L.R. 562 = A.I.R. 1941 Bom. 312.

SPECIFIC PERFORMANCE—*Right to—Readiness and willingness of plaintiff to perform contract—Proof required.*

In a suit for specific performance it is incumbent on the plaintiff to prove that he was ready and willing to perform the contract as it actually was and not as he alleges it was. Where, therefore, the plaintiff's case is that he agreed to purchase the property for Rs. 85 and that he was ready and willing to pay this price but the Court has found that the purchase price fixed by the contract was not Rs. 85 but Rs. 130, the claim for specific performance must fail. (*Sen, J.*) RUSTOMALI *v.* SHEIKH AHIDER RAHAMAN MIA.
45 C.W.N. 837.

SPECIFIC RELIEF ACT (I OF 1877), S. 9—Applicability—Plaintiff in actual physical possession of land—Defendant realising rent from stall keepers on market days. *See* 1940 Dig., Col. 1117. SONA MIA *v.* PROKASH CHANDRA.
191 I.C. 803 = 13 R.C. 284.

——S. 9—*Exclusive possession in the case of co-owners—If possible.*

It may well be that a joint owner of property is still at the date of suit under S. 9, Specific Relief Act, entitled to the property and would be given possession in a suit properly instituted for that purpose. But nevertheless it is open to one co-owner of property for oust the others and to obtain exclusive possession to himself. The title of others may not be extinguished when this is done, but if that ouster took place more than 6 months before the institution of the suit under S. 9, Specific Relief Act, then for purposes of S. 9 that ouster would hold good. (*Bose, J.*) ABDUL AZIZ *v.*

SPECIFIC RELIEF ACT (1877), S. 9.

SK. AMIR. **193 I.C. 805=13 R.N. 348=1941 N.L.J. 115=A.I.R. 1941 Nag. 130.**

——**S. 9 and Civil Procedure Code, S. 115**—*Maintainability of suit—Suit for possession—No question of tenancy alleged or admitted—Order or decree under S. 9, Specific Relief Act—Interference in revision.*

A suit brought for possession on the ground of forcible dispossession by the defendant, under S. 9 of the Specific Relief Act is not barred by S. 108 (10) of the Oudh Rent Act when there is neither any allegation or admission of relationship of landlord and tenant. An order or decree passed under S. 9, Specific Relief Act, has not been made the subject of any appeal or review and although the High Court is not precluded from interfering with such orders in revision under S. 115, C. P. Code, such interference should be confined to cases of a very exceptional nature. (*Ghulam Hasan, J.*) RAJAI SINGH *v.* SURAJ BALI. **1941 O.W.N. 1237=1941 O.A. 940=1941 A.W.R. (Rev.) 1062**

——**S. 9**—Order for removal of structures erected by defendant—Legality. *See* 1940 Dig., Col. 1117. SONA MIA *v.* PROKASH CHANDRA. **191 I.C. 803=13 R.C. 284.**

——**S. 19**—*Applicability—Power of Court to award compensation in cases where specific performance cannot be granted in law.*

S. 19 of the Specific Relief Act does not apply to cases in which specific performance cannot be claimed at all or in which S. 21 of the Act bars specific performance. S. 19 applies to cases in which a contract may be specifically enforced, but in the opinion of the Court for equitable reasons it should not be enforced specifically. In such cases the Court is empowered to grant compensation in lieu of specific performance. It would not apply to cases where the Court cannot under the law grant specific performance. (*Abdul Ghani and Subramania Aiyar, JJ.*) A. J. RAM *v.* ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **46 Mys. H.C.R. 125=19 Mys.L.J. 1.**

——**Ss. 21 and 12**—*Refusal of specific performance—Circumstances justifying—Hire purchase agreement.*

A sold certain article to *B* in pursuance of a hire purchase agreement between the parties. The article was to remain the property of *A* until the payment of all the instalments of the purchase price. *B* was entitled to return the article in good working order at any time provided all amounts due by way of instalments were paid. If any instalments were not paid, *A* could take possession of the article as well as recover the amount of instalments due, and the costs of putting it in order. The parties subsequently fell out and instead of returning the goods himself as per terms of the agreement *B* requested *A* to take back the article. *A* instead of ignoring the letter as being contrary to the terms of the agreement asked for time to take back the article and after getting it examined refused to take it as it was not found in good working order. *A* then sued *B* for the amount of all instalments due up to the date of the suit and for a declaration that *B* was liable to pay all remaining instalments as set out in the agreement.

Held, that the suit was one for the specific performance of the contract for the sale of goods and since the failure of *B* to perform his obligations under the hire-purchase agreement for the sale of goods could be adequately compensated in money the contract could not be specifically enforced.

Held, further, that *A's* letter asking for time to take back the article amounted, so far as the obligation of *B* to return the goods was concerned, to a novation of the agreement (*Roberts, C.J. and Dunkley, J.*) ABDUL

SPECIFIC RELIEF ACT (1877), S. 42.

RAHAMAN NIZAMI *v.* MANIKRAM HANUMANBUX. **195 I.C. 860=14 R.R. 65=A.I.R. 1941 Rang. 177.**

——**S. 21 (b) and (g)**—*Applicability—Contract by company to employ person as medical adviser or legal adviser for twelve years—Specific performance—Wrongful termination by employer—Remedy.*

It is well settled that a contract of personal service cannot be specifically enforced. Neither affirmative nor negative covenants between an employer and an employee will be enforced at the instance of either. A contract to employ in service as a medical adviser or a legal adviser is a contract for personal service and under S. 21 (*b*) of the Specific Relief Act is not specifically enforceable. The fact that the employer is a company makes no difference in this respect. If the employer terminates the services of the employee on unreasonable or illegal grounds, the remedy of the aggrieved employee is to sue for damages and not for specific performance. A contract involving the performance of a continuous duty as medical adviser or legal adviser for a period of 12 years also falls under S. 21 (*g*) of the Specific Relief Act. (*Abdul Ghani and Subramania Aiyar, JJ.*) A. J. RAM *v.* ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **46 Mys. H.C.R. 125=19 Mys.L.J. 1.**

——**S. 22**—*Scope of discretion conferred by—Interference by appellate Court—Justification.*

S. 22 of the Specific Relief Act lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal. The section itself stresses the necessity on the part of the Court to exercise discretion in a sound and reasonable manner and not in an arbitrary fashion. The latter portion of the section itself recognizes that it is competent for an appellate Court to intervene and correct any wrong if the exercise of discretion has been arbitrary. (*Ghulam Hasan, J.*) BENI MADHO *v.* RAM NATH. **194 I.C. 533=14 R.O. 1=1941 R.D. 100=1941 O.W.N. 265=1941 A.W.R. (Rev.) 151=1941 O.A. 203=A.I.R. 1941 Oudh 324**

——**S. 22**—*Suit for specific performance of sale—Plea of inadequacy of price in defence—Court of equity, when will not countenance.*

Where a contract of sale is entered into by the vendor, with full knowledge before a Court of law and with the advice of his counsel and there is no suggestion whatever of his having been in any way imposed upon, a Court of equity will not be entitled to interpose its aid on the ground of mere inadequacy of price. (*Ghulam Hasan, J.*) BENI MADHO *v.* RAM NATH. **194 I.C. 533=14 R.O. 1=1941 R.D. 100=1941 O.A. 203=1941 O.W.N. 265=1941 A.W.R. (Rev.) 151=A.I.R. 1941 Oudh 324.**

——**S. 23 (b)**—Option of repurchase in contract of sale—Assignment of—Right of assignee to enforce option. *See* 1940 Dig., Col. 1118. VISHWESHWAR NARSABHATTA *v.* DURGAPPA IRAPPA. **191 I.C. 139.**

——**S. 42**—*Applicability.*

A suit for a declaration that the defendant is not keittima daughter of the plaintiff and her husband does not lie under S. 42 It is a suit to establish a negative case. (*Roberts, C.J. and Dunkley, J.*) DAW PONE *v.* MA HNIN MAY. **196 I.C. 352=14 R.R. 95=A.I.R. 1941 Rang. 220.**

——**S. 42**—Declaratory suit—Maintainability—Suit for declarat ion of plaintiff as director of company—Suit

SPECIFIC RELIEF ACT (1877), S. 42.

also challenging appointment of other directors. *See* 1940 Dig., Col. 1120. SATI NATH MUKHERJEE *v.* SURESH CHANDRA ROY. **195 I.C. 376 = 14 R.C. 74 = 1941 Comp. C. 203 = A.I.R. 1941 Cal. 136.**

——**S. 42**—Declaratory suit—Maintainability—Suit to declare plaintiff not the father of a child—Burman Budhist becoming a rahan—Effect. *See* 1940 Dig., Col. 1120. U ARZEINA *v.* MA KYIN SHWE. **192 I.C. 439 = 13 R.R. 180.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for declaration that contract is void and for its cancellation—Maintainability.*

No doubt the powers of Court to make declaratory decrees are limited to those contained in S. 42 of the Specific Relief Act, and apply only to cases in which the plaintiff, being entitled to any legal character or to any right to any property, may bring a suit against any person denying his title to such character or right. But if the plaintiff claims not merely a declaration that a certain contract is void but prays for its cancellation as provided by S. 39 of the Specific Relief Act, the suit is maintainable. (*Lort Williams, J.*) BAHADUR MULL CHAUDHURI *v.* NAGAR MULL MADAN GOPAL. **I.L.R. (1941) 1 Cal. 451 = 197 I C. 22 = 45 C.W.N. 795 = A.I.R. 1941 Cal. 534.**

——**S. 42**—*Declaratory suit—When not barred—Plaintiff not shown to be entitled to sue for any other relief.*

Where it is not proved that the plaintiff could have sought any relief other than a mere declaration, his declaratory suit is not barred by S. 42, Specific Relief Act. (*Harper, S.M.*) NAR SINGH *v.* BADRI. **1941 O.A. (Supp.) 894 = 1941 A.W R. (Rev.) 1101**

——**S. 42**—*Declaratory suit without consequential relief—Maintainability—Test.*

Where notwithstanding a sale by him of his property a plaintiff sues for a mere declaration that he was the owner of the property covered by the sale, such a suit would be maintainable, if the sale was not a real transaction. He need not ask the sale to be set aside, for there is no real sale. The property is where it was. But when once a third party's interest is affected, the transaction becomes something other than unreal and the transaction is not a nullity and has to be set aside. (*Stone, C.J. and Bose, J.*) ONKARSINGH *v.* SHRIKISHAN. **195 I.C. 847 = 4 R.N. 69 = 1941 N.L.J. 197 = A.I.R. 1941 Nag. 174.**

——**S. 42**—*Relief under—Discretion—Refusal to exercise—Decree*, brutum fulmen.

Where certain members of a registered society sued to obtain a declaration that certain amendment to the rules of the society passed at a meeting were *ultra vires* as not having complied with the rules for the purpose, and also prayed that the executive committee should continue to hold office in spite of the fresh elections held under the amended rules and it was also found, that according to the rules of the society, similar amendments could be made by a proper compliance with the rules, it was *held*.

Per *Ghulam Hasan, J.*—That as any decree that might be passed is likely to be rendered nugatory by the passing of the amendments according to the rules, the decree would be *brutum fulmen* and that hence the Court should refuse to grant the declaration.

Per *Agarwal, J.*—That the decree in such a case would not be *brutum fulmen* because it could not be said that the rules would surely be amended at a subsequent meeting. (*Ghulam Hasan and Agarwal, JJ.*) BISWANATH SARAN SINGH *v.* MUJTABA HUSAIN. **195 I.C. 402 = 14 R.O. 82 = 1941 O.L.R. 584 = 1941 A.L.W. 538 = 1941 O.A. 432 =**

SPECIFIC RELIEF ACT (1877), S. 45.

1941 A.W.R. (C.C.) 175 = 1941 O.W.N. 661 = A.I.R. 1941 Oudh 422.

——**S. 42**—Relief under—Discretion of Court—Interference in appeal. *See* 1940 Dig., Col. 1121. UDAY CHANDRA PAL *v*, B H. PARMAR. **196 I.C. 185 = 14 R.C. 187 = 72 C.L.J. 412 = A.I.R. 1941 Cal. 153.**

——**S. 42**—*Relief under—Discretion—Plaintiff out of possession—Defendant in possession—Prayer for injunction and not for possession.*

Where the plaintiff who is out of possession institutes a suit against the defendant who is in possession for a declaration of his title with a prayer for injunction, the Court in the exercise of its discretion will not grant to the plaintiff his prayer for injunction even if injunction could be considered to be further relief within the meaning of the proviso to S. 42 of the Specific Relief Act, as he could have prayed for recovery of possession. (*Mitter and Khundkar, JJ.*) ANILABALA DEBI *v.* MADHABENDU NARAIN ROY. **74 C.L.J. 241 = 46 C.W.N. 20.**

——**S. 42**—Scope—Declaration merely reciting law. *See* 1940 Dig., Col. 1121. UDAY CHANDRA PAL *v.* B.H. PARMAR. **196 I.C. 185 = 14 R.C. 187 = 72 C.L.J. 412 = A.I.R. 1941 Cal. 153.**

——**S. 42**—*Scope—Declaration negativing defendant's title to property—Suit for—Maintainability.*

For the purpose of deciding whether a suit is for a declaration authorised under S. 42 of the Specific Relief Act, the substance and not the form must be regarded. Where a plaintiff asserting his mortgage rights in sixteen annas of the properties mortgaged to him asks for a declaration that the defendant has no proprietary right in the same, the suit is in substance for a declaration of his mortgage rights in the property and comes within the purview of S. 42 of the Specific Relief Act and is, therefore, maintainable. In seeking for a declaration which negatives the defendant's title to the properties, the plaintiff in substance asserts his own right and seeks for a declaration in respect thereto. (*Mitter and Khundkar, JJ.*) JASODA BAI *v.* MANGAL CHAND. **45 C.W.N. 470.**

——**S. 42**—*Scope—Office of* mahant *of* math—*Suit for declaration of title to and possession of—Maintainability without prayer for possession of* math *properties—Plaintiff not in possession—Effect.*

It is not possible to separate the office of a *mahant* or *pandarasannadhi* of a *math* from the properties which form the endowments of the office, and a suit by a person, not in possession of such properties, for a declaration of his title to, and possession of, the office is not maintainable by reason of S. 42 of the Specific Relief Act, where the plaintiff has failed to ask for possession of the *math* properties. (*Leach, C.J., Mocket and Krishnaswami Ayyangar, JJ.*) KANDASWAMI THAMBIRAN *v.* VAGHEESAM PILLAI. **54 L.W. 357 = 1941 M.W.N. 831 = 196 I.C. 721 = A.I.R. 1941 Mad. 822 = (1941) 2 M.L.J. 463 (F.B.).**

——**S. 45**—*Building plan sanctioned by Municipal Corporation in disregard of bye-laws—Right of adjacent owner to apply for mandamus—Calcutta Municipal Act, Sch. XVII.*

The Corporation owes a legal duty to an adjacent owner and there is, therefore, a corresponding right in his favour, to prevent building plans being passed contrary to the bye-laws. If, therefore, the Building Committee of the Corporation sanctions a building plan in disregard of the bye-laws and an adjacent owner is thereby injured as to light, air, health and amenities by reason of the particular situation of his property, he can apply for mandamus under S. 45 of the Specific Relief

SPECIFIC RELIEF ACT (1877), S. 45.

Act. (*Ameer Ali, J.*) SM. LAKSHMIMONI DASI. *In re.*
I.L.R. (194) 1 Cal. 16 = 196 I.C. 452 = 45 C.W.N. 401 = A.I.R 1941 Cal. 391.

——**S. 45**—*Building plan sanctioned by Municipal Corporation in violation of regulations—Right of adjacent owner to apply for mandamus—Calcutta Municipal Act, Ss. 17, 18, 19 and Sch. XVII.*

Where the amenities and sanitation of a person's property will be substantially prejudiced if a building plan which violates the regulations is sanctioned, such person has the right to call upon the Municipal Corporation to see that the provisions of the statute are observed. He can apply for mandamus under S. 45 of the Specific Relief Act, as the Calcutta Municipal Act furnishes no specific and adequate legal remedy to persons in his position. Ss. 17, 18 and 19 of that Act do not purport to confer rights upon aggrieved parties. (*Panckridge, J.*) A.C. MAHOMED *v.* CORPORATION OF CALCUTTA.
45 C.W.N. 408.

——**S. 45**—*Municipal Corporation sanctioning building plan in violation of rules—Right of neighbouring owner to apply for mandamus—No objection raised by immediate neighbour—Calcutta Municipal Act, Ss. 17 and 19.*

An owner of premises has a clear right to insist that the building rules should be strictly observed by the Corporation in sanctioning plans in respect of buildings proposed to be erected in the neighbourhood, although the owner of the premises which lie immediately next to the proposed building has no objection to building operations being undertaken in accordance with the plans. He has a right to apply for a mandatory order on the Corporation under S. 45 of the Specific Relief Act, as the Calcutta Municipal Act furnishes no specific and adequate legal remedy to persons in his position. (*Edgley, J.*) HIRENDRA NATH *v.* CORPORATION OF CALCUTTA. **I.L.R. (1941) 1 Cal. 435 = 196 I.C. 832 = 45 C.W.N. 413 = A.I.R. 1941 Cal. 386.**

——**S. 54**—*Absolute injunction against enjoyment of own land—Legality—Fear of acquisition of easement—If a sufficient ground for restraining use of one's doors and windows.*

The grant of an absolute injunction restraining a person from enjoying his own land is wholly illegal. The apprehension of the defendants acquiring a right of easement of light and air after the lapse of 20 years, if their doors and windows are allowed to stand and remain open, cannot afford any justification for preventing the defendants by an injunction from enjoying their property by keeping their doors and windows open. (*Ghulam Hasan, J.*) GANESH PRASAD *v.* BASDEO.
16 Luck 686 = 194 I C. 73 = 13 R O. 533 = 1941 R.D. 270 = 1941 A W.R. (Rev.) 296 = 1941 A L.W. 371 = 1941 O.L.R. 392 = 1941 O.W.N. 509 = 1941 O.A. 327 = A.I.R. 1941 Oudh 442.

——**S. 54**—*Injunction—When may not be issued.*

An injunction will not issue in the case of contracts which cannot be specifically enforced or where their breach can be adequately compensated in damages. (*Young, C.J. and Sale, J.*) GULAB SINGH *v.* THE PUNJAB ZAMINDARA BANK, LTD., LYALLPUR.
43 P.L.R. 619 = 1941 Comp. C. 301.

——**Ss. 54 and 56 (1)**—Municipal committee imposing illegal tax—Injunction—If can be granted. *See* 1940 Dig., Col. 1123. MUNICIPAL COMMITTEE, MONTGOMERY *v.* SANT SINGH.
I.L.R. (1940) Lah. 707.

——**Ss. 55 and 45**—*Injunction to public bodies—Issue of—Power of Court.*

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S. 55 is independent of S. 45 of the Specific Relief Act and an injunction can be issued under that section to a public body like a Municipal Committee even in those cases where S. 45 of the Act does not apply. (*Dalip Singh and Din Mahomed, JJ.*) ADMINISTRATOR, LAHORE MUNICIPALITY *v.* MUNIRUDDIN.
I.L.R. (1941) Lah 278 = 196 I.C. 70 = 14 R.L. 117 = 43 P.L.R. 18 = A.I R. 1941 Lah. 200.

——**S. 56 (k)**—*Injunction—Sanction to build by Municipal Committee—Suit to restrain construction—Facts to be proved—Nuisance—Test.*

Where a plaintiff asks for an injunction to restrain the building of a house sanctioned by a Municipal Committee, it is incumbent on him under S. 56 (*k*) of the Specific Relief Act to show that he has some personal interest in the matter. It is only when the act of any corporation or public company which is in excess of the powers is calculated to be injurious to the rights of the property of an individual that he would have the right to protection of the Court by injunction. The plaintiff can succeed only on proof of some special damage or injury occasioned to them by reason of the permission granted by the Municipal Committee. To determine whether an act which is complained of as being a nuisance is strictly so or not is to be judged by the ordinary standards of persons residing in the neighbourhood and the criterion would be the ordinary physical comfort of human existence according to plain, sober and simple notions obtaining amongst people. (*Niyogi and Clarke, JJ.*) C B. PARAKH *v.* P. N. RUDRA. **I.L.R. (1941) Nag. 266 = 1941 N.L.J. 211.**

——**S. 56 (k)**—*Suit for injunction restraining building of house—Proof of special damage—Necessity*—Ultra vires *act of Municipal committee—If can confer right to sue.*

In a suit for injunction restraining the building of a house it is incumbent on the plaintiff under S. 56 (*k*) to show some special damage or injury. The mere fact that the Municipal Committee acted beyond its powers in granting the sanction for construction of the house is not by itself sufficient to entitle the plaintiff to sue. (*Niyogi and Clarke, JJ.*) CAWASHAH BOMANJI *v.* PRAFULLA NATH. **A.I.R. 1941 Nag. 364.**

STAMP ACT (II OF 1899), S. 2 (5)—*Instrument, if a bond—Construction as a whole and not piecemeal.*

In deciding the question whether an instrument does or does not fall within the purview of bond as defined by S. 2 (5) the instrument must be considered as a whole and it is not permissible to divide it into several parts and look at it piecemeal and then to assign each one of such parts to some other article of Sch. 1 of the Act. (*Iqbal Ahmad, Ag.C.J., Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTE.
I.L.R. (1941) All. 471 = 195 I.C. 791 = 14 R.A. 84 = 1941 A.L.J. 427 = 1941 A.W.R (Rev.) 704 = 1941 O.A. (Supp.) 636 = 1941 A.L.W. 693 = 1941 R D. 611 = A.I R. 1941 All. 243 (F.B.).

——**S. 2 (5) and Sch. 1, Arts. 15 and 41**—*Deed—Construction—Proper stamp—Test.*

The material part of the document executed by an agriculturist ran as follows: "I, the executant, by hypothecating for the year 1344 F. the sugarcane fields . . . which I had cultivated and produced, have taken, by promising to sell the said sugarcanes a sum of Rs. 35 in cash, as a peshgi (advance-money) on interest from Sugar Factories, Ltd., and for such sums as I will take in future I shall abide by the following terms . . . . . That whenever a necessity will dictate I shall in addition to the zar-i-peshgi aforesaid, continue to take, under

STAMP ACT (1899), S. 2.

receipts further sums from the said creditor, the aggregate amount whereof will come to Rs. 100 and all the sugarcanes shall stand hypothecated for the entire mutaleba, aforesaid and the price of the sugarcanes supplied will be allowed a set off against the mutaleba re-zar-i-peshgi and receipts, aforesaid; that if, after the mutaleba aforesaid, has been set-off, a surplus amount, payable to me by the said creditor on account of price of sugarcanes, be found to have accumulated, I, the executant, shall, on demand, take it interest free; and that I shall pay up the mutaleba, if any, found due by me. That I, the executant, shall, after (enforcement of) this contract, no longer have any proprietary right of any kind in the hypothecated sugarcanes, referred to above." The instrument bore a stamp of two annas, was signed by the executant and was attested by witnesses. It was however not registered.

Held, (1) Per *Full Bench* (*Verma and Mulla, JJ.*, contra).—That the document was sufficiently stamped.

(2) Per *Full Bench*.—That the instrument was a mortgage of and agreement to sell sugarcane crop.

(3) Per *Full Bench* (*Verma and Mulla, JJ.*, dissenting).—That the amount secured under the document was Rs. 100 and not Rs. 135.

(4) Per *Full Bench* (*Bajpai and Dar, JJ.*, contra).—That the document was a bond within the meaning of S. 2 (5). Case-law discussed. (*Iqbal Ahmad, Ag.C.J., Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI.

I.L.R. (1941) All. 471 = 195 I.C. 791 = 14 R.A. 84 = 1941 A.L.J. 427 = 1941 A.W.R. (Rev.) 704 = 1941 O.A (Supp.) 636 = 1941 A.L.W. 693 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).

——**S. 2 (10)**—*'Conveyance'—Document recording prior oral transaction.*

A document by which property is not actually transferred but which merely purports to be a record in writing of a prior oral transaction is not a conveyance within the definition of S. 2 (10) of the Stamp Act and is not, therefore, liable to stamp duty as such. (*Mitchell, F.C.*) PARSHOTAM DAS *v.* EMPEROR.

43 P.L.R. 294 = 20 Lah.L.T. 108.

——**S. 2 (24)**—*Deed both a deed of trust and of settlement—Stamp duty.*

A deed by which a certain income from a certain property is vested in a body of trustees to be applied to certain charitable institutions is a deed of settlement as well as a deed of trust, and as such is separately liable to stamp duty. (*Mitchell, F.C.*) ISHAR DAS *v.* EMPEROR.

20 Lah.L.T. 151.

——**S. 19**—*Promissory note executed abroad—Suit thereon in British India—Need for affixing stamp and cancelling note—Procedure before endorsement of note.*

In a case of assignment or transfer of a promissory note drawn or made outside British India the first holder in British India must affix a proper stamp and cancel the same and the affixing of the stamp and its cancellation must be done before the process of transfer began in British India. 8 M.L.J. 182 and 36 M.L.J. 188, Rel on. (*Mockett, J.*) SIVASUBRAMANIA THEVAN *v.* KALANKARAYAN KONAR.

1941 M.W.N. 968 = A.I.R. 1941 Mad. 868 = (1941) 2 M.L.J. 301.

——**S. 24, Expl.**—Construction—Sale of undivided share in property subject to mortgage—Stamp duty—Whole mortgage debt if to be taken into account or only proportional share of debt. *See* 1940 Dig., Col. 1125. SUPERINTENDENT OF STAMPS *v.* TEJMAL NIHAL CHAND.

I.L.R. (1941) Bom. 23 = 191 I.C. 382 = 13 R.B. 158.

STAMP ACT (1899), S. 40.

——**S. 29**—*Agreement to the contrary—What amounts to—Conveyance.*

An understanding between the parties to a conveyance that the expenses of executing it are to be borne by the vendor amounts to an agreement to the contrary within the meaning of the opening words of S. 29 of the Stamp Act. (*Mitchell, F.C.*) AMAR NATH *v.* LAKHSHMI NATH.

20 Lah.L.T. 143.

——**Ss. 31 and 56 (2)**—*Order of Collector—Revision.*

The Court of the Financial Commissioner has no power to interfere on revision with any order passed by a Collector under S. 31 of the Stamp Act. On the other hand, under S. 56 (2) of the Act it is open to a Collector acting under S. 31 to refer any matter for the decision of that Court if he feels doubt as to the amount of duty with which any instrument is chargeable. (*Mitchell, F.C.*) VOLKART BROTHERS *v.* EMPEROR.

20 Lah.L.T. 126.

——**S. 31**—*Original document not produced—Opinion given by Collector—Value of.*

S. 31 of the Stamp Act refers to the giving of an opinion by the Collector on the duty chargeable on any document brought to the Collector. Where the document in original is not before the Collector an opinion given by him after seeing a copy of the document only cannot be regarded as a final adjudication under that section but must be regarded purely as an expression of opinion carrying with it no fiscal results whatever. (*Mitchell, F.C.*) VOLKART BROTHERS *v.* EMPEROR.

20 Lah.L.T. 126.

——**S. 33**—*Document tendered in evidence for collateral purpose—It can be impounded.*

A document tendered in evidence merely for a collateral purpose can be impounded. S. 33 of the Stamp Act does not define any particular intention with which a document must be tendered in order that the section may become operative. All that is required is that the document should come before the Court in discharge of its functions. (*Garbett, F.C.*) MOHAMMAD HUSSAIN *v.* EMPEROR.

20 Lah.L.T. 5.

——**Ss. 33 (1) and 40**—*Certificate granted by Court under S. 42 (1)—Power of Collector thereafter to impound document or assess further deficiency and penalty.*

The Collector cannot impound a document again under the provisions of S. 33 (1) or proceed to assess further deficiency and penalty under the provisions of S. 40 of the Stamp Act. Where the Court has granted a certificate under S. 42 (1) of the Act having admitted the document into evidence under the provisions of proviso (*a*) of S. 35. (*Dalip Singh, Bhide and Blacker, JJ.*) NAND LAL *v.* EMPEROR.

I.L.R. (1940) Lah. 628 = 193 I.C. 368 = 13 R.L. 455 = A.I.R. 1941 Lah. 65.

——**S. 36**—"Admitted in evidence"—Meaning of. *See* 1940 Dig., Col. 1125. DHOLAN DAS *v.* TAHILRAM.

191 I.C. 427 = 13 R.S. 135.

——**S. 40**—Certificate granted by Court under S. 42 (1)—Power of Collector thereafter to assess further deficiency and penalty. *See* STAMP ACT, SS. 33 (1) AND 40

I.L.R. (1940) Lah. 628.

——**Ss. 40 and 35**—Document insufficiently stamped—Presentation to Court by person not its executant—Such person if can be compelled to pay duty and penalty. *See* 1940 Dig., Col. 1125. MAHOMED HUSSAIN *v.* EMPEROR.

I.L.R. (1940) Lah. 637.

——**S. 40 (1) (b)**—*Order imposing penalty on Co-operative Bank—Propriety.*

It is true that the Central Co-operative Bank is of a peculiar nature and distinct from those business concerns, which are interested only in making big profits. Nevertheless, if such a Bank is so careless in its business

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affairs as to misunderstand and break the laws and rules such as those contained in the Stamp Act, it must like any other citizen be expected to be called upon not only to refund the money due from it but also the cost, or a proportion of the costs, of the machinery of Government which has had to be set in motion in order to make that recovery possible. (*Garbett, F.C.*) LAHORE CENTRAL CO-OPERATIVE BANK, LAHORE *v.* EMPEROR. **20 Lah.L.T. 46.**

——**Ss. 48 and 58**—*Deed settling property and arranging for its management—Stamp duty.*

A deed by which a person settles his property on his sons and arranges for its management is liable to stamp duty under Arts. 48 and 58 of the Stamp Act. (*Garbett, F.C.*) MOHAMMAD HUSSAIN *v.* EMPEROR. **20 Lah.L.T 5.**

——**S. 56**—*Revision petitions—Entertainment of—Procedure—Punjab.*

No doubt only the Financial Commissioner has authority to pass orders on a petition under S. 56 of the Stamp Act. But the instructions of the Financial Commissioners contained in para. 53 of Chap. 3 of Part 1 B of the Punjab Stamp Manual require Commissioners in the first instance to entertain such petitions and to forward them to the Court of the Financial Commissioner with their opinion thereon. (*Alan Mitchell, F.C.*) PARSHOTAM DAS *v.* EMPEROR. **43 P.L.R. 294 = 20 Lah.L.T. 108.**

——**Sch. I, Art. 1**—Applicability—Signing of memo. of accounts—Effect *See* 1940 Dig., Col. 1126. MADHORAO *v.* HANMANT. **13 R.N. 285 = 192 I.C. 891 = A.I.R. 1941 Nag. 70.**

——**Sch. I, Art. 5, Exemption (a)**—*Applicability—Agreement for sale of goods embodying other transactions also.*

Per *Full Bench* (*Verma and Mulla, JJ.*, contra).—The word 'exclusively' in Exemption (*a*) governs the phrase 'the sale of goods or merchandise' and therefore an agreement for the sale of goods or merchandise is exempt from stamp duty even though the instrument embodying the agreement evidences certain other transactions also.

Per *Verma, J.*—The exemption will apply only if the instrument is so framed as to amount to a mere agreement to sell (goods or merchandise) and has not got any other characteristics. (*Iqbal Ahmad, Ag.C.J. Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI. **I.L.R. (1941) All. 471 = 195 I.C. 791 = 14 R.A. 84 = 1941 A.L.J. 427 = 941 A.W.R. (Rev.) 704 = 1941 O.A. (Supp.) 636 = 1941 A.L.W. 693 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).**

——**Art. 15**—*Applicability—Instrument constituting bond—Other portions of instrument falling under other articles of Sch. 1.*

Per *Verma and Mulla, JJ.* (*Bajpai and Dar, JJ.*, dissenting).—Art. 15 applies to that portion of the instrument which does amount to a "bond" and to which that article would otherwise be applicable, even if any portion of the instrument comes within any article of Sch. 1, Stamp Act, other than Art. 15 which excludes only such instruments as are covered by any one of the categories of bonds mentioned in the note appended to that article, namely, Administration bond, Bottomry bond, Customs bond, Indemnity bond, Respondentia bond and Security bond. Therefore, Art. 15 cannot be said to be a residuary article in the sense that it cannot apply so long as the instrument to which it is sought to be applied falls under any one of the other articles in Sch. 1 (*Iqbal Ahmad, Ag.C.J., Bajpai, Verma, Mulla and Dar, JJ.*)

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L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI.
I.L.R. (1941) All. 471 = 195 I.C. 791 = 14 R.A. 84 = 1941 A.L.J. 427 = 1941 A.W.R. (Rev.) 704 = 1941 O.A. (Supp.) 636 = 1941 A.L.W. 693 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).

——**Art. 35 (a) and (i) (a) (iv)**—*Lease—Duration not fixed—Terminable on a month's notice—Article applicable.*

Where no period is fixed or mentioned in a lease but the tenancy is terminable on a month's notice, it is not a lease purporting to be for a term of less than one year and does not fall under Art. 35 (*a*) (i) of the Stamp Act but falls under Art. 35 (*a*) (iv) (which is Art. 35 (*a*) (viii) as amended for United Provinces) which relates to cases where the lease does not purport to be for any definite term inasmuch as the lease does not fix a period for its duration. (*Yorke, J.*) NAIR-UL-NISA *v.* AKHTIAR HUSAIN. **192 I.C. 717 = 13 R.O. 403 = 1941 A.W.R. (C.C.) 52 = 1941 O.L.R. 221 = 1941 O.A. 16 = 1941 O.W.N. 45 = A.I.R. 1941 Oudh 217.**

——**Art. 35 (a) and (b)**—*'Rent reserved'—Meaning of—Whole rent paid in advance in respect of lease for six years—Article applicable.*

The only meaning that can be given to the word 'reserved' in Art. 35 (*b*) of the Stamp Act is, that it is rent agreed to be paid and received as such and not a payment which has already been made and received in consideration of which possession of the property is transferred for the term specified. There is nothing to distinguish a sum represented as having been paid in advance for rent from any other money advanced. Hence Art. 35 (*b*) applies to cases of leases in which money is advanced as consideration for the lease and where no rent is reserved or where no provision has been made for the payment of rent for the period of the lease, and not Art. 35 (*a*). (*Burton, F.C.*) HIPTULLA BHAI, *In re.* **1941 N.L.J. 103.**

——**Sch. I-A, Art. 35 (b)**—*Mortgage disguised as lease—Stamp duty.*

Under Art. 35 (*b*) of Sch. I-A of the Stamp Act, the duty payable in the case of a lease where the whole rent is paid in a lump sum in advance is the same as that payable on a conveyance. If the parties execute a mortgage in the form of a lease for a specified period with the whole rent payable in advance, the proper stamp duty would be that required for a conveyance although it may subsequently be held in proceedings under the Punjab Alienation of Land Act that the document is in fact a mortgage and merely disguised as a lease in an attempt to defeat the provisions of that Act. (*Mitchell, F.C.*) NAIZ ALI SHAH *v.* EMPEROR. **20 Lah.L.T. 193.**

SUCCESSION ACT (XXXIX OF 1925), S. 63—*Attestation—What amounts to—Registrar—If attesting witness.*

A will was executed by two executants who affixed their thumb impressions and against their thumb impressions one P. signed on behalf of the executants. One K.S. signed the will as a scribe and he stated that he read over the contents to the executants. He did not state under his signature that he attested the signature of the executants. The signature of one L. H. also appeared on the will, but his signature was from the pen of K. S. and there was a mark below it. There was no evidence that this mark was by L. H. He was dead before proceedings were started in Court.

Held, that the will was not properly attested as required by S. 63 of the Succession Act.

SUCCESSION ACT (1925), S. 96.

Quaere.—Where the Registrar who registers the will and makes an endorsement can be taken as an attesting witness? (*Varma and Manohar Lall, JJ.*) BULAKI MAHTON *v.* DULIA. **193 I.C. 463=13 R.P. 611=7 B.R. 567=A.I.R. 1941 Pat. 368.**

——**S. 96**—Applicability—Will—Bequest to daughter's son for life and afterwards to her sons or sons' sons—Daughter dying leaving son and sons' sons—Right of latter to succeed when their father is alive—Mortgagee from father during suit—Appeal by—If lies—C. P. Code, S. 146 and O. 22, Rr. 10 and 11 *See* 1940 Dig., Col. 1128. RAJU CHETTIAR *v.* SHANMUGHAM PILLAI. **A.I.R. 1941 Mad. 245=(1940) 2 M.L.J. 376.**

——**S. 105**—*Will—Annuity payable to legatee* putra pautradi krame—*Legatee predeceasing testator—Effect on legacy.*

Where by the terms of a will an annuity is payable to a certain person *putra pautradi krame*, but is not charged on any specific property, and the legatee predeceases the testator, it must be held that the will confers an estate of inheritance, but the legacy lapses because the legatee has predeceased the testator. The words *putra pautradi krame*, etc., are merely descriptive of the estate which the testator proposed to confer on the legatee and do not import a gift over to the sons and grandsons of the legatee. (*Agarwala, J.*) JAGADISH CHANDRA DEO *v.* RAI PADE DHAL. **196 I.C. 66=7 B.R. 993=22 Pat.L.T. 396=14 R.P. 175=A.I.R. 1941 Pat. 458.**

——**S. 109**—"*Child or other lineal descendant*"—*Illegitimate son—If included.*

The expression "any child or other lineal descendant" in S.109, Succession Act, does not include an illegitimate son. It is well-established that illegitimate children are not included in the term "child" in a will unless some repugnancy or inconsistency would result from their exclusion. An illegitimate child would be included in the word "child" only when there is a *designatio personae*. (*Agarwala, J.*) JAGADISH CHANDRA DEO *v.* RAI PADA DHAL. **196 I.C. 66=7 B.R. 993=22 Pat.L.T. 396=14 R.P. 175=A.I.R. 1941 Pat. 458.**

——**S. 114**—*Applicability—Charitable trusts made in perpetuity.*

Roberts, C.J.,—Charitable trusts though made in perpetuity are not within the mischief of S. 114 of the Succession Act provided the vesting is not delayed beyond the statutory period and there is no remainder over.

Dunkley, J.—S. 114 deals only with interests arising *in futuro*. It makes no difference between charitable and non-charitable objects. Gift to trustees for a religious or charitable object, if created or existing *in praesenti*, is not objectionable on any ground of perpetuity. (*Roberts, C.J. and Dunkley, J.*) C. W. MARIANO *v.* F. PROVOST. **1941 Rang.L.R. 410=A.I.R. 1941 Rang. 305.**

——**S. 118**—*Charitable bequest by testator with near relatives—Validity—Requirements of law—Proper construction of S.* 118.

The law does not prevent a testator with near relatives from making a charitable bequest, but it has enacted, in S. 118 of the Succession Act, a safeguard against his doing so by a disposition made when death is imminent. Under S. 118 and S. 42 *et seq.* of the Registration Act three conditions have to be satisfied first, the will must be executed; secondly the will must be deposited within 6 months of execution with the Registrar of deeds; thirdly the testator must survive for a period of 12 months after the execution of the will. The Legislature has not

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contemplated the withdrawal of a will from the custody of the Registrar except upon the terms that the charitable bequests in it are rendered void. The true construction of S. 118 in regard to the requirement of deposit of the will is that the will shall be deposited within six months from its execution and shall remain in deposit until the death of the testator. If there is a withdrawal there can be a redeposit but the requirements of S. 118 as to duration of deposit and time of execution should be once again complied with. (*Roberts, C.J. and Dunkley, J.*) C. W. MARIANO *v.* F. PROVOST. **1941 Rang.L.R. 410=A.I.R. 1941 Rang. 305.**

——**Ss. 142 and 150**—*Applicability—Testator having funds in Bank—Gift of sum to son for purchase of money and direction for payment of sum out of amount in bank—If specific or demonstrative.*

A testator had three sons, the plaintiff and defendants 2 and 3. He gave the 2nd and 3rd defendants each a large and a small house in Madras and some lands in the mofussil. To the plaintiff he gave specifically a small house in Madras and lands in the mofussil. The will then provided. "....there is a sum of Rs. 14000 in fixed deposit in my name in the Indian Bank, Madras out of that amount I have given Rs. 12,000 to this son (plaintiff), my executors shall as early as possible purchase a house of the value of Rs. 12 000 in Madras." The testator further provided that moneys advanced by him on promissory notes and mortgages as well as the money in the bank should be collected and the amount spent for the purchase of the house for the plaintiff being deducted, the balance should be divided into three shares, each of his three sons being entitled to a share. Later in the will he appointed his three sons as residuary legatees of all his movable and immovable properties. The fixed deposit matured before his death and the testator himself withdrew the amount and purchased a house in Madras for Rs. 10 000.

Held, (1) that the testator clearly intended that the money directed by him to be spent for the purchase of a house should not be divisible amongst his three sons, and that he intended to make a gift of a sum of money in favour of the plaintiff which sum was to be spent on the purchase of a house; (2) that the gift was not a specific gift but was a demonstrative gift, and that the direction that it was to be paid out of a specified fund did not make the gift a specific one. (*Gentle, J.*) MADHAVA RAO *v.* ADMINISTRATOR-GENERAL OF MADRAS. **1941 M.W.N. 773=(1941) 2 M.L.J. 677.**

——**S. 150**—Applicability—Gift of sum out of amount in bank for purchase of house for son—If specific gift or demonstrative gift. *See* SUCCESSION ACT, SS. 142 AND 150. **1941 M.W.N. 773.**

——**S. 152**—Applicability—Bequest of movable and immovable properties—Testator having mortgage decree and taking mortgage bond in satisfaction of decree from debtor—Effect of—Ademption—If any. *See* 1940 Dig. Col. 1129. SANTOSH KUMAR BOSE *v.* JALADSASHI DEVI. **A.I.R. 1941 Pat. 18.**

——**S. 211**—Inquiry under—Scope—Application for letters of administration—Question of title—If relevant—Caveat on ground of property being joint family estate—Sustainability—Remedy of caveator. *See* 1940 Dig., Col. 1129. BAI PARVATI BAI *v.* RAGHUNATH LAKSHMAN. **192 I.C. 681=13 R.B. 280=A.I.R. 1941 Bom. 60.**

——**Ss. 211 and 213**—*Executor obtaining probate—If becomes legal representative of testator from time of his death.*

S. 213 of the Succession Act only means that no Court shall recognise the right of an executor unless he has obtained probate of the will under which he claims

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But the effect of S. 211 is that the estate of the deceased testator vests in the executor by virtue of the will and from the date of his death. If, therefore, the executor obtains probate of the will of the deceased testator, he must be recognised by Court as the legal representative of the latter from the time of his death. (*Harris, C.J. and Chatterji, J.*) BHUDEB CHANDRA ROY *v.* BHIK. SHANKAR PATTANIK. **196 I.C. 837.**

——**Ss. 211 and 307**—*Administrator—Powers of—Mortgage of estate for purposes of business of deceased—Validity.*

An administrator has no authority in law to mortgage the estate under his administration even for what is called legal necessity. It is clear that to validate a mortgage by an administrator it must be proved that the mortgage was executed in the due course of administration; it must also be shown that he was entitled to mortgage the general estate as distinct from the business for which legal necessity is alleged. Further an executor (unless expressly authorised by the will) or an administrator is not entitled to continue the business of the deceased at all except for the purposes of winding it up. If he does continue it for any other purpose than winding up, it is deemed to be continued at his own risk. (*Broomfield and Macklin, JJ.*) KUBERDAS DEV CHAND *v.* JERKISH NAOROJI. **43 Bom.L.R. 981.**

——**S. 214**—Applicability—Provident fund of deceased employee—Claim to—Succession certificate—Necessity. *See* 1940 Dig., Col. 1130. SUBHADRAMMAL *v.* KANNAMMAL. **193 I.C. 329 = 13 R.M. 650 = (1940) 1 M.L.J. 715.**

——**S. 214**—*Mortgage debt—Hindu mortgagee dying intestate—Payment of interest to heir—Succession certificate—If obligatory—Mortgagor refusing to pay interest without certificate—Clause accelerating period of redemption—If operates—T. P. Act, S. 59-A.*

The defendant executed a mortgage in favour of a Hindu. The period of redemption was 12 years, but was subject to an acceleration clause which enabled the mortgagee to realise the security by filing a suit if interest for 6 consecutive months remained in arrears. The defendant paid interest regularly until the death of the mortgagee who died intestate but thereafter wrote to the plaintiff, the widow and sole heir of the mortgagee, asking her to receive payment of interest on production of succession certificate. The widow refused to obtain the certificate, and thereafter filed a suit to enforce the mortgage claiming that the acceleration clause had become operative.

Held, that the defendant mortgagor, having regard to S. 59-A of the T. P. Act was bound to pay to the plaintiff who derived title from the mortgagee the interest as it fell due, that the production of a succession certificate by the plaintiff was not obligatory, and that by reason of the defendant's failure to pay the interest the acceleration clause became operative and entitled the plaintiff to institute proceedings to bring the property to sale. (*Panckridge, J.*) KIRON BALA *v.* ATUL KRISTO. **45 C.W.N. 628.**

——**S. 214 (b)**—*Scope—Application to execute decree in favour of deceased person—Applicant not obtaining succession certificate—Effect.*

Where a person succeeding as heirs to a deceased person applies to execute a decree obtained by the deceased, he has to produce a succession certificate as required by S. 214 (*b*) of the Succession Act. If he has not obtained and produced a succession certificate as required by S. 214 (*b*), the Court cannot proceed upon his application and the same has to be dismissed. (*Harries, C.J. and Fazl Ali, J.*) KALYANI PRASAD SINGH DEO *v.* MAHADEV ROY. **22 P.L.T. 945.**

SUCCESSION ACT (1925), S. 263.

——**S. 219**—*Discretion of Court—Two persons standing in equal degree of kindred—Court, if bound to grant joint letters of administration.*

Where there are two persons standing in equal degree of kindred to the deceased and equally entitled to administration, the Court has a discretion under S. 219 of the Succession Act, to grant letters of administration to any one of them. The Court is not bound to grant joint letters of administration to both. (*Beaumont, C.J. and Macklin, J.*) DINBAI BEHRAMJI *v.* MOTIBAI BURJORJI. **43 Bom.L.R. 770 = A.I.R. 1941 Bom. 356.**

——**S. 225 (2)**—*Grant of probate of will—Probate of codicil revoking that will—If can be granted without revoking probate of will.*

If probate of a will has been granted, probate of a codicil which in effect revokes that will can not be granted until probate of the will has been revoked. (*McNair, J.*) SARAJINI DASSEE, *In the goods of.* **45 C.W.N. 757.**

——**Ss. 228 and 241**—Applicability—Grant of probate in England—Executor unable to come to India—Application by agent for letters of administration—Procedure—Liability to furnish security—Practice. *See* 1940 Dig., Col. 1131. E.C. MCCANKIE, *In the matter of.* **192 I.C. 381 = 13 R.M. 544 = (1940) 1 M.L.J. 264.**

——**Ss. 229 and 230**—*Effect of—Acceptance or renunciation by executor disputing validity of will—Stage.*

It is implied by Ss. 229 and 230 of the Succession Act that an executor who disputes the validity of a will appointing him as such, must accept or renounce the executorship under S. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person. (*Yorke, Bennett and Agarwal, JJ.*) LAKSHMI SHANKER, *In re.* **16 Luck 454 = 194 I.C. 227 = 13 R.O. 569 = 1941 O.W.N. 653 = 1941 O.A. 409 = 1941 A.L.W. 493 = 1941 A.W.R. (C.C.) 163 = 1941 O.L.R. 438 = A.I.R. 1941 Oudh 293 (F.B.).**

——**S. 232**—*Will with reference to religious property—Probate or letters of administration, if can issue.*

Where the property sought to be devised appears *prima facie* to be Hindu religious property and it is not shown to be the personal property of the testator, neither probate nor letters of administration can be issued. (*Davies.*) NARAIN SINGH *v.* KESHAR SINGH. **1941 A.M.L.J. 42.**

——**S. 263**—*Party cognisant of probate proceedings standing by—If can reopen proceedings—Law in England and India.*

Per *Panckridge, J.*—The rule followed in England is that if a party is cognisant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened. The law in India is substantially the same on this point as in England when the situation is not complicated by the existence of an infant or of a *pardanashin* beneficiary. (*Derbyshire, C.J. and Panckridge, J.*) O. V. FORBES *v.* V. G. PETERSON. **I.L.R. (1941) 2 Cal 1 = 196 I.C. 111 = 14 R.C. 171 = 45 C.W.N. 739 = A.I.R. 1941 Cal. 417.**

——**S. 263**—*Revocation of probate—Application for—Consideration for Court.*

When an application is made for revocation of a grant of probate on the ground that the proceedings are defective in substance, the Court on a consideration of all the facts of the case will have to consider whether the proceedings are substantially defective. (*Nasim Ali*

SUCCESSION ACT (1925), S. 263.

and Akram, JJ.) PASUPATI SADHUKHAN *v.* JANAKI NATH MUKHERJEE. **74 C.L.J. 383.**

——**S. 263** —*Scope of.*

S. 263 of the Succession Act is exhaustive of the cases in which just cause shall be deemed to exist for the revocation or annulment of the grant of letters of administration. (*Mya Bu and Mosely, JJ.*) GULAM ALI *v.* RAHMATULLA. **1941 Rang.L.R. 376 = A.I.R. 1941 Rang. 259.**

——**Ss. 264 and 279**—*Revocation of probate—Proper Court—Courts having equal jurisdiction.*

An application for revocation of probate should be made to the Court from which the grant has already been made. Although some other Court has equal jurisdiction, it will not exercise it, but will refer the applicant to the Court by which the original grant was made in order to observe a comity between jurisdictions the disregard of which would lead to most unfortunate friction. (*McNair, J.*) SARAJINI DASSEE, *In the goods of.* **45 C.W.N. 757.**

——**S. 271**—*Discretion of High Court to refuse application—Right to observe comity of Courts—Discretion once exercised—Effect of.*

Per *Derbyshire, C.J* —The High Court on its original side has at least the discretion given by S. 271 of the Succession Act to the Judge of a District to refuse an application for grant of probate of a will when the deceased testator was not living within its jurisdiction. It has a right to observe a comity of Courts and avoid, wherever it is possible to avoid, any real. and even any apparent conflict of jurisdiction between two equally competent tribunals. The Court is not deprived of its discretion under the section because it exercised it on an earlier occasion so as to permit the proceedings to go on. That discretion is exercisable by the Court whenever the Court is placed in the position of having to decide what order is to be made upon the application for probate. Certainly no judge would exercise it to the contrary effect while the facts remained the same. (*Derbyshire, C.J. and Panckridge, J.*) O. V. FORBES *v* V. G. PETERSON. **I.L.R. (1941) 2 Cal. 1 = 196 I.C. 111 = 14 R.C. 171 = 45 C.W.N. 739 = A.I.R. 1941 Cal. 417.**

——**S. 273**—*Oudh Chief Court—If 'High Court'—Power of that Court to grant probate.*

Per *Derbyshire, C.J.*—The Oudh Chief Court is a High Court within the meaning of S. 273 of the Succession Act and has jurisdiction to grant probate of a will "with effect throughout British India."

Per *Panckridge, J.*—Even if the Chief Court of Oudh be not a High Court, the grant of probate made by it is, until revoked or annulled, conclusive proof, certainly as against those cited if not against all the world that the grantee has established his title as executor of the deceased's last will and testament. Where the Court granting the probate is not a High Court, the grant is not effective with respect to assets beyond the limits of the Province in which the Court is situated; but this only means that with regard to other assets the grantee must apply to the appropriate Court for a grant of letters of administration with the will annexed, to which he has an indisputable right. (*Derbyshire, C.J. and Panckridge, J.*) O. V. FORRES *v.* V. G. PETERSON. **I.L.R. (1941) 2 Cal. 1 = 196 I.C. 111 = 14 R.C. 171 = 45 C W.N. 739 = A.I.R. 1941 Cal. 417.**

——**S. 276**—*Probate of codicil—Proper Court—Practice of English Courts.*

Per *Derbyshire, C. J.*—It is the practice of English Courts to require that codicils must be proved in the Court from which the probate of the will has been obtained. (*Derbyshire, C.J. and Panckridge, J.*) O.

SUCCESSION ACT (1925), S. 372.

V. FORBES *v.* V. G. PETERSON. **I.L.R. (1941) 2 Cal. 1 = 196 I.C. 111 = 14 R.C. 171 = 45 C.W.N. 739 = A.I.R. 1941 Cal. 417.**

——**S. 278**—*Absence of estate and debts—Letters of administration—If can be granted.*

Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. (*Bennett and Ghulam Hasan, JJ.*) HAJIRA KHATOON *v.* MUSTAFA HUSAIN. **194 I C. 410 = 13 R.O 597 = 1941 A.L.W. 625 = 1941 A.W.R. (C C.) 238 = 1941 O.A. 533 = 1941 O.W.N. 780 = A.I.R. 1941 Oudh 474.**

——**S. 283**—*"Interest"—Person claiming independently of will and adversely to testator—Right to oppose grant of probate or letters of administration.*

A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of S. 283 of the Succession Act so as to entitle him to oppose the grant of a probate or letters of administration. (*Meredith and Shearer, JJ.*) KASHI NATH SINGH *v.* GULZARI KUER. **193 I.C. 856 = 7 B.R. 627 = 13 R.P 631 = 1941 P.W.N. 334 = A.I.R. 1941 Pat. 475.**

——**S. 283 (1) (c)**—'Interest"—Simple creditor of estate—Right to object to grant of probate. *See* 1940 Dig., Col. 1132. ELSIE AUGUSTA BLACK, *In the goods of.* **22 Pat.L.T 649 = A.I R. 1941 Pat. 151.**

——**S. 283 (1) (c)**—*Probate in common form—Right to object to grant—"Interest"—Creditor— Right to object to grant.*

Whether or not a person can oppose the grant of probate depends entirely upon whether he has or has not an interest in the estate of the deceased. A creditor who has attached a portion of the estate might possibly be a person who has an interest in the estate, but a mere creditor who has not even obtained a decree can hardly be said to be have an interest in the estate and such a creditor has no right to object to the grant of probate in common form.

Fazl Ali, J.: The interest which entitles a person to object to the grant of probate must be an interest in the estate and not merely an interest in the result of the probate proceedings or "interest" in any remote sense of the term. (*Harries, C. J. and Fazl Ali, J.*) R. S. SINHA *v.* MISS SALENA HECTOR. **20 Pat. 75 = 1941 P.W.N. 221.**

——**S. 283 (c)**—"Interest"—Debtor of deceased—Right to object to grant of letters of administration. *See* 1940 Dig., , Col. 1132. SANTOSH KUMAR BOSE *v.* JALADSASHI DEV. **A.I.R. 1941 Pat. 18**

——**S. 292**—Assignment under—If confers a new cause of action on assignee. *See* LIMITATION ACT, ART 68 AND SUCCESSION ACT, S. 292. **1941 O.W.N. 4 = (1941) 1 M.L J. 88 (P.C.).**

——**S. 301**—Common manager appointed for estate —Powers and rights of—Right to sue on promissory note in favour of estate—Promissory note not endorsed and delivered over to him—Effect. *See* NEGOTIABLE INSTRUMENTS ACT, SS. 8, 48 AND 78. **7 Cut.L.T. 77.**

——**S. 306**—Applicability— Criminal proceedings. *See* PENAL CODE, S. 500 AND CR. P. CODE, SS 198, 247, 259. **1941 Rang.L.R. 224.**

——**S. 372**—*Application defective — Amendment—Permissibility.*

SUCCESSION ACT (1925), S. 372.

No doubt where an application is substantially defective no succession certificate should be granted on such an application. But where the petition is defective in that the name of the person whose estate is claimed is not correctly given but the petitioner takes up the correct position by putting in another petition before hearing, the petition should be allowed to be amended and not dismissed by reason of such defect. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA. **I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 663.**

——**S. 372**—*Application for certificate—It should comply strictly with requirements.*

As the certificate that is to be granted must be in accordance with the petition made under S. 372, it is only proper that the application for certificate should conform strictly to the requirements of that section. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA. **I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 663.**

——**S. 373**—*Scope of enquiry.*

The Court in granting a succession certificate has only to make a *prima facie* enquiry as to whether the debts mentioned in the schedule did or did not belong to the deceased. The petitioner certainly can demand an enquiry of that sort and the Court will be bound in that case to investigate the point and take such evidence as it considers proper for the purpose of satisfying itself as to whether the debts and securities *prima facie* belonged to the deceased or not. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA.

I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 663.

——**S. 373 (4)**—*Joint certificate—Legality.*

No doubt the practice of granting joint certificate has been condemned as it is fraught with obvious inconveniences. But there may be cases when the several applicants have the same degree of interest in the estate of the deceased and there are no circumstances present which would enable the Judge to say that one is better qualified than the other. Under such circumstances the granting of joint certificate is not illegal, particularly if the persons to whom the certificate is granted agree to take it in that form. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA.

I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 663.

——**S. 375**—*Applicant for certificate having only limited interest—Security, if should be demanded.*

Where the petitioners applying for certificate have only a limited interest, *e.g.*, that of a Hindu widow, in the estate, it is proper that in the interest of the reversioners, some security should be taken from them, although they are heirs to the deceased. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA. **I.L.R. (1941) 2 Cal 311 = A.I.R. 1941 Cal 663.**

——**S. 379 (3)**—Failure to furnish security as directed—Refund of unexpended deposit—If can be refused. *See* 1939 Dig., Col. 1073. FATMABI, *In re.* **I.L.R. (1941) Nag. 576.**

——**S. 379 (3)**—*Failure to furnish security as directed—Refund of unexpended deposit—Right of applicant.*

An applicant is entitled to a refund of the deposit made by him under S. 379 (1) with his application for a succession certificate when his application is dismissed for his failure to furnish the security subject to which his application was allowed and the deposit has not been expended under S. 379 (2). (*Tek Chand, J.*) PARKASH WATI *v.* PROVINCE OF PUNJAB. **197 I.C. 103 = 43 P.L.R. 624 = A.I.R. 1941 Lah. 399.**

SUITS VALUATION ACT (1887), S. 8.

——**S. 381**—*Grant of certificate—Effect of—Certificate to two or more jointly—Death of one of them—Certificate, if becomes inoperative.*

The grant of a certificate does not confer any title upon the grantee as an heir to the deceased; it only invests him or her with the requisite authority to collect debts due to the deceased and allows the debtors to make payments without any risk. If a certificate is granted to two or more persons jointly, the authority vested in them can be exercised by all of them together and if one of them dies, the remaining certificate holders cannot exercise the powers which could only be exercised by them along with the deceased, and as there is no estate vested in any of the grantees no question of survivorship at all arises. That is, on the death of one of them the certificate becomes wholly in operative. And before a fresh certificate is granted the existing certificate should be formally revoked. (*Mukherjea and Roxburgh, JJ.*) SUKUMAR DEB ROY *v.* PARBATI BALA.

I.L.R. (1941) 2 Cal. 311 = A.I.R. 1941 Cal. 663.

SUITS VALUATION ACT (IV OF 1887), Ss. 4 and 8—*Scope—Suit for partition—Plaintiff in joint possession—Valuation for jurisdiction.*

In a suit for partition by persons in joint possession of the land, the value for the purpose of jurisdiction is the actual market value of the property in suit, although court-fee is payable under Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras). Hence where the value of the plaintiffs' share will be not less than Rs. 10,000, the suit has to be filed in a Subordinate Judge's Court as a District Munsiff's Court has no jurisdiction to entertain it. (*Lakshmana Rao, J.*) MALLAYYA *v.* JAGANNADHAMMA. **54 L.W. 428 = 1941 M.W.N. 926 = (1941) 2 M.L.J. 567.**

——**S. 4**—*Suit to declare trust relating to certain villages, public trusts—Valuation.*

S. 4 of the Suits Valuation Act gives no room for the idea of a notional value. Where the sole question for decision is whether the title as trustee of certain villages vests in the public or in private persons, that is whether they are the subject of public trust or a private trust, the title to these villages is affected by the relief sought and therefore the valuation for the purposes of jurisdiction is the market value of the property itself. (*Yorke and Agarwal, JJ.*) BISHAMBHARNATH *v.* SRI PRAKASH SINGH **194 I.C. 445 = 13 R.O. 613 = 1941 A.W.R. (Rev.) 526 = 1941 A.L.W. 628 = 1941 O.W.N. 783 = 1941 O A. 514 = A.I.R. 1941 Oudh 405.**

——**S. 8**—*Applicability—Suit for restitution of conjugal right—Mode of valuation—Forum.*

S. 8 does not apply to a suit for restitution of conjugal rights. In such a suit therefore the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction are not necessarily the same. In a suit for restitution of conjugal rights the plaintiff is entitled for the purposes of jurisdiction to put any value he likes on the relief sought and thus determine the Court in which the suit is to be instituted, provided that the valuation is made *bona fide* and not in order to effect an improper purpose. A Court, other than the District Court, or the Sub-divisional Court or the Assistant District Court, the jurisdiction of which has been extended by Government to suits or original proceedings without restriction as regards the value, has jurisdiction to hear and determine a suit for restitution of conjugal rights provided the valuation placed upon the suit by the plaintiff in his plaint gives the Court jurisdiction. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) KHEM RAJ *v.* DURGI. **1941 Rang. L.R 495 = 195 I C. 613 = 14 R.R. 55 = A.I.R. 1941 Rang. 187 (F.B.).**

SUITS VALUATION ACT (1887), S. 8.

——S. 8—Mortgage—Co-mortgagees—Suit by one for his share only—Valuation—Share of plaintiff or whole mortgage debt. *See* COURT FEES ACT, S. 7 (1).
(1941) 2 M.L.J. 986.

——S. 8—*Mortgage—Redemption suit—Value for jurisdiction.*

In a suit for redemption of a mortgage of immovable property the value for purposes of jurisdiction is the amount of money which is found to be due on the mortgage. The market value of the property can on no account be ever the value for jurisdiction in a redemption suit. (*Almond, J.C. and Mir Ahmad, J.*) MT. MOTAI *v.* MOHAMMAD AKBAR KHAN. **193 I.C. 871 = 13 R.Pesh. 70 = A.I.R. 1941 Pesh. 28.**

——S. 11—Objection as to jurisdiction—If can be raised in second appeal. *See* 1940 Dig., Col. 1135 KANHAIYA LAL *v.* HAMID ALI. **15 Luck. 619.**

——S. 11—*Scope and effect of—Suit—Under-valuation—Objection not raised in trial Court or in appellate Court—Plea in execution that decree is without jurisdiction—If open.*

Where the defendant in a suit does not raise any objection to the valuation on the ground of gross under-valuation, though it is open to him, and fails to raise the objection in the appellate Court also which confirms the decree, it is not open to him in execution proceedings to raise that objection and plead that the decree under execution is a nullity on the ground that the same was without jurisdiction. A Court executing a decree may, no doubt, come to the conclusion that the decree is a nullity. But that can be only in cases where the want of jurisdiction of the Court which passed the decree is apparent on the face of the record. When that is not the case, the executing Court cannot hold the decree to be without jurisdiction and therefore a nullity on that ground. S. 11 of the Suits Valuation Act is a complete answer to the plea of want of jurisdiction when the defendant had not thought fit to raise the objection either in the trial Court or in the appellate Court, but only seeks to raise it in execution proceedings. He cannot be permitted to plead that the decree originally obtained in the suit was a nullity on the ground of want of jurisdiction arising from under-valuation. (*Harries, C.J. and Chatterji, J.*) BADRI NARAYAN SINGH *v.* CHANDER MOULESHWAR PRASAD NARAIN SINGH. **22 Pat.L.T. 855.**

——S. 11—*Scope—Unclassed suit wrongly assumed to be suit of small cause nature.*

S. 11 of the Suits valuation Act is limited to cases where by reason of over-valuation or under-valuation of a suit or appeal in the Court of first instance or the lower appellate Court, that Court had no jurisdiction with respect to the suit or appeal but has exercised jurisdiction with respect thereto. It has no application where there has been no under-valuation or over-valuation, but the nature of the suit was wrongly understood as when an unclassed suit was wrongly assumed to be a suit of small cause nature. (*Tek Chand, J.*) JAGDISH CHANDER *v.* SALAHEN. **196 I.C. 393 = 14 R.L. 152 = 43 P.L.R. 432 = A.I.R. 1941 Lah. 313.**

——S. 11 (2) and (3)—*Scope and effect—Appellate Court—Duty of—Appeal from decree in suit which Court had no jurisdiction to try—Procedure to be followed by appellate Court*

Where on an appeal from a decree, the appellate Court finds that the trial Court had no jurisdiction to try the suit, the proper course is not to summarily dispose of the matter by setting aside the decree and remanding the suit for return of the plaint to the plaintiff for presentation to the proper Court. Even in cases where the point as to under-valuation is properly taken, the Court can deal with the appeal provided S. 11 (2) of the Suits Valuation Act is complied with. But it cannot act under S. 11 (2) if it is satisfied that the question of under-valuation has prejudicially affected the disposal of the suit on the merits. If the appellate Court does not address itself to this question, its decision setting aside the trial Court's decree and remanding the suit is wrong and must be set aside. The appellate Court must consider the provisions of S. 11 (2) and (3) of the Suits Valuation Act and then proceed to dispose of the appeal. (*Harris, C.J. and Fazl Ali, J.*) BHIMRAJ DEBI BAKSH *v.* GAYA PRASAD SAHU.
194 I.C. 385 = 7 R.B. 757 = 13 R.P. 711 = 1941 P.W.N. 547 = A.I.R. 1941 Pat. 532.

SURETY.

SURETY. *See also* CONTRACT ACT, S. 127, ETC.

——Administration bond—Discharge of surety from liability—Power of Court. *See* ADMINISTRATION—CONTRACT OF SURETYSHIP.
1941 Rang.L.R. 376.

——Continuing guarantee — Acknowledgment by principal debtor—If saves limitation against surety. *See* 1939 Dig., Col. 1075. SUWALAL *v.* FAZLE HUSSAIN. **I.L.R. (1941) Nag. 415.**

——Continuing guarantee for limited amount—Extent of liability. *See* 1939 Dig., Col. 1075. SUWALAL *v.* FAZLE HUSSAIN. **I.L.R. (1941) Nag. 415.**

——Liability — Guarantor— Right to demand proof of debt—Admission by principal debtor—Sufficiency as against guarantor. *See* CONTRACT ACT, S. 133.
43 Bom.L.R. 53.

——Security bond — Construction—Mortgage suit—*Ex parte* decree—Setting aside on bond by surety—Undertaking to pay decree amount and costs in the event of case being decided against defendant and defendant failing to pay—Liability of surety—When arises. *See* MYSORE LIMITATION ACT, ART. 182 (5).
46 Mys. H.C.R. 248.

——*Security bond—Construction—Personal liability.*

A person executed a security bond in the following form:—"I, as next friend of the minors, have preferred an appeal to the High Court. The High Court has called upon me to file a security bond to the effect that if the decree money and the costs, etc., are not recovered in full from the land, I will be liable to make good the deficiency. Hence I hereby stand as surety for the minor-judgment-debtors and agree that in the event of the appellate Court's decision being against the judgment-debtors, my movable and immovable properties detailed hereinafter shall be liable for making good the deficiency, if the sale-proceeds of the hypothecated property are not sufficient to meet the demand (*i.e.*) the amount which may then be found due from the judgment-debtors according to the decision.

Held, that on a true construction of the security bond, the surety had undertaken personal liability. (*Tek Chand and Reckett, JJ.*) KESAR CHAND *v.* UTTAR CHAND. **43 P.L.R. 569.**

——*Security bond to Court—Execution—Proper course.*

A legal mortgage cannot be created in favour of the Court since the Court is not ordinarily a juristic person capable of acquiring an interest in the immovable property or of making a valid assignment. The correct course is to have a charge created either in favour of some actual person such as an officer of the Court or one of the parties. (*Tek Chand and Beckett, JJ.*) KESAR CHAND *v.* UTTAR CHAND. **43 P.L.R. 569.**

——*Security bond to Court—Scrutiny of form—Duty of Court.*

Careful scrutiny prior to the acceptance of security bonds is all the more necessary when they relate to

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charges upon specific immovable property, since it would be difficult for any Court to make absolutely certain that the person offering the security has an unfettered power of disposal over the property; and a clear provision for personal liability is required to balance the risk that he may turn out to have no such power of disposal. (*Tek Chand and Beckett, JJ.*) KESAR CHAND *v.* UTTAR CHAND. **43 P.L.R. 569.**

SURETY BOND—Construction—Appeal from decree—Surety for decree-holder for withdrawal of amount pending appeal—Bond by surety—Undertaking to be liable for amount if in this "number" decision is reversed—Part reversal in appeal—Second appeal—Suit entirely dismissed in second appeal—Liability of surety—If extends to second appeal also. *See* 1940 Dig., Col. 1136. DHARMAPURAM MUTT *v.* MAHOMED USMAN SAHIB. **A.I.R. 1941 Mad. 151=(1940) 2 M.L.J. 831.**

——Construction—Principle—Surety bond to prevent attachment before a judgment—Dismissal of claim for default and subsequent restoration—Surety, if absolved. *See* 1940 Dig., Col. 1137. PANNALAL *v.* ABDUL KARIM. **192 I.C. 348=13 R.N. 242=A.I.R. 1941 Nag 61.**

——Construction—Rules—Liability of surety—If limited by recitals. *See* 1940 Dig., Col. 1138. MOHINI MOHAN *v.* BIR BIKRAM KISHORE MANIKYA. **195 I.C. 151=14 R.C. 55=72 C.L.J. 480=A.I.R. 1941 Cal. 257.**

——Discharge—Grounds—Bond by junior member of Malabar Tarwad for proper management by Karnavan—Right to be released or discharged from bond—Conditions. *See* 1940 Dig., Col. 1137. NARAYANAN NAMBIAR *v.* KUNHATHAYI AMMA. **191 I.C. 896=13 R.M. 533 (2)=(1940) 1 M.L.J. 939.**

TEA CONTROL ACT (VIII OF 1938), S. 7—*Proceeding in High Court—If judicial proceeding.*

Obiter.—Proceedings held in the High Court under S. 7 of the Tea Control Act are judicial proceedings. (*Bartley and Lodge, JJ.*) F. KARIM *v.* EMPEROR. **45 C.W.N. 1131.**

——S. 7 (2)—*Appeal under—Application in, dismissed with costs—Assessment of costs on original side scale—Discretion of Judge.*

If a Judge of the High Court hearing an appeal under S. 7 (2) of the Tea Control Act dismisses an application of the appellant for striking out the Tea Licensing Committee as respondents with costs and directs that they should be assessed as of Chamber Applications on the original side of the High Court, costs on that scale are not improper. It is entirely within his discretion in view of the nature of the case before him to decide whether the costs should be assessed either according to the original side scale or according to the appellate side scale or in any other manner he thinks proper. (*Derbyshire, C.J. and Nasim Ali, J.*) SUPROKASH *v.* INDIAN TEA LICENSING COMMITTEE. **45 C.W.N. 454.**

——S. 7 (2)—*Appeal under—Tea Licensing Committee—If proper party.*

The Tea Licensing Committee is a proper party to an appeal filed under S. 7 (2) of the Tea Control Act from its order. The committee is not a Court but only a statutory body. (*Derbyshire, C.J. and Nasim Ali, J.*) SUPROKASH *v.* INDIAN TEA LICENSING COMMITTEE. **45 C.W.N. 454.**

——S. 7 (2)—*Form of appeal—Choice of tea-estate.*

Under S. 7 (2) of the Tea Control Act, a tea-estate aggrieved by an order passed by the Committee under S. 14 is given the choice of the forum of appeal. It may prefer the appeal either to the Central Government or the High Court at its option. But once it has made its choice and lodged the appeal either in the High Court or the Central Government, this will bar an appeal to the other. (*Tek Chand and Dalip Singh, JJ.*) HARI RAM *v.* CENTRAL GOVERNMENT THROUGH THE SECRETARY, COMMERCE DEPARTMENT DELHI. **I.L.R. (1940) Lah. 745=194 I.C. 192=13 R.L. 516=A.I.R. 1941 Lah. 120.**

TEA CONTROL ACT (1938), Sch. Cl. 1.

——S. 7 (2)—*Parties to appeal—Central Government and Committee—If necessary parties.*

In appeals under S. 7 (2) of the Tea Control Act, it is not necessary for the appellant to make the Central Government or the Tea Licensing Committee a party to the appeal. The Court may, however, issue notice to the Committee to appear and support its decision, or the Committee may apply to be permitted to be heard, and if necessary to lead evidence to show that its order was correct. Similarly in some cases the Central Government might also like to be heard if any question of principle is involved, and the Court may permit it to do so. (*Tek Chand and Dalip Singh, JJ.*) HARI RAM *v.* CENTRAL GOVERNMENT THROUGH THE SECRETARY, COMMERCE DEPARTMENT, DELHI. **I.L.R. (1940) Lah 745=194 I.C. 192=13 R.L. 516=A.I.R. 1941 Lah. 120.**

——S. 14—*Committee appointed prior to Act fixing crop basis with out investigation—Power of committee appointed under Act to make investigation for recalculating crop basis.*

Where the crop basis which was allotted to a tea estate was not fixed after due investigation by the committee appointed under the Tea Licensing Resolution prior to the coming into operation of the Tea Control Act of 1933, the committee appointed under the Act has power to hold an investigation as to the acreage of tea plantation for the purpose of recalculating the crop basis of the tea estate. (*Edgley, J.*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE. **I.L.R. (1941) 1 Cal. 101.**

——Ss. 20 and 29—*Committee appointed prior to Act under Tea Licensing Resolution—Power to call for returns and inspect tea estates.*

A committee appointed under the Tea Licensing Resolution prior to the coming into operation of the Tea Control Act of 1933, was not bound to accept without question the figures submitted by the tea estates concerned as a basis for calculating the export quotas to which they were entitled. The committee were entrusted with certain statutory duties in connection with the allotment and determination of export quotas. If they had considered it necessary to call for further returns it would clearly have been their duty to do so and it would also have been open to them to test the accuracy of such returns by such legal means as might have been available to them, for example, by inspection of the tea estate with the consent of the owner. (*Edgley, J.*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE. **I.L.R. (1941) 1 Cal. 101.**

——S. 29—*Inspection for fixing export quota—Power of committee.*

Under the Tea Control Act of 1933, inspections might be held not only for the purpose of controlling the extension of tea cultivation, but also for the purpose of enabling the committee to perform their duties connected with the control of the export of tea. It was not intended by the Legislature that the words of S. 29 (2) of the Act should be taken to be limited by the head-note of the chapter. (*Edgley, J.*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE. **I.L.R. (1941) 1 Cal. 101.**

——Sch. Cl. (1)—Crop basis—Addition of hardship allowance—Permissibility—Inclusion of such allowance in crop basis under 1933 Rules—If unwarranted. *See* 1940 Dig., Col. 1139. BIJAYNAGAR TEA CO., LTD. *v.*

TEA CONTROL ACT (1938), Sch., Cl. (1).

INDIAN TEA LICENSING COMMITTEE. **191 I C. 387 = 13 R.C. 228.**

——**Sch., Cl. (1)**—*Crop basis—Method of calculation*

For the purpose of calculating the crop basis for a tea estate under Cl. (1) of the Schedule to the Tea Control Act, 1938, the initial figure to be taken by the committee must be either the crop basis figure which was ascertained for the tea estate for the financial year 1937-38 or any higher crop basis figure which may have been fixed for any previous year after investigation by the committee, whichever be higher. I.L.R. (1939) 2 Cal. 210, Foll. (*Edgley, J*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE. **I.L.R. (1941) 1 Cal. 101.**

——**Sch., Cl. (1)**—'*Investigation*'—*If includes investigation made by committee prior to act of* 1933.

The investigation for the purpose of Cl. (1) of the Schedule must clearly be an investigation by the committee constituted under the Tea Control Act of 1933. An investigation made by the committee constituted under the Tea Licensing Resolution prior to the coming into operation of that Act, cannot, therefore, come under that clause. (*Edgley, J.*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE. **I.L.R. (1941) 1 Cal. 101.**

——**Sch, Cl. (2)**—*Young area allowance—Right to —Onus of proof.*

Under Cl. (2) of the Schedule, the owner of a tea estate is entitled to the addition of an allowance for young areas, subject to the deductions prescribed in R. 4 (*b*) of the Tea Control Rules, 1938. The onus will, however, lie upon the owner of the tea estate concerned to show that the young areas had actually been planted by him within the material period mentioned in Cl. (2) of the Schedule. (*Edgley, J.*) F. KARIM *v.* INDIAN TEA LICENSING COMMITTEE.

I L.R. (1941) 1 Cal. 101.

TEA CONTROL RULES (1938). R. 4 (b)—If *ultra vires*—Young area allowance—Deduction exceeding allowance—Permissibility. *See* 1940 Dig., Col. 1140. BIJAYNAGAR TEA CO., LTD *v.* INDIAN TEA LICENSING COMMITTEE. **191 I.C. 387 = 13 R.C. 228.**

——**R. 4 (b) (1)**—Construction. *See* 1940 Dig., Col. 1139. BIJAYNAGAR TEA CO., LTD. *v.* INDIAN TEA LICENSING COMMITTEE. **191 I.C. 387 = 13 R.C. 228.**

——**R. 4 (b) (1)**—"Young clearings"—Meaning of. *See* 1940 Dig., Col. 1140. BIJAYNAGAR TEA CO., LTD. *v.* INDIAN TEA LICENSING COMMITTEE.

191 I.C. 387 = 13 R.C. 228.

——**R. 4 (b) (2)**—Deductions under—Calculation of —Recourse to Sch. II—Permissibility. *See* 1940 Dig. Col. 1140. BIJAYNAGAR TEA CO., LTD. *v.* INDIAN TEA LICENSING COMMITTEE. **191 I C 387 = 13 R.C 228.**

TITLE—How can pass. *See* 1940 Dig., Col. 1140. GIRDHAR *v.* MOTILAL CHAMPALAL.

I.L.R. 1941 Nag. 615 = 13 R.N. 267 = 192 I.C. 556 = A.I.R. 1941 Nag. 5.

TORT—*Conversion—Damages — Trespasser plucking green leaves and manufacturing them into black tea and selling them.*

A person who trespasses into a tea garden, plucks the green leaves and manufactures them into black tea, acquires no rights at all to the property in the tea. The leaves though dried, shrunk and blackened, remain tea and the property in them continues to remain in the owner of the tea garden. If the trespass is deliberate and criminal and the trespasser sells the manufactured tea the owner of the garden is entitled to the sale price of the manufactured tea as damages, and the trespasser cannot claim mitigation of damage in respect of the cost of manufacture. (*Derbyshire, C.J. and Lort*

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Williams, J.) CARRITT MORAN & CO. *v.* MANMATHA NATH MUKHERJEE. **I.L.R. (1941) 1 Cal 285 = 45 C.W.N. 286 = A.I.R. 1941 Cal. 691.**

——*Damages—Liability—Act of God or inevitable accident—Ship striking submerged snag and foundering—Death of passenger—Suit for damages—Liability —Absence of negligence or breach of statutory duty—Effect—Overcrowding—Relevancy.*

Where it is found that a steamer carrying passengers collided with a submerged snag, and that the collision was not due to the negligence of the owner or the master of the vessel, it cannot be held that either the owner or the master of the ship is guilty of negligence so as to render them liable for damages for the death of a passenger on board the vessel. These snags may appear suddenly and no shipping company can be held liable merely on the ground that it was not aware of the existence of such an obstacle. When the existence of the snag in a navigable and proper channel is unknown, unexpected collision with it is not an act of negligence. Such a collision is in the nature of an act of God or inevitable accident. Even if there has been overcrowding or overloading on the vessel, there would be no liability. When such overcrowding or overloading had nothing to do with the vessel striking the submerged snag. No damages can be awarded in the absence of proof of negligence or breach of statutory duty. (*Harries, C. J. and Manohar Lall, J.*) RIVER STEAM NAVIGATION CO., LTD. *v.* BIJOY KUMAR.

192 I.C. 659 = 13 R.P. 509 = 7 B.R 485 = 1941 P.W.N. 379 = 22 Pat.L T. 31 = A.I.R. 1941 Pat. 250.

——Defamation — Damages—Quantum — Criminal prosecution and conviction of defendant before filing of suit for damages—If ground for reducing amount of damages. *See* 1940 Dig., Col. 1141. VENKAYYA PANTULU *v.* SURYA PRAKASAMMA.

I.L.R. (1941) Mad. 255 = 191 I.C. 600 = 13 R.M. 499 = (1940) 2 M.L.J. 328.

——*Defamation—Libel — Cause of action—Publication to third party.*

It is an essential part of a cause of action for libel, to allege publication which means to a third party, or such circumstances as will lead the Court to presume publication to a third party. Publication to the plaintiff, according to the law, is not publication. (*Ameer Ali, J.*) SOHANLAL DAGA *v.* SREECHAND DAGA.

194 I.C. 119 = 13 R.C. 489 = A.I.R. 1941 Cal. 247.

——*Defamation — Libel — Publication in newspaper—Married woman giving instruction in physical culture and dancing and running free school for poor Parsi girls—Statement that she is unfit and would ruin the future of the girls—If libel.*

To publish a statement in a newspaper in respect of the profession or calling of a married woman who is an instructress in physical culture and dancing and who also runs an "udyoga ashram" for poor Parsi girls where instruction is given to them in various useful arts free of charge, that she is unfit and incompetent for the purpose is defamatory; and to say that the future of the girls, including their social, religious and moral future, would be spoiled by attending classes of the type of classes which the woman conducts is to impute to her an unfitness which is worse than attributing mere incapacity. Such a statement is defamatory and constitutes a libel, as the imputation has a tendency to prejudice the woman concerned in the way of her profession or calling. That is grossly defamatory and would be actionable. (*Wadia, J.*) MITHA RUSTOMJI MURZBAN *v.* NUSSERWANJI ENGINEER. **196 I C. 503 = 14 R.B. 135 = 43 Bom.L.R. 631 = A.I.R. 1941 Bom. 278.**

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———*Defamation—Libel—Right of individuals and journalists to hold and express views on subjects—Limits to—Publication of statement about another casting reflection calculated to disparage or injure—If defamation—Suit for damages—Proof of falsity of statement or malice—Necessity.*

Any person, whether he is a private individual or a public journalist, has a right to hold any views he pleases on a subject and to express the same. It is immaterial whether the opinion or the comment is correct or not correct, whether it is just or unjust, or whether it is couched in language which may not err on the side of moderation. What is material and important is that the comment must not go beyond the limits of what the law calls "fair." A statement which being published of another in the way of that person's lawful trade business, profession, calling or office, conveys a reflection on that person calculated to disparage or injure that person therein, is a defamatory statement even though it be not calculated to hold that person up to hatred, contempt or ridicule. In a suit for damages for defamation in respect of such a statement it is not necessary for the plaintiff to prove that the words are false. If the words are defamatory they are presumed to be false, and it is for the defendant, if he seeks to justify them, to prove that they are substantially true. Nor is it necessary for the plaintiff to prove any malice on the part of the defendant. It is only for the purpose of rebutting the defence of qualified privilege that it becomes necessary to prove express malice in the sense of improper motive on the part of the defendant. (*Wadia, J.*) MITHA RUSTOMJI MURZBAN *v.* NUSSERWANJI ENGINEER. **196 I.C. 503 = 14 R.B. 135 = 43 Bom.L.R. 631 = A.I.R. 1941 Bom. 278.**

———*Defamation — Libel—Suit for damages—Apology tendered in prior criminal complaint and accepted —If bar to suit for damages.*

The fact that an accused in a criminal case of defamation (libel) tenders an unqualified apology which is accepted, leading to the withdrawal of the criminal proceeding, does not bar a subsequent civil suit for damages for libel. The apology in the criminal case is no defence to the civil action, unless at the time of the giving of the apology it is specifically agreed between the parties that the acceptance of the apology should also operate as an accord and satisfaction of the civil action. *Venkataramana Rao, J.*) GOVINDACHARYALU *v.* SESHAGIRI RAO. **1941 M.W.N. 786 = A.I.R. 1941 Mad. 860 = (1941) 2 M.L.J. 674.**

———Defamation—Privilege—Communication or complaint to police charging a person with criminal breach of trust—If absolutely privileged. *See* 1940 Dig., Col. 1141. BAPALAL & CO. *v.* KRISHNASWAMI IYER. **I.L.R. (1941) Mad. 332 = 195 I.C. 24 = 14 R.M. 114 = A.I.R. 1941 Mad. 26 = (1940) 2 M.L.J. 556.**

——— *Defamation—Privilege — Publication in newspaper—Extent of privilege—Unfair comments or imputations upon person's character or in respect of his profession or calling—If privileged—Test—Burden of proof.*

Newspapers are subject to the same rules as other critics and have no special right or privilege, and in spite of the latitude allowed to them, it does not mean that they have any special right to make unfair comments or to make imputations upon the character of a person or imputations upon or in respect of a person's profession or calling. The range of a journalist's criticism or comments is as wide as, and no wider than, that of any other subject. Though it may be said to be true in one sense that newspapers owe a duty to their readers to publish any and every item of news that may interest them, that is not, however, such a duty as makes every communication in the paper relating to a matter of public interest a privileged one. The defendant has to show that what he communicated was relevant or pertinent to the privileged occasion. (*Wadia, J.*) MITHA RUSTOMJI MURZBAN *v.* NUSSERWANJI ENGINEER. **196 I.C. 503 = 14 R.B. 135 = 43 Bom.L.R. 631 = A.I.R. 1941 Bom 278.**

———Defamation—Privilege — Verbal complaint of decoity made to village Magistrate—If can be made basis of suit for damages for defamation—Privilege. *See* TORT—MALICIOUS PROSECUTION. **(1941) 1 M.L.J. 200.**

———*Defamation—Slander—Imputation of criminal offence—If actionable* per se*—Conditions to support action—Burden of proof.*

An imputation of a criminal offence, in order to be actionable *per se*, must be a distinct charge and must not be a mere statement of suspicion. It may be made in so many words or it may be made in words from which the charge could be inferred; but the inference must be clear and unequivocal. It is for the plaintiff to prove that the words were capable of conveying, and did in fact convey that meaning; and the evidence must be sufficiently strong and cogent for the purpose. (*Wadia, J.*) MITHA RUSTOMJI MURZBAN *v.* NUSSERWANJI ENGINEER. **196 I.C. 503 = 14 R.B. 135 = 43 Bom.L.R. 631 = A.I.R. 1941 Bom 278.**

———*Joint tort-feasors — Compromise with some—Aggrieved party, if loses remedy against all.*

A compromise by the aggrieved party with some only of the joint tort-feasors does not disentitle him to his remedy against the rest for he has not released his entire cause of action. (*Agarwal, J.*) HAR KRISHNA LAL *v.* QURBAN ALI. **196 I.C. 685 = 14 R.O. 198 = 1941 O.L.R. 730 = 1941 O.W.N. 1124 = 1941 O.A. 832 = 1941 A.L.W. 948 = 1941 A.W.R. (Rev.) 938.**

———Making false charge—Damages—Claim for—Sustainability—Charge made orally to village Magistrate alleging commission of dacoity—Charge reported false and proceedings dropped without summons to person charged—Right of action—Privilege. *See* TORT—MALICIOUS PROSECUTION. **(1941) 1 M.L.J. 200.**

———*Malicious prosecution—Cause of action—Pleader prosecuted by Municipal Corporation for practising without licence—On production of licence pleader discharged—Suit for damages.*

There are three sorts of damage, any one of which is sufficient to support an action for malicious prosecution. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger of life, limb or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary 'charges to acquit himself of the crime of which he is accused.' It is no answer to the plaintiff's claim that the crime of which he was accused is punishable with fine only. A pleader was prosecuted by the Municipal Corporation for practising without licence in spite of his having paid the requisite licence fee. On production of the licence however he was discharged. In a suit for malicious prosecution by the plaintiff,

Held, that there was no danger to life, limb or liberty of the plaintiff because the offence with which he was charged was punishable with fine only. Nor could the matter of which the plaintiff was accused be described as scandalous. Nor could the charges incurred by the plaintiff in engaging a pleader and paying him a fee, be justified inasmuch as the plaintiff himself was a

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pleader and had a complete answer to the charge in the form of the licence granted by the Corporation. Consequently the plaintiff had no cause of action. (*Panckridge, J.*) JATINDRA MOHAN BANERJI *v.* CORPORATION OF CALCUTTA. **194 I.C. 374=13 R.C 501=A.I.R. 1941 Cal. 13.**

———*Malicious prosecution—"Prosecution"—Meaning of—Verbal complaint to village Magistrate charging person with dacoity—Dismissal without summons to person charged—Suit for damages—Maintainability.*

A verbal complaint was made by the defendant against the plaintiff to the village magistrate charging him with the offence of dacoity. The village Magistrate sent a report on the same day to the police and to the Stationary Sub Magistrate. The latter ordered an inquiry by the police who subsequently made a report that the complaint was false. The plaintiff was not even summoned. The Magistrate thereupon declined to take any further action, and the proceedings were dropped. In a suit by plaintiff for damages for malicious prosecution,

Held, (1) that the plaintiff was not "prosecuted," and he could not therefore bring an action for damages for malicious prosecution; (2) that the suit was not maintainable even as a claim for damages for bringing a false charge apart from either malicious prosecution or defamation; (3) that statements made in a complaint to a Magistrate or even to a police officer which could only be made with a view to their being repeated on oath before the Magistrate must be held to be absolutely privileged; (4) that even if the allegations made by the defendant to the village Magistrate be held to be defamatory since they were made on an occasion which was found to be absolutely privileged, no claim for damages for defamation would lie. (*Abdur Rahman, J.*) VATTAPPA KONE *v.* MUTHUKARUPPAN SERVAI.

53 L.W. 238=1941 M.W.N. 226=A.I.R. 1941 Mad. 538=(1941) 1 M.L.J. 200.

———*Malicious prosecution—Reasonable and probable cause—Municipal Corporation prosecuting plaintiff in spite of his paying requisite licence fee—Corporation official responsible for prosecution knowing that plaintiff had paid fee—Absence of entries in books—Corporation, if can rely on.*

In an action for malicious prosecution by the plaintiff who was prosecuted by the Municipal Corporation in spite of his having paid the requisite licence fee, the Corporation cannot rely on entries or the absence of entries in their books or the absence of corrections in their books which are due solely to their own failure to maintain proper supervision. If any Corporation official who was responsible for the prosecution knew that the plaintiff had paid his licence fee there was no reasonable and probable cause, and equally there must have been malice. (*Panckridge, J.*) JATINDRA MOHAN BANERJI *v.* CORPORATION OF CALCUTTA.

194 I.C. 374=13 R.C. 501=A.I.R. 1941 Cal. 13.

———*Malicious prosecution—Suit for—Correctness of plaintiff's acquittal—Defendant, if can question.*

Generally speaking, it is not open for a defendant in an action for malicious prosecution to question the correctness of the plaintiff's acquittal. (*Panckridge, J.*) JATINDRA MOHAN BANERJI *v.* CORPORATION OF CALCUTTA. **194 I.C. 374=13 R.C. 501=A.I.R. 1941 Cal. 13.**

———Negligence—Building used by occupant for storing combustible material—Loss by fire—Failure to take precautions against fire or to put out fire or to rescue anything from fire—Liability for damages to owner of building. *See* 1940 Dig., Col. 1144. NARASIMHA

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AYYAR *v.* KRISHNA AYYAR. **192 I.C. 85=13 R.M. 526=(1940) 2 M.L.J. 11.**

———Negligence—Destruction of leased property by fire—Suit for damages—Onus—Negligence when may be presumed. *See* T. P. ACT, S. 108 (*m*) (*o*). **1941 A.L.J. 361.**

———Negligence — Shipowner — Responsibility regarding health and safety of crew. *See* 1940 Dig., Col. 1144. BROCKLEBANK, LTD. *v.* NOOR AHMODE. **I.L.R. (1940) Kar. (P.C.) 435=191 I.C. 229=13 R.P.C. 124=7 B.R. 278=45 C.W.N. 197=73 C.L.J. 135=43 Bom.L R 450=1941 A.W.R. (P.C.) 21=1941 O A. 444=1941 P.W.N. 1=1941 O.L.R. 1 (P.C.).**

———Negligence—Suit for damages—Onus—Plaintiff's house damaged by water escaping from municipal burst pipe—Essentials to be proved by plaintiff. *See* 1940 Dig., Col. 1145. RAMDAS TOPANDAS *v.* SUKKUR MUNICIPALITY **192 I C. 494=13 R.S. 191.**

———Nuisance—Damages— Assessment of — House becoming unlettable due to proximity of nuisance. *See* 1940 Dig., Col. 1146. S.A. BASIL *v.* CORPORATION OF CALCUTTA. **195 I.C. 306=14 R.C. 67=45 C.W.N. 1008=A.I.R. 1941 Cal. 207.**

———Nuisance—Duty of neighbour. *See* 1940 Dig., Col. 1146. S.A. BASIL *v.* CORPORATION OF CALCUTTA. **195 I.C 306=14 R.C. 67=45 C.W.N. 1008=A.I.R. 1941 Cal. 207.**

———*Nuisance—Municipality discharging sewage water into storm water channel—Injunction, if can be granted.*

There was an old storm water channel in certain area which was constructed before that area became thickly populated. With the increase of population, the need for sanitation grew more acute and the municipality adopted the simple expedient of discharging sewage water into the old storm water channel. An individual in the locality claimed that this led to two distinct nuisances, from which he in particular was a sufferer. During the rainy season the water overflew into his house, with unpleasant results. At other times the water in channel became stagnant and gave off a stench so offensive that his house was practically uninhabitable, He therefore sought an injunction to restrain the municipality from discharging the sewage water into this channel, or in the alternative, to compel it either to convert the channel into a suitable drain or to have proper drainage laid down elsewhere.

Held, that the committee could not be compelled to make satisfactory drainage arrangements; but if it undertook the duty of making such arrangements, it could be restrained from making arrangements which were negligent or dangerous to health or even interfered with the ordinary comfort of an individual. (*Beckett, J.*) SYED MAZAFFAR HUSSAIN *v.* ADMINISTRATOR OF THE LAHORE MUNICIPALITY. **A.I.R. 1941 Lah. 453.**

———Nuisance—Public nuisance—Special damage—Facts to be proved. *See* 1940 Dig., Col. 1147. MUNICIPAL BOARD, LUCKNOW *v.* RAM DEI.

16 Luck. 173=A.I.R. 1941 Oudh 52.

———Nuisance—Public nuisance—Temporary storing of rubbish on public road. *See* 1940 Dig., Col. 1147. MUNICIPAL BOARD, LUCKNOW *v.* RAM DEI.

16 Luck, 173=A.I.R. 1941 Oudh 52.

———*Nuisance—Test—Standard to be applied.*

To determine whether an act complained of as a nuisance is strictly so or not is to be judged by the ordinary standards of persons residing in the neighbourhood and the criterion would be the ordinary physical comfort of human existence according to plain, sober and simple notions obtaining amongst people and not

according to the elegant and dainty modes and habits of living. It is not the standard of a petulant, cynical, hypersensitive or fastidious person that would furnish a guide but that of a person who expects to enjoy the ordinary comforts of a decent and healthy life in the local area where he resides. The inconvenience or discomfort must be of a substantial character to warrant legal interference. (*Niyogi and Clarke, JJ.*) CAWACSHAH BOMANJI *v.* PRAFULLA NATH.

A.I.R. 1941 Nag. 364.

——Passing off. *See* TRADE MARKS.

——*Pleadings—Sufficiency — Allegation of tort against guardian of defendant.*

In order to found a cause of action in tort it must be alleged that the defendant committed the tort. An allegation that the tort was committed by the defendant's guardian purporting to act on his behalf is not a pleading of a sufficient or proper nature alleging that the defendant committed the tort alleged. (*Ameer Ali, J.*) SOHANLAL DAGA *v.* SREECHAND DAGA.

194 I.C. 119=13 R.C. 489=A.I.R. 1941 Cal. 247.

——Trade Marks. *See* TRADE MARKS.

——*Vicarious liability—Liability of master for acts of servant—When arises.*

All that is required to make the master liable for the acts of his servant is that the servant should have been acting within the apparent scope of his authority and in the course of his employment. Where a servant is employed, among other things, to seize the cattle, trespassing upon his master's property, and he seizes cattle he is doing that for which he is employed. The fact he seizes them while they were lawfully on the road, though it would amount to exceeding his authority would not make his action any the less one in the course of his employment and within the apparent scope of his authority. (*Bose, J.*) BABULAL *v.* KISHANSINGH.

195 I C. 365=14 R.N. 48=1941 N.L.J. 328.

——*Vicarious liability—Master and servant—Negligent act of servant causing injury—Liability of master—Jamaica Public Health Law* (1925), *Ss.* 89 *and* 223.

The plaintiff was injured by the wheel of a cart driven negligently by the servant of a corporation in the course of his employment; plaintiff brought a suit against the corporation for damages for the injuries.

Held, that the plaintiff was entitled to damages against the corporation to whom the cart belonged and under whom the cart was being driven under circumstances which rendered the corporation liable; (2) that notice under S. 89 of the Jamaica Public Health Law was not necessary, because S. 89 of the Act afforded protection only to persons and not to bodies corporate or incorporate, and the section had no application to the corporation as such; (3) that the three months' limitation prescribed by S. 89 (2) did not therefore apply; (4) that S. 223 of the Act did not afford any protection to the corporation as there had been no disregard of its provisions. (*Lord Justice Luxmore.*) OLGA HALL *v.* KINGSTON AND ST. ANDREW CORPORATION.

196 I C. 549=14 R.P.C. 42=1941 O.L.R. 746=8 B.R. 96=1941 O.A. 599=1941 A.W.R (P.C.) 47=1941 P.W.N. 492=A.I R. 1941 P.C. 103.

——*Wrongful attachment—Damages — Action for—Essentials to be proved—Legal act done with malice—If gives right of action.*

A plaintiff in an action for damages for abuse of civil proceedings, *e.g.*, wrongful distress, must, in order to succeed, prove that the proceedings were instituted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant also acted maliciously, and in certain classes of cases, that the proceedings have come to a proper or legal end, *i.e.*, terminated in the plaintiff's favour, unless the proceedings are incapable of so terminating. There is, however, no cause of action in respect of doing a legal act, even if it is done with malice and without reasonable and probable cause. (*Wadia, J.*) NASIRUDDIN KARIM UMERJI ADAM & CO. **196 I.C. 385=14 R.B. 124=43 Bom.L.R 546=A.I.R. 1941 Bom. 286.**

——*Wrongful attachment—Damages—Liability for—Essentials to be proved—Execution of decree—Application for attachment—Order by Court for arrest—Warrant of attachment wrongly issued by Court—Attachment and locking up of premises by amin—Claim for damages against decree-holder—Sustainability—Ratification.*

The defendant held a decree against the plaintiff and applied for execution of the decree by attachment of the movable properties of the plaintiff. The execution petition was put up for orders before the Judge in Chambers, and an order was made for arrest of the plaintiff in chambers where neither the defendant nor his Counsel was present. But through the mistake of the Court officials, a warrant of attachment was issued and the amin who went to execute it took the defendant (decree-holder) with him and proceeded to a printing press of the plaintiff. As it was late in the day and nothing could be done, the amin locked up the press and sealed it with the seal of the defendant and went away. The press remained locked for three or four days and was opened by orders of Court only after the plaintiff (judgment-debtor) deposited the decree amount in Court. The plaintiff then brought a suit for damages against the defendant, alleging that the defendant was responsible for malicious prosecution, and trespass on property and also for abuse of process of Court.

Held, that the plaintiff, in order to succeed, should prove that in spite of the order for arrest, or after knowing that the order was only for arrest, the defendant deliberately got a warrant of attachment by misleading or influencing the officers responsible for issuing the warrant and that he instigated the amin to lock up the press; (2) that on the evidence on record, the defendant was neither responsible for the wrong issue of a warrant of attachment instead of a warrant of arrest nor in any way instrumental in getting the press locked; (3) that it was clear from the evidence that the defendant neither instigated the amin to lock the press nor was any way responsible for that act on the part of the amin; (4) that the error was wholly and entirely on the part of the officers of the Court for which the defendant was not responsible, (5) that there could be no question of ratification by the defendant of the act of the amin; and (6) that therefore the defendant could not be held liable for damages. (*Abdul Ghani and Subramanya Aiyar, JJ.*) NARASIMHA MALLAIYA *v.* ABDUL GAFFOOR. **46 Mys.H.C.R. 175=19 Mys.L.J. 69.**

——*Wrongful attachment—Entrustment to* supurdar *—Suit for damages—Liability of decree holder—Basis.*

Where a suit is brought for loss caused to property attached and entrusted to *supurdar* the decree holder is liable when the attachment is found to be illegal. His liability arises because it was he who got the property attached and he was bound to restore it in the condition in which it was when it was attached. (*Agarwal, J.*) PIRTHI NATH *v.* M. H. NOWROJI. **193 I.C. 654=13 R.O. 484=1941 O L R. 313=1941 A.W.R. (C.C.) 136=1941 O.A. 367=**

TORT.

1941 A.L.W. 409=1941 O.W.N. 555=A.I.R. 1941 Oudh 412.

———Wrongful dismissal. *See* MASTER AND SERVANT.

TRADE MARK. *See also* PENAL CODE, SS. 482 AND 486.

———English decisions—Applicability. *See* 1940 Dig., Col 1148 THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **1941 P.W.N. 210=(1940) 2 M.L.J. 151 (P.C.).**

———*Infringement—Damages not proved—Right to nominal damages.*

In a case of infringement of trade mark in the absence of proof of damages, the damages awarded should be really nominal. (*Dalip Singh and Sale, JJ.*) RAM KUMAR JALAT *v.* R.J. WOOD & CO. **195 I.C. 831=14 R.L. 103=43 P.L.R. 269=A.I.R. 1941 Lah. 262.**

———Infringement—Passing off action—Acquiescence of plaintiff in user by defendant—Effect of delay—Dismissal of suit—Defendant's right to costs. *See* 1940 Dig., Col. 1148. DEVIDOSS & CO. *v.* ABBOYEE CHETTY & CO. **I.L.R. (1941) Mad. 300=195 I.C. 433=14 R.M. 194=A.I.R. 1941 Mad. 31=(1940) 2 M.L.J. 793.**

———Infringement—Passing off action—Right to injunction—Trade-mark—Use of words in English to denote name of goods of particular trader—Another trader using words in vernacular having same meaning in connection with similar goods—If constitutes infringement. *See* 1940 Dig., Col. 1149. J. C. ENO, LTD. *v.* VISHNU CHEMICAL CO. **193 I.C. 392=13 R.B. 308=A.I.R. 1941 Bom. 3.**

———*Infringement—Test—Expert opinion—Admissibility.*

The test in cases of infringement of trade mark is whether the unwary purchaser, not the intelligent purchaser, is likely to be deceived. The *expert* opinion of persons well acquainted with the trade as to whether an alleged resemblance between the contrasted marks is or is not calculated to deceive the unwary, is inadmissible, and in the absence of any direct evidence that the unwarys have been deceived, it is for the Court and the Court alone to decide whether there is a possibility of deception. (*Dalip Singh and Sale, JJ.*) RAM KUMAR JALAN *v.* R. J. WOOD & CO. **195 I.C. 831=14 R.L. 103=43 P.L.R. 269=A.I.R. 1941 Lah. 262.**

———*Passing off—Action for—Damages—Measure of—Exemplary damages—If can be awarded.*

Exemplary or penal damages are not usually awarded in a passing off action. The plaintiff can either ask for an account of profits or damages to cover his own losses; but in the latter case, the ordinary rule is to ascertain the actual losses. (*Tek Chand and Beckett, JJ.*) UPPER SIND CIGARETTES MANUFACTURING CO. *v.* PENINSULAR TOBACCO CO., LTD. **196 I.C. 19=14 R.L. 114=43 P.L.R. 389=A.I.R. 1941 Lah. 293.**

———*Passing off—Action for — Injunction—Right to.*

In a passing off action the plaintiff is entitled to ask for the issue of an injunction, if the defendant persists in denying that there had been any infringement of plaintiff's rights and does not give any undertaking with regard to the future (*Tek Chand and Beckett, JJ.*) UPPER SIND CIGARETTES MANUFACTURING CO. *v.* PENINSULAR TOBACCO CO, LTD. **196 I.C. 19=14 R.L. 114=43 P.L.R. 389=A.I.R. 1941 Lah. 293.**

———Passing off—Manufacturer of smoking tobacco selling his goods under certain trade mark—Manufacturer of chewing tobacoo using similar mark—Probability of deception—Proof. *See* 1940 Dig., Col. 1149.

T. P. ACT (882), S. 3.

THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **1941 P.W.N. 210=(1940) 2 M.L.J 151 (P.C.).**

———Passing off—Use of same mark on other goods—Permissibility. *See* 1940 Dig., Col. 1150. THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **1941 P.W.N. 210=(1940) 2 M.L.J. 151 (P.C.).**

———Similarity of marks—Comparison of marks side by side—If proper test. *See* 1940 Dig., Col. 1151. THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **1941 P.W.N. 210=(1940) 2 M.L.J. 151 (P.C.).**

———Similarity of marks—Differences in get up—If material. *See* 1940 Dig., Col. 1151. THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **1941 P.W.N. 210=(1940) 2 M.L.J. 151 (P.C.)**

———*Trade name—Infringement—Goods, if to be identical or belong to the same class.*

Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin. It is not necessary that the goods should be identical or belong to the same class. (*Venkataramana Rao, J.*) DHANALAKSHMI WEAVING WORKS *v.* MAHOMED ABDUL AZEEZ SAHIB. **54 L.W. 207=1941 M.W.N. 1018=(1941) 2 M.L.J. 435.**

TRADE UNIONS ACT (XVI of 1926), S. 13—Scope and applicability—Combination to prevent cutting of rates—Suit by one member against another—Maintainability. *See* PARTNERSHIP ACT, SS. 4 AND 69 AND TRADE UNIONS ACT, S. 13. **I.L.R. 1941 Nag. 702.**

TRANSFER OF PROPERTY ACT (IV OF 1882)—Scope—If exhaustive of matters dealt with. *See* 1940 Dig., Col. 1152. GHASI RAM *v.* KUNDAN BAI. **I.L.R. (1941) Nag 513=194 I C 861=14 R.N. 17.**

———**S. 3**—Constructive notice—Applicability—Arrears of municipal taxes. *See* U. P. MUNICIPALITIES ACT, S. 177 AND T. P. ACT, S. 3. **1941 O.W.N. 122.**

———**Ss. 3 and 123**—*Future rent—If immovable property.*

According to the definition in S. 3 (25) of the General Clauses Act, a benefit to arise out of land is immovable property. Future rent is a benefit to arise out of land. The right to receive future rent must therefore be held to be immovable property. A gift of such right must under S. 123 of the Transfer of Property Act be effected by a registered instrument attested by at least two witnesses. (*Harries, C.J and Chaterji, J.*) BHUDEB CHANDRA ROY *v.* BHIK SHANKAR PATTANIK. **196 I.C. 837.**

———**S. 3**—*Money debt—If actionable claim.*

There can be no doubt that a money debt, being an obligation to pay a definite sum of money, is an actionable claim as defined in S. 3 of the T. P. Act. (*Dalip Singh and Sale, JJ.*) RAM KRISHAN MOHAN LAL *v.* GURDIAL MAL SAGAR MAL. **43 P.L.R. 439=A.I.R. 1941 Lah. 337.**

———**S. 3**—*"Wilful"—Meaning of—Omission to make inquiries—Effect of.*

The words "wilful abstention from an inquiry or search" in S. 3, T. P. Act, must be taken to mean such abstention from inquiry or search as would show want of *bona fides*, and a mere omission to make inquiries cannot be regarded as sufficient to constitute constructive notice within the meaning of the section. (*Leach, C.J. and Happell, J.*) KAUSALAI AMMAL *v.* SANKARA-

T. P. ACT (1882), S. 6.

MUTHIAH PILLAI. **53 L.W. 744 = 1941 M.W.N. 621 = A.I.R. 1941 Mad. 707 = (1941) 1 M.L.J. 815.**

——**S. 6 (e)**—Mere right to sue—Policy of insurance effected by Mahomedan for benefit of children—Interest of children—Nature of—Trust—Right of beneficiary to release interest. *See* MARRIED WOMEN'S PROPERTY ACT, S. 6. **(1941) 2 M.L.J. 740.**

——**S. 6 (c)**—*Mere right to sue—Suit for damages for wrongful dispossession of land in breach of agreement of lease—Assignment of profit and loss of suit by plaintiff—Right of consignee to continue suit on death of plaintiff.*

Where after the filing of a suit for damages for wrongful dispossession of premises in breach of an agreement of lease, the plaintiff assigns by way of sale the profit and loss of the suit to another, and on the death of the plaintiff thereafter, the assignee claims to be brought on record and to continue the suit, he cannot be permitted to do so. The right to recover damages whether for tort or contract is a mere right to sue, and, according to S. 6 (*c*) of the T. P. Act cannot be transferred. The assignment of the fruits of a pending action, though valid, gives the assignee no right to interfere in proceedings in the action. The Court has merely to consider the nature of the suit. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) RAJAMANICKAM CHETTY *v.* ABDUL HALIM SAHIB. **58 L. W. 64 = 1941 M.W.N. 37 = A.I.R. 1941 Mad 389 = (1941) 1 M.L.J. 22.**

——**Ss. 6 (e) and 130**—*Applicability—Sale of land set aside at instance of real owner as vendor had no title—Right of vendee to recover purchase money—Assignability—If mere right to sue or actionable claim.*

Appellant sold some properties to the respondents 2 and 3. The sale was set aside at the instance of two persons claiming to be the real owners of the property. The respondents 2 and 3 then assigned their right to recover the purchase money from the appellant to the 1st respondent (plaintiff). The latter filed a suit for recovery of the purchase money from the appellant who pleaded S. 6 (*e*) of the Transfer of Property Act in bar of the claim.

Held that the claim was a claim to recover a precise sum which the appellant was bound to repay on the setting aside of the sale, as there must be implied a contract to repay the purchase money as between the vendor and vendee. A right to claim enforcement of this contract cannot be said to be a bare right to sue falling under S. 6 (*e*), T. P. Act, but is an actionable claim to which S. 130, T. P. Act, would apply. The right is therefore clearly assignable and the suit therefore was maintainable. (*Somayya, J.*) CHINNAPPAREDDI *v.* VENKATARAMANAPPA. **54 L.W 491 = (1941) 2 M.L.J. 695.**

——**S. 6 (e)**—*Sale of goods in transit, whereabouts unknown—If a transfer of mere right to sue—Legality of sale.*

Sale of goods sent by Railway which had not reached its destination and about which investigation was proceeding, is not a transfer of a mere right to sue and hence such a sale is not illegal. (*Davies.*) RADHA KISHEN *v.* B. B. & C. I. RAILWAY. **1941 A.M.L.J. 35.**

——**S. 6 (f)**—Public servant getting salary below attachable limit—Agreement with creditor for attachment and deduction of part every month—Legality. *See* C. P. CODE, O. 21, R. 48. **43 Bom.L.R. 758**

——**S. 8**—*Sale of specific Zamindari patti—Interest in the abadi—If passes.*

T. P. ACT (1882), S. 39.

Where the sale is of a specific Zamindari patti in its entirety without any reservation or exception whatsoever, the interest of the Zamindar in the abadi numbers will also pass to the transferee. (*Ghulam Hasan, J.*) SHEORAJ *v.* GANGA PRASAD **193 1 C. 675 = 13 R.O. 502 = 1941 O.L.R. 361 = 1941 A L.W. 519 = 1941 A W R. (Rev.) 372 = 1941 O.A. 399 = 1941 R.D. 328 = 1941 A L.W.. 462 = 1941 O.W.N. 618 = A.I.R. 1941 Oudh 395.**

——**S. 8**—*Transfer by owner having both proprietary and under-proprietary rights—Absence of any reservation—Rights conveyed.*

In the absence of any reservation, where an owner possessing both proprietary and under-proprietary rights transfers his rights, the sale is of both proprietary and under-proprietary rights in the land. (*Agerwal, J.*) BISHESHWAR SINGH *v.* ACHHAIBAR DIN. **195 I.C. 242 = 14 R.O. 63 = 1941 A.L.W. 670 = 1941 O.L.R. 558 = 1941 R.D. 489 = 1941 O.A. 560 = 1941 A.W.R. (Rev.) 581 = 1941 O.W.N. 820 = A.I.R. 1941 Oudh 507.**

——**S. 18**—Applicability—"For the benefit of the public"—Meaning of—Roman Catholic—Dedication of properties for defraying expenses of puja at father's tomb and for feeding pilgrims at festival—Validity. *See* 1940 Dig., Col. 1154. K. M. S. FIRM *v.* MUTHUSWAMI ODAYAR. **A.I.R. 1941 Mad. 188 = (1940) 2 M.L.J. 803.**

——**S. 19**—*Burma Oil Subsidiary Provident Fund Rules—Nature of interest of member in deposits.*

Where according to the rules of Burma Oil Subsidiary Provident Fund the member's money is handed over to the trustees to be dealt with by them in accordance with those rules, and a subscriber relinquishes his right of complete control but nowhere is it suggested that the money ceases to be his property, a member has a vested interest in the deposits made by himself. It may be that that interest is liable to be divested by a condition subsequent, for instance, on the member's becoming insane. (*Mackney, J.*) R.C. DASS *v.* SECRETARY OF BURMA OIL SUBSIDIARY PROVIDENT FUND TRUST (INDIA), LTD. **A.I.R. 1941 Rang 239.**

——**S. 35**—Doctrine of election—Applicability to surrender by Hindu widow. *See* HINDU LAW—WIDOW—SURRENDER. **(1941) 1 M.L.J. 349.**

——**Ss. 39 and 100**—Distinction between. *See* 1940 Dig., Col 1154. GHASIRAM *v* KUNDANBAI. **I.L.R. (1941) Nag. 513 = 194 I.C. 861 = 14 R.N. 17.**

——**(as amended in 1929), S. 39**—*Scope—If retrospective—"Notice"—Omission to make inquiry—Effect of—Maintenance decree creating charge—Mortgage of properties prior to suit—Priority.*

A transferee claiming under a transfer before 1929, cannot by reason of the amendment of the T. P. Act, in 1929, be required to do more than he was required to do by the law as it stood when the property was transferred to him. Nor can a mere omission to make inquiries be regarded as sufficient to constitute "notice" within the meaning of Ss. 3 and 39, T. P. Act. The abstention from inquiry must be designed, and due to a desire to avoid an inquiry which would lead one to ultimate knowledge before the omission to make inquiry can be said to constitute constructive notice. The appellant who was the widow of a Hindu coparcener sued on 18—10—1926, her husband's coparcener for maintenance, her husband having died some time before 1926. She got a decree under which certain properties were charged for her maintenance. On 25—7—1926, these properties were mortgaged by the surviving coparcener to the respondent who in 1931 filed a suit to enforce the mortgage, claim-

T. P. ACT (1882), S. 41.

ing priority over the maintenance charge. It was found that the mortgage was a genuine transaction and was for consideration and that it was for a necessary purpose binding on the joint family. It was not suggested that the mortgage was created in order to defeat the appellant. It was, however, contended that since the respondent did not make any inquiry as to whether a widow had a claim on the properties, he should be postponed after the appellant.

Held, that there was no wilful abstention or gross negligance on the part of the respondent, that the omission on his part to make inquiries could not be regarded as sufficient to constitute constructive notice and the appellant therefore was not entitled to priority over the respondent.

Quaere. Whether S. 39 T. P. Act, as amended has retrospective effect. (*Leach, C.J. and Happell, JJ.*) KAUSALAI AMMAL *v.* SANKARAMUTHIAH PILLAI.
53 L.W. 744 = 1941 M.W.N. 621 = A.I.R. 1941 Mad. 707 = (1941) 1 M.L.J 815.

——— **S. 41**—*Applicability—Application for pre-emption.*

It cannot be said that S. 41 of the Transfer of Property Act has no application to an application for pre-emption. (*Henderson, J.*) AYETUNNISSA BIBI *v.* JAHAR ALI. **45 C.W.N. 735.**

———**S. 41**—Applicability—Hindu widow –Allegation of adoption of son—Adopted son dealing with property and executing mortgage—Death of adopted son—Reversioner impeaching mortgage— Estoppel— Burden of proof. *See* 1940 Dig., Col. 1155. TEJUMAL JASUMAL *v.* ROCHALBAI. **191 I.C. 558 = 13 R.S. 159.**

———**S. 41**—*Applicability—Mortgage duly registered but not entered in land revenue papers—Mortgagor transferring his interest in mortgaged property—Mortgagee, if estopped from asserting his mortgage.*

There is no legal obligation on the mortgagee either to have his mortgage entered in the land revenue records or to sue for possession under his mortgage deed before the period of limitation for suing expires. Consequently where an anomalous mortgage which is to be simple for a certain period after the expiry of which the mortgagee is entitled to possession is duly registered but not entered in the land revenue papers and subsequently the mortgagor transfers his interest in the mortgaged property to a third person, the mortgagee is not estopped from suing for possession by the principles of S. 41 and is entitled to sue for possession any time within limitation. (*Almond. J.C. and Soofi, J.*) HIRA SINGH *v.* MAHOMED AFZAL KHAN. **196 I.C. 17 = 14 R. Pesh. 22 = A.I.R. 1941 Pesh. 59.**

———**S. 41**—*Applicability—Movable property—Decree for money*—Bona fide *purchaser for value from benamidar or ostensible owner—If protected.*

Though S. 41 of the Transfer of Property Act only relates to inmovable property, the principle of that section can be applied where movable property, such as a decree for money, has been sold to a *bona fide* purchaser for value by the ostensible owner. Where one of two innocent persons has to suffer by the act of a third person, the person who has enabled the third person to occasion the loss must sustain it, (*Leach, C.J. and Chandrasekhara Ayyar, J.*) SWAMINATHA PILLAI *v.* KRISHNA PADAYACHI. **1941 M.W.N. 917 = 54 L.W. 426 = (1941) 2 M.L.J 601.**

———**S. 41**—Applicability—Patta under Madras Estates Land Act—Effect of—Transferee from pattadar —Right to claim protection of estoppel under section. *See* 1940 Dig., Col. 1155. GOPALA CHETTIAR *v.* ARASAPPA PILLAI. **191 I.C. 428 = 13 R.M. 493 = (1940) 1 M.L.J. 791.**

T. P. ACT (1882), S. 52.

———**S. 41**—*Applicability — Transfer by ostensible owner after real owner's death—Good faith—Onus.*

A Hindu husband purchased certain property with his own money in the name of his wife who after his death alienated it. After the widow's death the reversioner put forth his claim to the property:

Held, that the purchaser could invoke the provisions of S. 41 to his aid and that the onus was on him to show that he was a purchaser in good faith without knowledge of the real state of affairs. (*Sen, J.*) CHAPALABALA DASI *v.* SARAT KUMARI DASI. **A.I.R. 1941 Cal. 318.**

———**S. 41**—Purchaser with notice of real title—If acquires no title. *See* 1940 Dig., Col. 1156. PURNENDU NATH *v.* HANUT MULL. **192 I.C. 416 = 13 R C. 312.**

———**S. 41**—Subsequent transferees—Rights of. *See* 1940 Dig., Col. 1156. PURNENDU NATH *v.* HANUT MULL. **192 I.C. 416 = 13 R.C 312.**

———**S. 43**—Applicability—Alienation of ancestral property by Hindu father without necessity—Subsequent division—No misrepresentation—Benefit of S. 43 if available. *See* 1940 Dig., Col. 1156. BIJLESHARI BAKHSH SINGH *v.* GAJADHAR. **16 Luck. 484 = 191 I.C. 195 = A.I.R. 1941 Oudh 123.**

———**S. 43**—Sale of partnership property by one partner—Sale of same property to different person by the remaining partner—Allotment of that property to one of the partners in subsequent arbitration proceedings—His transferee, if can claim benefit of S. 43. *See* 1940 Dig., Col. 1157. PEAREY LAL *v.* MISRI. **I.L.R. (1940) All. 674 = 192 I.C. 281 = 13 R A. 307.**

———**S. 45**—*Applicability—Involuntary transfers.*

There is nothing in S. 45 to suggest that it ought to be limited to voluntary transfers. S. 45 applies to involuntary transfers also. (*Henderson, J.*) REAZADDI BEPARI *v.* YAKUB BEPARI. **A.I.R. 1941 Cal. 416.**

———**S. 52**—Alienation of property after order on claim petition and before suit under O. 21. R. 63, C. P. Code—If affected by *lis pendens*. *See* 1940 Dig., Col. 1158. SARDAR BEGAM *v.* HARSUKH RAI. **192 I.C. 663 = 13 R.L. 397.**

———**S. 52**—Applicability—Hindu widow—Suit for maintenance by widow claiming charge on specific property—Sale of property pending suit to discharge husband's debt—If affected by *lis pendens*—Charge created by decree—Priority over sale pending suit. *See* 1940 Dig., Col. 1158. GANGABAI PANDURANG *v.* PAGUBAI NARAYAN. **I.L.R. (1941) Bom. 1 = 192 I.C. 257 = 13 R B. 242.**

———**S. 52**—*Applicability—Partition suit—No contest as to fractional share of parties.*

An ordinary partition suit where there is no contest as to the fractional share of the parties is not a suit in which their rights to the immovable property are directly and specifically in question S. 52 does not apply to such a case. (*Panckridge, J.*) BHUPATI BANERJEE *v.* BON BEHARY ROY. **195 I.C. 856 = 14 R C. 139 = A.I.R. 1941 Cal. 436.**

———**S. 52**—*Applicability—Proceedings before Registrar of Co-operative Societies or arbitrator on reference under Co-operative Societies Act.*

The word "Court" in S. 52 of the Transfer of Property Act is comprehensive enough to include the Registrar of Co-operative Societies or the arbitrator appointed by him under the Co-operative Societies Act. A reference to the Registrar under the Co-operative Societies Act and the proceedings taken thereafter are all substitutes for a suit in a Civil Court and the doctrine of *lis pendens* applies to such proceedings. (*Somayya, J.*) VENKATACHALAMIAH *v.* VENKATIAH. **1941 M.W.N. 895 = 54 L.W. 435 = (1941) 2 M.L.J. 588.**

T. P. ACT (1882), S. 52.

——S. 52—Mortgage suit—Adjudication of mortgagor during pendency of—Receiver, if a transferee *pendente lite*. *See* 1939 Dig., Col. 1094. INDIAN COTTON CO., LTD. *v.* RAMCHARAN LAL.

I.L.R (1941) Nag. 559.

——S. 52—Partition suit—Pendency in wrong Court—Mortgage during that period—Re-presentation of plaint to proper Court and ultimate decree—Mortgage if affected by *lis pendens*. *See* 1940 Dig., Col. 1159. NATHUSINGH *v.* ANANDRAO.

I.L.R. (1941) Nag. 652.

——S. 53—*Action, if falls under—Test.*

The primary object of an action under S. 53 of the T. P. Act is to make the assets of the transferor available o the general body of creditors. If it would, then the action would in substance be an action under S. 53 and would have to be instituted by, or on behalf of all the creditors. If it would not, then the action cannot be regarded as one under that section. The proper test to apply when a question of this nature is raised is to see whether if the plaintiff succeeds in the action, the property claimed in the action would be available to the general body of creditors. Where there was no indication in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors but on the other hand there was every indication in the averments of the plaint, that the plaintiff wanted only to vindicate his personal and individual rights, and not the rights of other creditors, it was held that the suit was not one under S. 53 of the T. P. Act. (*Thomas, C.J. and Ghulam Hasan, J.*) FAQIR BUX *v.* THAKUR PRASAD.

194 I.C. 588 = 14 R.O. 6 = 1941 O.W.N. 801 = 1941 A.L.W. 640 = 1941 A.W.R. (C.C.) 222 = 1941 O.A. 519 = A.I.R. 1941 Oudh 457.

——S. 53—Applicability—Fictitious gift. *See* 1940 Dig., Col. 1159. HIDAYAT-UL-NISSA *v* JALALUDDIN.

191 I.C. 742 = 13 R.O. 278 = 1941 O.L.R. 29 = A.I.R. 1941 Oudh 95.

——(as amended in 1929), S. 53—Applicability—Suit under O. 21, R. 63 by decree-holder to set aside adverse claim order—Prayer for declaration of bogus nature of sale deed and for setting it aside as being a fraud on the creditors—Frame of—Leave under O. 1, R. 8, C. P. Code—Necessity. *See* 1940 Dig., Col. 1160. MADINA BIBI SAHIBA *v.* ISMAIL DURGA ASSOCIATION.

194 I.C. 766 = 14 R.M. 58 = (1940) 1 M.L.J. 872.

——S. 53—*Avoidance of transfer—Facts to be proved.*

In a suit under S. 53, T. P. Act, the plaintiff cannot succeed in avoiding the transfer on the ground that it had been made with intent to defeat or delay the creditors of the transferor unless he succeeds in showing that the transfer, although genuine, was fraudulent within the meaning of the section. (*Thomas, C.J. and Ghulam Hasan, J.*) FAQIR BUX *v.* THAKUR PRASAD.

194 I.C. 588 = 14 R.O. 6 = 1941 O.W.N. 801 = 1941 A.L.W. 640 = 1941 A.W.R. (C.C.) 222 = 1941 O.A. 519 = A.I.R. 1941 Oudh 457.

——S. 53—*Bona fide* transferee from fraudulent transferee—If protected. *See* 1940 Dig., Col. 1160. MANSING MOTI RAM *v.* B. N. SINHA.

191 I.C. 639 = 13 R.L. 320.

——S 53—*Burden of proof.*

Ordinarily speaking, when a transaction is attacked under S. 53 of the Transfer of Property Act, the burden lies on the attacking party to show in the first instance that the transaction was a fraudulent one intended to defeat and delay creditors. When a *prima facie* case has been made out onthat basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration. (*Wadsworth, J.*) NARASIMHAMURTHI *v.* MAHARAJA OF PITTAPUR.

1941 M.W.N. 513 = 54 L.W. 76 = A.I.R. 1941 Mad. 690 = (1941) 2 M.L.J. 99.

T. P. ACT (1882). S. 53.

——S. 53—Form of decree—Decree declaring assignment of decree void—Duty of Court to make clear as to whether it is cancelled altogether or only held void as against creditors—Construction of decree. *See* 1940 Dig., Col. 1161. RAMCHANDRA KRISHNAJI *v.* VITHU GOVIND.

193 I.C. 79 = 13 B.B. 304 = A.I.R. 1941 Bom 65.

——S. 53—*Fraudulent transfer—Deed of gift by judgment-debtor with a view to obstruct and defraud creditor—Deed never intended to be acted upon and merely colourable transaction—If void against creditor.*

Where a judgment debtor executes a deed of gift, which is merely a colourable transaction never intended to be acted upon, and continues, even after the deed, to be in possession of the property dealt with under the gift deed, and it is found that the transaction is effected in order to put obstacles in the way of the decree-holders or to defraud them, it must be held that the transfer is void against the decree-holder and he can therefore proceed to attach and sell the property. (*Harries, C.J. and Manohar Lall, J.*) RAM BEHARI SAHAI *v.* BINDA PRASAD.

194 I.C. 45 = 13 R.P. 651 = 7 B.R. 680 = A.I.R. 1941 Pat. 394.

——S. 53—Fraudulent transfer—What is—Preference of one creditor to another. *See* 1940 Dig., Col. 1161. KARNIDAN SARDA *v.* SAILAJA KANTA MITRA.

192 I.C. 187 = 13 R.P. 416 = 7 B.R. 330.

——S. 53—*Intent to defeat or delay creditors—Evidence of—Inclusion of fictitious debt—Inference.*

The inclusion of a debt in a document of transfer, which would otherwise not be within S. 53, T. P. Act, is *prima facie* evidence of an intention to defeat and delay the creditors, and it lies upon the party who wishes to take advantage of the document to show that there was no such intention (*Wadsworth, J.*) NARASIMHAMURTHI *v.* MAHARAJA OF PITTAPUR.

1941 M.W.N. 513 = 54 L.W. 76 = A.I.R. 1941 Mad. 690 = (1941) 2 M.L.J. 99.

——S 53—*Plea of fraudulent transfer—If open by way of defence*

Where the plaintiff seeks to recover possession of property on the basis of a trust deed, it is open to the defendant to plead by way of defence that the plaintiff should not be allowed to recover on the basis of the said document as it was a fraudulent one intended to defeat the rights of creditors among whom the defendant is one. (*R. C. Mitter and Akram, JJ.*) JAGAT KISHORE ACHARYA *v* KULA KAMINI DASSYA.

197 I.C. 50 = 72 C.L.J. 420 = A.I.R. 1941 Cal. 233.

——S. 53—*Scope—Fraudulent transfer—Collusive transfer by debtor to creditor partly in discharge of prior debt and partly for fictitious consideration—Intent to defeat or delay creditors present—If to be set aside as a whole—Creditor if protected to the extent of consideration found true.*

Where a transaction is intended to defeat and delay creditors, the mere fact that a portion of the consideration was paid is no ground for not setting aside the transaction entirely. When a debtor with a view to defeat or delay his creditors colludes with one of his creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to the creditor, on the finding that the transaction, as a whole, was a collusive transaction intended to defeat and delay creditors, the transaction should be set aside as a whole and the creditor who is a

party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby. There is no distinction in this respect between fraudulent transfers by way of mortgage and fraudulent transfers by way of sale. (*Wadsworth, J.*) NARASIMHAMURTHI *v* MAHARAJA OF PITTAPUR.
1941 M.W.N. 513 = 54 L.W. 76 = A.I.R. 1941 Mad. 690 = (1941) 2 M.L.J. 99.

——S. 53—*Single creditor—Representative suit—Propriety.*

Even if a person is the sole and only creditor, he can, and has to, sue under S. 53, T.P. Act, in a representative capacity, on behalf of the general body of creditors. (*Roberts, C.J. and Mosely, J.*) DEOKALI PATTAK *v* RAMDEVI. 1940 Rang. L.R. 777 = 193 I.C. 286 = 13 R.R. 239 = A.I.R. 1941 Rang. 76.

——S. 53—Suit under by creditor to set aside transfer by debtor made prior to adjudication in insolvency—Sanction of Insolvency Court—Necessity. *See* PROVINCIAL INSOLVENCY ACT, S. 28 (2).
(1941) 2 M.L.J. 684 (F.B.)

——S. 53—*Suit under—Onus—Gift by husband to wife—Duty of plaintiff to produce best evidence.*

In a suit under S. 53 T. P. Act, the onus of proving that the gift by the husband to his wife is fraudulent and fictitious, having been effected to defraud the donor's creditors, lies upon the plaintiff where unimpeachable evidence is available and is not produced by him and no reason is shown for this, he fails to discharge the onus on him. (*Bennett and Ghulam Hasan, JJ.*) ABDUL RAHMAN *v.* SULTAN BEGAM. 192 I.C. 96 = 3 R.O. 322 = 1941 A.W.R. (C.C.) 33 = 1941 O.L.R. 65 = 1940 O.A. 1278 = 1940 O.W.N. 1336 = A.I.R. 194 Oudh 178.

——S. 53—Transfer challenged by defendant creditor—Time limit. *See* 1940 Dig., Col. 1162. MAN SINGH MOTI RAM *v.* B. N. SINHA.
191 I.C. 639 = 13 R.L. 320

——S. 53—*Transfer partly good—Transfer in part for consideration but vitiated by fraud—Validity.*

Where part of the consideration for a mortgage executed in favour of a creditor is proved to be fictitious and this fictitious part of the consideration is put in the bond in order to protect the mortgagor's property from his other creditors, it is a transfer made to defeat and delay creditors and by virtue of S. 53 of the T. P. Act it becomes voidable *in toto*, and cannot be enforced partially in respect of the consideration which was actually paid. Under the section mere proof of consideration by the mortgagee is not enough. The section postulates two things:—Consideration and good faith, and there cannot be any good faith when the mortgagee knows that part of the consideration is fictitious and when he assists the mortgagor in his device to defeat and delay his creditors. (*Sen, J.*) JAMADAR SINGH *v.* NAIYAB ALI. I.L.R. (1941) 1 Cal. 536 = 196 I.C. 193 = 74 C.L.J. 121 = 14 R.C. 190 = 45 C.W.N. 498 = A.I.R. 1941 Cal. 378.

——S. 53—*'Transfer'—What is included in—Fraudulent transfer—Test—Onus.*

The word 'transfer' used in S. 53, T. P. Act, is comprehensive enough to embrace within its purview all kinds of transfers, whether with consideration or without consideration, but applies to both kinds of transfers. The crucial question, however, under the section is one of determining the intention and motive underlying the transfer. The mere fact that a transfer is executed without consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with intent to defeat or delay the creditors of the

transferor. Each case must be examined on its own merits and it must be found upon a consideration of the entire circumstances surrounding the execution of the deed of transfer, whether it was brought about with a fraudulent intent or otherwise. Under the general law the burden of proving that a transfer is fraudulent under S. 53, T. P. Act, lies on the creditors. (*Thomas, C.J. and Ghulam Hasan, J.*) RAM RAJ SINGH *v.* LAL CHANDRA PRATAP SINGH. 192 I.C. 619 = 13 R.O. 376 = 1941 A.W.R. (C.C.) 46 = 1941 R.D. 42 = 1941 O.L.R. 210 = 1941 O.W.N. 56 = 1941 O.A. 9 = A.I.R. 1941 Oudh 205.

——S. 53-A—*Applicability—Agreement to transfer partial interest in property.*

Quere:—Whether S. 53-A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. (*Lord Atkin.*) S. N. BANERJI *v.* KUCHWAR LIME AND STONE, CO., LLD. 1941 O.A. 1026 = 1941 A.W.R. (P.C.) 109 = A.I.R. 1941 P.C. 128 (P.C.).

——S. 53-A—Applicability—Benefit of section if available only to a defendant. *See* 1940 Dig., Col. 1162. RAM JIAWAN *v.* HANUMAN PERSHAD.
16 Luck. 191.

——S. 53-A—*Applicability—Contract not complete or invalid.*

The contract contemplated by S. 53-A of the T. P. Act is a completed contract and a valid contract. A person cannot seek the benefit of the section on the basis of a contract forbidden by law or on the basis of negotiations which had not matured into a contract. (*Sen, J.*) BHARAT CHANDRA *v.* MOHAMMAD RAMJAN.
45 C.W.N. 489.

——S. 53-A—*Applicability—Contract not specifically enforceable.*

It is not correct to state that if a contract cannot be specifically enforced, S. 53-A of the T. P. Act will have no application. The object of this section is to protect persons in cases where there is a contract which cannot be proved in evidence or the specific performance of which is barred. (*Sen, J.*) BHARAT CHANDRA *v.* MOHAMMAD RAMJAN. 45 C.W.N. 489.

——S. 53-A—*Applicability—Contract valid in part.*

S. 53-A of the T. P. Act contemplates reliance upon the entire contract. It does not contemplate the splitting up of a contract into different parts. If, therefore, a contract is partly valid and partly invalid, the section cannot be availed of so far as the valid part of the contract is concerned. (*Sen, J.*) BHARAT CHANDRA *v.* MOHAMMAD RAMJAN. 45 C.W.N. 489.

——(as amended in 1929), S. 53-A—Applicability—Cosharers—Deed effecting partition of properties—Inadmissibility due to non-registration—Co-sharer disturbed in possession by another co-sharer—Right to sue in ejectment on basis of deed. *See* REGISTRATION ACT, S. 17 (1) (*b*). (1941) 2 M.L.J. 707.

——S. 53-A—*Applicability to Punjab.*

Unless S. 53-A can be taken as embodying some general rule of equity which would prevail in India, apart from the provisions of the Transfer of Property Act, it can have no force in the Punjab, to which it has not been applied. (*Tek Chand, Monroe and Beckett, JJ.*) SHANKRI *v.* MILKHA SINGH. 43 P.L.R. 656 = A.I.R. 1941 Lah. 407 (F.B.).

——S. 53 A—*Applicability—Transferee already in possession—Continuance of possession pursuant to contract—Need for proof.*

T. P. ACT (1882, S. 53-A.

In order to avail oneself of the benefit of the provisions of S. 53-A of the T. P. Act, it must be shown that the possession refers unequivocally to the contract. Where a person is already in possession as lessee and continues in possession after the contract for sale, it does not necessarily follow that he continues in possession in part performance of the contract. He must show either from the contract itself or from some other evidence that the continuance of his possession was in reference to or pursuant to the contract for sale. (*Sen, J.*) BHARAT CHANDRA *v.* MOHAMMAD RAMJAN.
45 C W.N. 489.

——**S. 53-A**—*Applicability — Writing signed by transferor or on his behalf—Necessity—"Signed on his behalf"—Meaning of.*

The first requirement mentioned in S. 53-A, T.P. Act, as a condition for the applicability of the section is that there should be a writing signed by the transferor or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section mean signed by a person who has authority to bind or represent the transferor. (*Broomfield and Macklin, JJ.*) BECHARDAS DAMODARDAS *v.* AHMEDABAD BORROUGH MUNICIPALITY. **43 Bom.L R. 603 = A.I.R. 1941 Bom. 346.**

——**S. 53 A**—*Construction—Complete performance or complete willingness to perform by transferee—If condition precedent.*

The third clause of S. 53-A, T.P. Act, enacts a condition that the transferee has performed or is willing to perform his part of the contract. It is obvious that it is primarily intended for the benefit of the transferee, and when the section speaks of the performance of his part or willingness to perform his part, it means complete performance or complete willingness to perform so far as he is concerned. It is not a sufficient compliance with this condition that the transferee has performed his part of the contract to some extent. (*Broomfield and Macklin, JJ.*) BECHARDAS DAMODARDAS *v.* AHMEDABAD BORROUGH MUNICIPALITY.
43 Bom L.R. 603 = A.I.R. 1941 Bom 346.

——**S. 53-A**—*Defence under—Specific plea—Need for.*

A defence under S. 53-A of the Transfer of Property Act ought to be raised in specific terms, as it involves questions of fact. (*Biswas, J.*) SERAJUL HOQUE *v.* DWIJENDRA MOHAN SEN. **192 I.C. 751 = 13 R.C. 345 = 45 C.W.N. 240 = A.I.R. 1941 Cal 33**

——**S. 53-A**—Part-performance, doctrine of—If can be pleaded by purchaser from Hindu widow, against the reversioner. *See* 1940 Dig., Col 1163. BALARAM *v.* KEWALRAM. **191 I.C. 881 = 13 R N. 221**

——**S. 53-A**—*Retrospective effect.*

S. 53-A applies to suit instituted after 1st April 1930 even if the transaction itself was earlier. (*Henderson J.*) JAGAD BHUSAN *v.* PANNA LAL.
A.I.R 1941 Cal. 287.

——**S. 53-A**—*Retrospective effect.*

S. 53-A of the T. P. Act applies retrospectively to transactions completed before the 1st April, 1930 (*Biswas, J.*) SERAJUL HOQUE *v.* DWIJENDRA MOHAN SEN. **192 I C 751 = 13 R.C. 345 = 45 C.W N. 240 = A.I.R. 1941 Cal 33.**

——**S. 53 A**—Retrospective effect—Transfer prior to amendment Disputes in Court subsequent to amendment. *See* 1940 Dig., Col. 1162. BALARAM *v* KEWALRAM. **191 I.C 881 = 13 R.N. 221**

——**S. 53 A**—*Right under—When available.*

S. 53 A of the T. P. Act gives the right to the transferee-defendant to resist the transferor-Plaintiff's

T. P. ACT (1882), S. 54.

claim for possession only when he has himself performed his part of the contract or where performance on his part was still due, he has offered to perform what remained to be performed by him. (*Mitter and Biswas, JJ.*) PROBODH KUMAR DAS *v.* DANTMARA TEA CO., LTD. **45 C.W.N. 132.**

——**S. 53-A**—*Scope and effect.*

S. 53-A does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons (*Lord Atkin.*) S. N. BANERJI *v.* KUCHWAR LIME AND STONE CO., LTD.
1941 O.A. 1026 = 1941 A.W.R. (P C.) 109 = A.I.R. 1941 P C. 128 (P.C.)

——**S. 53-A**—*Scope and effect of—Possession by transferee—If sufficient to confer title to property.*

S. 53-A of the T. P. Act only enunciates the doctrine of part performance and does not in any way invest the transferee with any title to the property of which the transferee might have taken possession. (*Collister and Baipai, JJ.*) KUNJAMAL & SONS, *In re.*
1941 I T.R. 358.

——**S. 53-A**—*Scope—If can be availed of by transferor for founding suit for damages for breach of contract.*

S. 53-A, T. P. Act, according to its terms, debars a transferor from exercising rights which he would have apart from the agreement. Although there is an exception to this disablement in the words "other than a right expressly provided by the terms of the contract," it is clear that the transferor cannot in any case derive any rights from the section which are inconsistent with the conditions subject to which the section comes into operation. Since it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract at the time when the section is sought to be made use of, which is the material time, it necessarily follows that a suit by the transferor for damages for breach of contract can never be founded upon S. 53-A. (*Broomfield and Macklin, JJ.*) BECHARDAS DAMODARDAS *v.* AHMEDABAD BORROUGH MUNICIPALITY. **43 Bom L.R. 603 = A.I.R. 1941 Bom. 346.**

——**S. 54**—*Agreement of sale—Effect of—Mortgagor entering into agreement of sale with third person before mortgage but completing sale after mortgage—Right of mortgagee to precedence over purchaser.*

An agreement of sale gives the purchaser an equitable title as owner in the property concerned. But, ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. Consequently, where the mortgagor enters into an agreement to sell property with a third party before mortgaging the same property and the sale is completed after the mortgage, the mortgagee if he had acted in good faith and had no notice of the agreement of sale is entitled to precedence over the purchaser. (*Beckett, J.*) JALAL UD-DIN *v.* MIRAN BAKHSH.
194 I.C. 787 = 14 R.L. 10 = A.I.R. 1941 Lah. 240.

——S. 54—Contract to sell land—Subsequent attachment of land in execution of decree against owner—Effect—Sale in pursuance of contract—Subsequent Court sale in execution—Vendee under sale in pursuance of contract—Title of. *See* C. P. CODE, S. 64.
(1941) 2 M.L.J. 722.

——**S. 54**—*Sale of property worth less than 100 Rs.—Modes available—Defect in one mode—If can impair the other properly carried out mode.*

T. P. ACT (1882), S. 54.

In the case of property worth less than Rs. 100 there are according to S. 54, Transfer of Property Act, obviously two methods of transfering title (1) registered instrument and (2) delivery of the property. Any defect in one mode cannot obviously impair the validity of the other mode if properly carried out. If there is delivery of possession in lieu of the receipt of consideration, there is nothing more required to effectuate the sale. A superfluous unregistered sale deed cannot invalidate the sale otherwise valid. (*Niyogi, J.*) JAMNA PRASAD *v.* SINGHAI BANSIDHAR. **1941 N.L.J. 643.**

——**Ss. 54 and 9**—Scope and applicability of S. 54—'Other intangible thing', meaning of—Licence to sell electricity—Transfer, if can only be by registered instrument. *See* 1940 Dig., Col. 1164. MANMOHAN DAS *v.* OFFICIAL LIQUIDATORS. **192 I.C. 367 = 13 R.A. 318.**

——**S. 55 (3)**—Construction—Land forming bloc—Sale in different parcels to different persons—Covenant to produce title-deeds when called upon—Sale of remaining plot comprising largest area—Right to title-deeds—Covenants in prior sale-deeds to produce—If bar—Duty of last purchaser to indemnity vendor. *See* 1940 Dig., Col. 1165. KHANDERAO SHIVAJIRAO GAEKWAR *v.* D. D. ROMER **(I.L.R. 1941) Bom. 55 = 13 R.B. 297 = 192 I.C. 845 = A.I.R. 1941 Bom. 48.**

——**S. 55 (4) (b)**—*Vendor leaving part of purchase price with vendee for payment to mortgagee—Pre emptor depositing amount of pre-emption decree in Court and withdrawing part of amount for payment to mortgagee—Vendee and pre-emptor both defaulting—Vendor's lien—If extinguished.*

The vendor of property subject to a mortgage left a part of the purchase price with the vendee who undertook to clear off the mortgage by paying the same to the mortgagee. Subsequently a pre emption suit in respect of the property sold was decreed and the pre-emptor deposited the amount mentioned in the pre-emption decree but subsequently withdrew part thereof for payment to the mortgagee but neither the vendee nor the pre-emptor or his transferee with notice of non payment paid anything to the mortgagee. It was contended that title passed to the pre-emptor on his depositing in Court the amount as determined in the decree and that he was under no further liability to discharge any obligation which the vendee might have undertaken in the sale-deed or which might have been imposed upon him by operation of law and the unpaid vendor's lien was extinguished by the deposit of decretal amount.

Held, that on the facts as proved in the case the 'lien' was not extinguished by the deposit of the pre-emption money in Court and that the vendor had a subsisting charge for the unpaid amount on the property which he was entitled to enforce both against the pre-emptor as well as his transferee with notice of non payment. (*Tek Chand and Dalip Singh, JJ.*) KESHO DAS *v.* JIWAN. **I.L.R. (1941) Lah. 568 = 195 I.C. 786 = 14 R.L. 98 = 43 P.L.R. 450 = A.I.R. 1941 Lah. 10.**

——**S. 55 (6) (b)**—*Applicability to Punjab.*

Although the Transfer of Property Act is not in force in the Punjab, the principle enunciated in S. 55 (6) (*b*) being a general rule of English law applies as being in accordance with justice, equity and good conscience. (*Tek Chand, Monroe and Beckett, JJ.*) SHANKRI *v.* MILKHA SINGH. **43 P.L.R. 656 = A.I.R. 1941 Lah. 407 (F.B.)**

——**(1882 before amendment in 1929), S 55 (6) (b)**—*Contract of sale cancelled and purchaser allowed to remain in possession till repayment of purchase price paid by him—Suit by subsequent transferee from seller for possession—Purchaser under cancelled sale alleging novation but not proving it—No question of statutory charge under S. 55 (6) (b) raised in trial Court—Appellate Court, if can entertain such question—B's possession, if amounts to sufficient notice.*

T. P. ACT (1882), S. 58.

B, who had entered into a contract to purchase certain property from *A*, cancelled the contract but was allowed to remain in possession of the property until the purchase price which he had paid was repaid to him. In a suit for possession by *C*, who had purchased the property subsequently from *A*, *B* pleaded the novation of the contract under which he was allowed to remain in possession till payment but failed to prove the novation. Except this contractual charge, no question of statutory charge, under S. 55 (6) (*b*) was raised in the pleadings and no issue was framed thereon.

Held, that it was not open to the High Court in appeal to entertain this question of statutory charge under S. 55 (6) (*b*) as it involved the issues of fact which had not been raised or considered, *viz.*, (1) whether *B* had improperly declined to accept delivery and (2) whether *C* had notice of payment by *B* to *A*.

Held further, that *B's* possession was not sufficient notice within the meaning of S. 55 (6) (*b*) as possession by a tenant is not notice of the lessor's title, unless the transferee had in fact learnt that the rents were paid to him. (*Lord Thankerton.*) M.M.R.M CHETTIAR FIRM *v.* S.R.M.S.L. CHETTIAR FIRM. **195 I.C. 9 = 1941 O.L.R. 552 = 54 L.W. 237 = 1941 A.W.R (Rev.) 664 = 1941 O.W.N. 1030 = 14 R.P.C 3 = 1941 P.W.N. 545 = 1941 R.D. 780 = 1941 A.L.W. 869 = 46 C.W.N. 57 = 7 B.R. 896 = 1941 O.A. 698 = A.I.R. 1941 P.C. 47 (P.C.).**

——**Ss. 56 and 81** — *Applicability — N.-W. F. Province.*

Ss. 56 and 81 of the Act do not apply to N.-W. F. Province but their principles are applicable as principles of equity, justice and good conscience. Equity demands that the mortgagee should not be permitted to unequally distribute the mortgage money on two different properties and to release one lightly and burden the other more than it normally should be. A *pro rata* share should be recovered from the property which has been proceeded against if the mortgagee has released another property which was also liable for the security. (*Mir Ahmad and Soofi, JJ.*) ABDUL QAYUM KHAN *v.* MT. TURI. **195 I.C. 322 = 14 R.Pesh. 15 = A.I.R. 1941 Pesh. 49.**

——**(as amended in 1929), S. 56**—Scope—Exhaustive character of—Powers of Court to allow marshalling under O. 34, Rr. 4 and 5, C. P. Code. *See* 1940 Dig., Col. 1166. VENKANNA *v.* RAMANNA. **191 I.C. 719 = 13 R.M. 504 = (1940) 2 M.L.J. 27.**

——**Ss. 58 and 100**—*Construction of deed*— A *borrowing sum from* B *and mortgaging certain properties—Consent decree creating charge in favour of* C *on same properties—Further advance by* B *to* A *secured by instrument called further charge—Instrument incorporating provision in first mortgage regarding transfer of property to mortgagee—If amounts to mortgage*— B's *right of property over* C.

A borrowed a sum from *B* and mortgaged certain properties by way of security. A charge was created afterwards in favour of *C* by a consent decree. Subsequently *B* made a further advance to *A* and this sum was secured by an instrument described as a further charge. The deed provided that all the hereditaments comprised in the first mortgage would be security for the payment of sum advanced under first mortgage as well as the further advance. The provision in the first mortgage deed transferring the property to the mortgagee by way of security was also incorporated in the deed of further charge.

T. P. ACT (1882), S. 58.

Held, that the deed of further charge was a transfer and therefore a mortgage within the meaning of S. 58. The rights of *B* under the deed of further charge ranked in priority to the rights of *C* under the consent decree. (*Pan. kridge, J.*) BHUPATI BANERJEE *v* BON BEHARY ROY. **195 I.C. 856 = 14 R.C. 139 = A.I.R. 1941 Cal. 436.**

——**Ss. 58 and 105**—Description as lease but really a mortgage — Effect. *See* 1939 Dig., Col. 1102. JABBARSHAH *v.* KANCHEDILAL.
I.L.R. (1941) Nag. 203.

——**S. 58**— *Sale or mortgage— Determination — Reference to surrounding circumstances—Permissibility —Tests to be applied.*

The question whether a sale deed and a contemporaneous agreement record an out and out sale with a contract or condition for repurchase or record a transaction of mortgage, is in the first instance one of construction of the deeds in question. But a number of surrounding circumstances under which the transaction came into existence, can be taken into consideration by Court. The crucial test, in such cases, is the intention of the parties. It is not satisfactory to apply the test whether the relationship of debtor and creditor is created by the document. Where the deed emphasises the transferee being a representative of the vendor, it would seem to suggest that the transferee is regarded as being or being expected to be only a temporary transferee. Where parties areMahomedans there is a certain amount of presumption in favour of the transaction being a mortgage concealed under the cloak of a sale deed with a condition for repurchase. Where a period of 15 years is fixed for repurchase at the same price the probabilities are in favour of mortgage rather than sale. (*Yorke and Bennett, JJ.*) MEHDI HUSAIN *v.* MOHAMMAD JAWAD.
194 I.C. 417 = 13 R.O. 605 = 1941 A.W.R. (C.C) 196 = 1941 A L.W. 598 = 1941 O.A. 491 = 1941 O.W.N. 760 = A.I.R. 1941 Oudh 479.

——**S. 58 (b)**—Simple mortgage—Personal liability —Presumption. *See* 1940 Dig., Col. 1166. OM PARKASH *v.* MUKHTAR AHMAD
I.L.R. (1941) Lah. 601 = 13 R.L. 482 = 193 I.C. 789.

——**S. 58 (b) and (d)**—*Usufructuary mortgage— Provision for recovery of money if possession not given —Nature of mortgage—Remedy of mortgagee when possession not given.*

Where in a usufructuary mortgage it is provided that if the mortgagee did not obtain possession or if he lost possession he could recover his money and interest by sale of the mortgaged or any other property of the mortgagor, it amounts to an implied agreement that the mortgagor will give possession to the mortgagee and whether the deed is considered an usufructuary or an anomalous mortgage, there is no reason why effect should not be given to the agreement. The mortgage is certainly not a simple mortgage, though it may be considered a combination of a simple and an usufructuary mortgage. It is open in either case to the mortgagee to sue either for possession or for the mortgage money. (*Bennett, J.C.*) RAM PADARATH SINGH *v.* NIMAR SINGH.
197 I.C. 164 = 1941 O.A 926 = 1941 A.L.W. 1035 = 1941 A.W R (C.C.) 349 = 1941 O.W.N. 1220.

——**S. 58 (c) Proviso**—*Effect of.*

The effect of the proviso to S. 58 (*c*), T.P. Act, is only that a transaction of mortgage by conditional sale shall not be deemed to be a mortgage unless the condition of reconveyance is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a

T. P. ACT (1882), S. 60.

mortgage. (*Bennett and Madeley, JJ.*) SHAMBHU SINGH *v.* JAGDISH BAKHSH SINGH.
195 I.C. 828 = 14 R O. 123 = 1941 O.A 722 = 1941 A W R. (Rev.) 757 = 1941 O.W.N. 994 = 1941 O.L R. 626 = 1941 A.L W. 852 = A.I.R. 1941 Oudh 582.

——**Ss. 58 (d) and 68**—*Applicability—Usufructuary mortgage—Rehan deed—Executant undertaking to deliver possession to person advancing money and authorizing him to retain possession until repayment—Effect of—Non delivery of possession by executant—Suit for possession—Maintainability.*

A deed styled as *rehan* recited that the mortgagor executant bound himself to deliver possession of the property in Jeth 1341 F authorized the mortgagee to retain possession till Jeth 1350 F, when the executant bound himself to pay the money, which was spoken of as *rehan* money. It further provided that the mortgagee would be entitled to retain possession until payment of the money advanced. The deed was executed on 6—6—1933, but possession was never delivered to the mortgagee and the latter on 6—6—1936, brought a suit for recovery of possession. It was pleaded that there was no hypothecation clause in the deed as is commonly found in similar deeds, that the plaintiff was not a usufructuary mortgagee and no decree for possession could therefore be passed.

Held, (1) that the deed was a usufructuary mortgage deed coming under S 58 (*d*) of the T. P. Act, as amended in 1929, and that the plaintiff must be held to be a usufructuary mortgagee; (2), that since he was not put in possession as stipulated in the deed he was entitled under S. 68 of the T. P. Act either to a decree for the amount lent by him or for possession of the property (*Harries, C.J. and Manohar Lal, J.*) HARNATH SINGH *v.* MAIYA AMBIKA DEVI. **193 I.C. 272 = 7 B.R. 512 = 13 R.P. 571 = 1941 P.W.N 506 = A.I.R. 1941 Pat. 301.**

——**S. 58 (e)**—English mortgage—Rents and profits —Mortgagee's right to, upon foreclosure—Receiver appointed in suit. *See* 1940 Dig. Col. 1167. PRUDENTIAL ASSURANCE CO., LTD. *v.* J. C. GALSTAUN.
191 I.C. 559 = 13 R.C. 262.

——**S. 59**—*Applicability—Mortgagee in possession even prior to mortgage.*

Quaere—Whether S. 59, T. P. Act, applies only if in pursuance of the mortgage possession is delivered. (*Sathe, J.M.*) RAM NATH SHUKLA *v.* JAGESHAR KOHAR. **1941 R.D. 718 (2) = 1941 O.A. (Supp.) 621 (1) = 1941 A.W.R (Rev.) 681 (1).**

——**S. 59**—*Rule as to attestation of mortgage—If applicable to registered hypothecation bond of a fund in Court.*

On a question whether a registered bond bypothecating a fund in Court executed by the first defendant, but not properly attested, would operate as a valid hypothecation.

Held, that the provision regarding attestation in S. 59 of the Transfer of Property Act was not applicable to a case of hypothecation of movables and therefore the bond operated as a valid hypothecation of the fund in Court. (*Somayya, J.*) VASUDEVAN NAMBUDRIPAD *v.* MARIA KUTTI UMMA. **1941 M.W.N. 751 = 54 L.W. 233 = A.I.R. 1941 Mad. 805 (2) = (1941) 2 M.L.J. 293.**

——**Ss. 60 and 82**—Applicability and scope—Landlord taking mortgage of half share in tenure and obtaining decree on mortgage—Sale—Purchase by landlord subject to rent decrees in his favour against whole property—Effect on right to execute rent decrees against

T. P. ACT (1882), S. 60.

other half share—Whole rent decree if extinguished and discharged—Right of contribution—Separate suit to enforce—Necessity—C. P. Code, S. 47. *See* 1940 Dig., Col. 1168. PRABHU RAM *v* KAMESHWAR PRASAD SINGH. **1940 P.W.N. 990**

——**S. 60**—*Piecemeal redemption—Permissibility—Integrity of mortgage split up by redemption by one of co-mortgagors.*

Piecemeal redemption must be allowed if once the integrity of the mortgage has been split up owing to redemption by one of several co-mortgagors. (*Beckett, J.*) PHULA SINGH *v.* HARNAMAN. **43 P.L.R. 705 = A.I.R 1941 Lah. 421.**

——**S. 60, last paragraph**—Scope—If governs S. 82—"Remaining due"—Meaning of. *See* T. P. ACT. S. 82. **(1941) 2 M.L.J. 520.**

——**(as amended in 1929), S. 65-A**—Scope—If retrospective. *See* 1940 Dig., Col. 1170. PUNDAI KAKSHUDU *v.* KONDAYYA. **193 I.C. 366 = 13 R.M. 659 = (1940) 1 M.L.J. 601.**

——**S. 67 (a)**—*Scope of—English mortgages executed prior to 1st April*, 1930—*Suit on such mortgages—Limitation—Limitation Act, Arts.* 132 *and* 147.

The effect of S. 31 (*c*), read with S. 63, of Act XX of 1929 is that so far as English mortgages executed prior to the 1st April, 1930, are concerned, they must be deemed to be outside the scope of the amendment made by substitution of the new Cl. (*a*) in S. 67 of the T. P. Act. This being so, suits on such mortgages must be held to be governed by Art. 147 and not by Art. 132 of the Limitation Act. (*Edgley and Biswas, JJ.*) SARADINDU MUKHERJEE *v.* JAHARLAL AGARWALLA. **74 C.L.J. 61 = 46 C.W.N 33.**

——**S 67-A**—Applicability—Two successive mortgages in favour of same person—Amount on later mortgage becoming due earlier than on first mortgage--Sale on the later subject to the earlier mortgage—Property, if can again be sold on the first mortgage. *See* 1940 Dig., Col. 1170. MUNNALAL *v.* SINGHAI KOMAL CHANDRA. **192 I.C. 251 = 13 R.N 227 = A.I.R. 1941 Nag. 3.**

——**S. 67-A**—If controls S. 17, Court-Fees Act. *See* COURT FEES ACT, S. 17 AND T.P. ACT, S. 67-A. **1940 Rang.L.R. 767.**

——**S. 68 (1) (a)**—*Applicability—Personal covenant to pay—What amounts to—Mortgage bond—Provision for redemption at expiry of specified term—Deed to hold good until payment in defanlt of payment at expiry of term—Suit for mortgage-money—Maintainability.*

A mortgage bond after reciting that the mortgagor had on taking Rs. 435 by way of *rehan* money paying no interest let out in *rehan* and pledged the whole and entire land owned and possessed by him, etc., provided *inter alia*, "when the term of this deed will expire in the month of Bhado 1338 Fasli, then at that time the executant on paying the entire mortgage-money will get back the deed and *rehan* will be redeemed. In case of non payment, this deed with all the above conditions will precisely remain in tact and hold good till payment of the said *rehan* money, that is, for nine years from 1334 to 1342, when we shall pay the said *rehan* money we shall pay it towards the end of Bhada of any year."

Held, that there was no covenant by the mortgagor to repay the mortgage money, as nowhere did the mortgagor bind himself to pay the money at the end of Bhado 1338 or at any other time; there was merely a provision that the bond may be redeemed at the end of Bhado 1338; but if it was not, the term of the bond was extended. There was no promise by the mortgagor to repay the amount within the meaning of S. 68 (1) (*a*) of the T. P. Act, and hence a suit to recover the mortgage money did not lie. (*Harries, C.J. and Fazl Ali, J.*) JAMUNA SINGH *v.* SHEONANDAN SINGH. **194 I.C. 392 = 13 R.P. 713 = 7 B R 758 = 22 P.L.T. 529 = 1941 P.W N. 549 = A.I.R. 1941 Pat. 486.**

T. P. ACT (1882), S. 69-A.

——**S. 69**—*Applicability—Mortgagee's power of sale without intervention of Court—It can be conferred by a mortgagor who is the manager of a joint Hindu family—Power of sale—If can be conferred on second mortgagee when first mortgagee was not given such power*

S. 69 of the Transfer of Property Act applies to Hindus and the manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property belonging to the family in Madras City may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. There is nothing in S. 69 of the Transfer of Property Act to prevent a mortgagor giving to a second mortgagee, a power of sale, even when he has not given a similar right to the first mortgagee. (*Leach, C.J. and Chandrasekhara Aiyar, J.*) PARAMANAND DOSS (HOTA DOSS *v.* NANNULAL KANJI. **54 L.W. 656 = (1941) 2 M.L.J. 923.**

——**S. 69**—*Power of sale—Validity—Clause giving mortgagee power to postpone sale—If illegal—Power "to buy in or rescind or vary any contract of sale"—If bad.*

A power of sale must include all steps which are necessary to be taken in that connection and it necessarily includes a power to postpone the sale. In order to make a power bad, there must be words in S. 69 which render the whole power invalid in law. If the mortgagor contends that a clause in a mortgage deed conferring a power of sale restricts in any way the power of the parties to enter into a contract, the burden is on him to show that the words of S. 69, T. P. Act, prevent an agreement between the parties as embodied in the mortgage. A power to sell is a power to sell either now or at a later date; and a clause which gives power to postpone the sale is not against the words of S. 69, T. P. Act, and is not illegal. Nor is a power 'to buy in or rescind or vary any contract of sale" bad and against the words of S. 69. Such a clause containing the words buy in' cannot be taken as giving the mortgagee a right to buy the property for himself and would not violate S. 69 in any manner. (*Kania, J.*) MULRAJ VIRJI *v.* NAINMAL PRATAPCHAND. **43 Bom.L.R. 890.**

——**S. 69 (c)**—"*Power of sale*"—*Meaning of.*

The words "power of sale" in S. 69 (*c*) of the T. P. Act refer to a clause to be expressly included in the mortgage and must be understood to mean what is ordinarily known and understood in conveyancing by that expression. It is a well-known expression in conveyancing and is a technical one. (*Kania, J.*) MULRAJ VIRJI *v.* NAINMAL PRATAPCHAND. **43 Bom.L.R. 890.**

——**S. 69-A**—*Deed appointing receiver—Provision entitling him to carry on mortgagor's business—Receiver's authority to pay mortgagor's prior debt.*

A provision in a deed appointing a receiver under S. 69-A of the T. P. Act, which entitles him to carry on the business of the mortgagor as before, does not carry with it an implied authority to meet the liability which the mortgagor himself had incurred in respect of transactions which took place prior to the date of his appointment. The receiver has all the rights and liabilities arising out of the new transactions into which he enters and he is not in any way affected by any equity which may be enforced against the mortgagor. (*Derbyshire C.J. and Mukerjea, J.*) BANERJEE & CO. *v.* WILFRED

T. P. ACT (1882), S. 69-A.

JOHN YOUNIE. **195 I.C. 141=14 R.C. 50=45 C.W.N. 169=A.I.R. 1941 Cal. 308.**

——**S. 69 A**—*Position of receiver—Authority to pay unsecured debt of mortgagor.*

A receiver appointed under S. 69-A of the T. P. Act is undoubtedly an agent of the mortgagor as laid down in Cl. (3) of that section. The effect of that, is that the mortgagee is not liable in respect of any default committed by the receiver and the sole responsibility for acts and omissions on the part of the receiver rests on the mortgagor alone. But that does not entitle the receiver to pay out of the funds in his hands an unsecured creditor of the mortgagor before the dues of the mortgagee are satisfied. (*Derbyshire, C.J. and Mukerjea, J.*) BANERJEE & CO. *v.* WILFRED JOHN YOUNIE. **195 I.C. 141=14 R.C. 50=45 C.W.N. 169=A.I.R. 1941 Cal. 308.**

——**S. 69 (2) (a)**—*Scope—Notice of three months—If imperative.*

The right conferred by S. 69 (2) on the mortgagee is the right to exercise his power of sale only upon fulfilment of one of the two conditions mentioned in S 69 (2). The notice required by S. 69 (2) (*a*) is not only necessary but imperative, and even the period of three months cannot be curtailed by agreement of parties. (*Wadia, J.*) BABAMIYA MOHIDIN SHAKKAR *v.* JEHANGIR DINSHAW. **43 Bom.L.R. 553=A.I.R. 1941 Bom. 339.**

——**S. 70**—*Accession—Superstructure built on mortgaged site.*

The superstructure built on the mortgaged site is an accession to the mortgaged property within the meaning of S. 70 of the Act; and it is as much available to the mortgagee as the site. (*Mir Ahmad and Soofi, JJ.*) ABDUL QAYUM KHAN *v.* MT. TURI. **195 I C. 322=14 R Pesh. 15=A.I R. 1941 Pesh. 49.**

——**S. 70**—*Applicability—Mortgage of proprietary share—Reservation of occupancy rights in* sir *lands only—Transfer of equity of redemption and a subsequent surrender of occupancy rights to the transferee - Effect.*

Where a mortgage of a proprietary share including *sir* lands contained an exception reserving the occupancy rights in *sir* lands and the mortgagor transfers the equity of redemption and surrenders his occupancy rights to the transferee, there is no disappearance of tenancy rights so as to improve the security of the mortgagee which could be regarded as an accretion under S. 70, T. P. Act. It is not a case falling under S. 70. The exception in the mortgage cannot be construed so as to make it disappear when the lands ceased to be *sir*. (*Stone, C.J. and Bose, J.*) GOVINDRAO *v.* RADHAKISAN. **1941 N.L.J. 35.**

——**S. 72 (3) and United Provinces Encumbered Estates Act, S. 35**—*Expenses of suing for possession—Recovery in proceedings under the U P. Encumbered Estates Act.*

Where to work out his rights under a deed of mortgage, the mortgagee has to sue for possession, the amount spent in such a suit in getting a decree for possession is money spent in making good his title against the mortgagor which he is entitled to spend under S. 72 (3) of the T. P. Act. Where such a mortgage is the subject of proceedings under U. P. Encumbeed Estates Act, the amounts so spent can be recovered in those proceedings because the effect of the U. P. Encumbered Estates Act is only that the mortgaged property is redeemed by proceedings under it. Hence the same principles which would have been applicable, had a suit for sale or redemption been brought, should be applied in such cases. (*Yorke and Agarwal, JJ.*) MAHOMED

T P. ACT (1882), S. 76.

EJAZ RASUL *v.* SAIYID ALI MAHOMED. **194 I.C. 615=1941 O.A. 506=14 R.O. 18=1941 R D. 431=1941 A.L.W.613=1941 A.W.R. (Rev) 618=1941 O.L R. 512=1941 O.W.N. 768=A.I.R. 1941 Oudh 498.**

——**S. 73**—Sale of mortgaged property for arrears of revenue—Surplus sale proceeds—Mortgagee's claim to as against attaching money decree-holder. *See* C. P. CODE, O. 1, R. 10. **7 Cut L.T. 49**

——**S 76**—Liability to keep accounts—When arises. *See* 1940 Dig., Col., 1171. ANGNU RAM *v.* BHIKHI. **191 I.C. 716=13 R.O. 269=1941 O L R 13=A.I.R. 1941 Oudh 84.**

——**S. 76 (b)**—Mortgagor taking mortgaged property on lease from mortgagee—Mortgage deed providing for payment of interest and also for crediting rent paid towards interest—Mortgagor making default in payment of rent and right to recover it becoming time barred—Mortgagee's right to recover interest. *See* 1940 Dig., Col. 1172. GHULAM MAHOMED *v.* RAJESHWAR. **I.L.R. (1940) Lah. 658=192 I.C. 505=13 R.L. 385.**

——**S. 76 (c)**—Rent paid by mortgagor—Mortgagee's liability to account—Redemption suit. *See* 1940 Dig., Col. 1172. SUBEDAR MIAN *v.* SHEO SHANKAR MISSIR. **1940 P.W N. 1028.**

——**S. 76 (c)**—*Scope—Usufructuary mortgagee from lessee—Liability to landlord of mortgagor—Lessor's right to proceed against mortgagee for rent.*

S. 76 of the Transfer of Property Act deals only with the relative rights and duties of the mortgagor and the mortgagee, and cannot confer on a landlord the right to proceed directly against a usufructuary mortgagee from his lessee for rent or jodi due to him. (*King, J.*) GOVINDARAJULU NAIDU *v* GOPALASWAMY CHETTY. **53 L.W. 153=1941 M.W.N 185=A.I.R. 1941 Mad. 401=(1941) 1 M.L.J. 225.**

——**Ss. 76 (h) and 77**—*Applicability and scope—Mortgagee from lessee in possession—Undertaking to appropriate rents and profits and to pay rent to superior landlord - Failure to pay—Decree for arrears of rent against mortgagor and mortgagee—Execution barred—Redemption suit—Mortgagee's liability to account for rents unpaid by him.*

A lessee from a jenmi executed a usufructuary mortgage of his interest under which the mortgagee was to remain in possession enjoy the profits in lieu of interest and to pay the rent due to the lessor (jenmi). At the end of three years the mortgagor was to get back possession on payment of the principal amount only. The mortgagee did not pay the rent due to the lessor for several years and the latter sued both the mortgagor and the mortgagee for possession of the property leased and for arrears of rent and obtained a decree. He, however, allowed the decree to become barred by limitation and lost all his right to the property and to the arrears of rent by his inaction. The mortgagor sued the mortgagee for redemption and claimed an account from the mortgagee of the amount which the latter ought to have paid to the lessor-jenmi as arrears of rent out of the receipts from the mortgaged property.

Held, that the effect of the document was to take the mortgage entirely out of the purview of S. 76 (*h*), T. P. Act, and deprived the mortgagor of the benefit of that clause, and as the lessor did not insist on the payment of the rent, his inaction enured to the benefit of the mortgagee, not of the mortgagor. As there was a contract to the contrary within the meaning of S. 77, T. P. Act, S. 76 (*h*) could not apply. (*Leach, C.J. and Krishna-*

T. P. ACT (1882), S. 76.

swami Ayyangar, J.) PARU AMMA *v.* KELU KURUP.
1941 M.W.N. 239 (2) = 53 L.W. 300 =
A I R. 1941 Mad. 549 = (1941) 1 M.L.J. 484.

——**S. 76 (h)**—*Applicability—Conditions—Mortgagee in possession as tenant upon rent under lease not connected with mortgage—Liability to account.*

For S. 76 (*h*), T. P. Act, to be applicable the possession of the mortgagee must be *qua mortgagee*, and for the mortgagee in possession to be held liable to account under S. 76 (*h*), it must be proved that the mortgagee had received possession by virtue of the agreement of mortgage. S. 76 (*h*) has clearly no application to a case where the mortgagee is in possession not as mortgagee but as a tenant on rent under a lease which has nothing whatever to do with the mortgage; in such a case possession is in no way referable to the mortgage and the mortgagee is not liable to account. (*Chatterji and Meredith, JJ.*) GULAB CHAND PRASAD *v.* RAM KUMAR. 193 I C 533 = 13 R.P. 601 =
22 Pat.L.T. 230 = 7 B R. 554 =
A.I.R 1941 Pat 296.

——**S. 76 (h)**—*Costs of rent suits filed by mortgagee in possession—Right to recover.*

Where a mortgagee is in possession and has to file suits for recovery of rent from the tenants, it is an act of management and hence the expenses incurred in connection therewith are recoverable under S. 76 (*h*) of the T. P. Act. (*Yorke and Agarwal, JJ.*) MAHOMED EJAZ RASUL *v.* SAIYID ALI MAHOMED.
194 I C. 615 = 1941 O A. 506 = 14 R O. 18 =
1941 R D 431 = 1941 A L.W. 613 =
1941 A.W.R (Rev.) 518 = 1941 O L.R. 512 =
1941 O.W.N. 768 = A.I.R. 1941 Oudh 498.

——**S. 77**—*Mortgagee in possession—Right to claim shortage in profits and interest thereon.*

Where there is no provision in a mortgage deed that the interest be not a charge on the property, but an undertaking is given by the mortgagor that he would make good to the mortgagee any deficiency in interest from his other properties, any shortage in profits, while the mortgagee is in possession of the property can be claimed by him but only he cannot claim interest on the shortage. (*Yorke and Agarwal, JJ.*) MAHOMED EJAZ RASUL *v.* SAIYID ALI MAHOMED.
194 I C. 615 = 1941 O A 506 = 14 R.O. 18 =
1941 R D. 431 = 1941 A L.W. 613 =
1941 A.W R. (Rev.) 518 = 1941 O.L R. 512 =
1941 O.W.N. 768 = A.I.R. 1941 Oudh 498.

——**S. 81**—*Applicability—Conditions.*

Where two properties have been mortgaged to a person who has obtained a decree on the mortgage, and one of them has been subsequently mortgaged to another, the latter would come within S. 81, T. P. Act and can claim a right to marshal provided the exercise of such right is not to the prejudice of the prior mortgagee or of any other person having interest in any of the properties. But where the property is found not to be worth anything like the amount due under the mortgage, the subsequent mortgagee has no right of marshalling, because to compel the prior mortgagee to sell that property first would be prejudicial to him. (*Harries, C.J. and Fazl Ali, J.*) DEOKINANDAN PRASAD SINGH *v* PARMESHWARI PRASAD SINGH. 1941 P.W.N. 582

——**Ss. 81 and 56**—Applicability—N.-W. F. Province. *See* T. P. ACT, SS. 56 AND 81.
A.I R. 1941 Pesh. 49.

——**S. 82**—*Applicability — Mortgagee purchasing equity of redemption in part of the property—Suit for sale against mortgagor or other person interested in other part of the property—Liability to contribute—*

T.P ACT (1882), S. 82.

Principle—Value of property to be taken—Material date for considering—S. 60.

Although S. 82, T. P. Act, may not in terms apply to the case of a suit for sale by a mortgagee who has purchased the equity of redemption of a portion of a mortgaged property against the mortgagor or any other person who may be interested in the other portion of the mortgaged property, the section lays down a general rule, and the last clause of S. 60, T. P. Act, is an instance of the application of the rule to a mortgagee who happens to acquire a share of the equity of redemption If a mortgagee happens to purchase a portion of the mortgaged property, there would be a merger and extinction of liability under the mortgage to that extent, and in the absence of any other circumstances showing that it is for the benefit of the mortgagee to keep his mortgagee's rights alive or that he declares his intention either expressly or by necessary implication that he would keep his subsequently acquired rights distinct from his prior rights which he held as a mortgagee, it must be held that his right to recover his money under the mortgage, is, on his purchasing the equity of redemption in a portion of the property mortgaged with him, extinguished *pro tanto*; or, in other words, he remains entitled to recover only a proportionate part of the amount due on the mortgage, that is to say, the portion of the debt which bears the same relation to the whole amount of the debt as the value of the property purchased bears to the value of the property comprised in the mortgage. The principle of S. 82, T.P Act, should be applied to such a case and the mortgagee should not by his purchase be permitted to improve his position and should be treated in the same manner as a stranger would be if he happens to purchase the property and the value of the property to be taken into account is the value of the property, as it existed on the date of the mortgage unaffected by any subsequent increase in the value on account of subsequent improvements or any subsequent decrease in value. The words "remaining due" in the last paragraph of S. 60. T. P. Act are, to some extent, misleading, and must not be taken too literally. (*Pandrang Row and Abdur Rahman, JJ.*) ARUNAGIRI MUDALIAR *v.* RADHAKRISHNA AIYAR.
(1941) 2 M.L.J. 520.

——**S. 82**—"Contract to the contrary"—Contract between assignee from mortgagor and purchaser of part of equity of redemption from the assignee—Undertaking by purchaser to discharge whole debt—Effect—Subsequent purchaser from such purchaser—Right to contribution. *See* 1940 Dig., Col. 1173. PATTABIRAMI REDDI *v.* VENKATAPPAYYA. A I R 1941 Mad 66 =
(1940) 2 M.L J. 484.

——**Ss. 82 and 100**—*Maintenance charged on two properties—Charge-holder losing remedy against one—Extent of liability of the other property.*

Where the payment of certain maintenance allowances are charged upon two properties and by their own negligence the charge holders allow their remedy to be lost as against one of the properties, they could not claim as against the other property to recover anything more than a proportionate share of the original maintenance charge. (*Yorke, J.*) ASIA BEGAM *v* RAGHUBAR DAYAL. 192 I C. 327 = 13 R.O. 352 =
1940 O A. 1210 = 1940 O.W N 1249 =
1941 A.W.R. (C C.) 13 = 1941 O.L R. 113 =
A.I.R. 1941 Oudh 203.

——**S. 82**—*Scope—Apportionment—English rule of equitable apportionment—Applicability as between subsequent mortgagee and purchaser of mortgaged property free of encumbrances.*

T. P. ACT (1882), S. 83.

Though S. 82 of the T. P. Act gives certain rights of apportionment, the English rule of equitable apportionment which is a rule between subsequent mortgagees can have no application to a case where the parties are a subsequent mortgagee and a purchaser of a property for valuable consideration free from encumbrances. (*Harries, C.J. and Fazl Ali, J.*) DEOKINANDAN PRASAD SINGH *v.* PARMESHWARI PRASAD SINGH.

1941 P.W.N. 582.

——**S. 83**—*Deposit by mortgagor—If extinguishes security.*

The mere act of the mortgagor in making a deposit under S. 83 of the T. P. Act does not cause an extinction of the security as if there has been valid satisfaction. That result can follow only when the mortgagee applies for and receives the money in terms of that section. If, therefore, the deposit made by the mortgagor is drawn out by somebody who is not entitled to it and is not available to the mortgagee when he applies for its withdrawal, the mere fact of the deposit does not extinguish the mortgagee's right to enforce the mortgage. (*Biswas, J.*) HORAY KRISHNA NASKAR *v.* SASHI BHUSAN.

192 I.C. 781 = 13 R.C. 351 = 45 C W.N. 174 = A.I.R. 1941 Cal. 18.

——**S. 83**—*Validity of deposit—Mortgage with possession—Mortgage bond stipulating payment beyond fruit season—Deposit made during fruit season.*

Where the mortgage bond contains a stipulation that the mortgage could be discharged only by payment beyond the fruit season, a deposit made in Court while the fruit season is still on is not invalid, when the mortgage is in lieu of interest and the mortgagor does not make a condition of the deposit that the mortgagee is to take out the money forthwith in satisfaction of his dues. (*Biswas, J.*) HORAY KRISHNA NASKAR *v.* SASHI BHUSAN.

192 I.C. 781 = 13 R.C. 351 = 45 C.W.N. 17¼ = A.I.R. 1941 Cal 18.

——**S. 84**—*Tender—Validity—Money payable under mortgage deed by 10th September, 1928—Tender in June 1927—Validiiy.*

Where by a mortgage deed of 10-9 1926, the mortgagors covenanted to repay all principal and interest payable under the deed "by the 10th September, 1928" it must be taken to mean that it shall be payable on or before the 10th September, 1928, and therefore a tender of the amount, in June, 1927, of the principal and interest then due, is a valid tender. (*Leach, C.J., Mockett and Krishnaswami Ayyangar, JJ.*) BHAGAVANTULAYYA DHORA *v.* VENKANDHORA.

I.L.R (1941) Mad. 767 = 195 I.C. 862 = 14 R.M. 236 = 1941 M W.N. 460 = 53 L.W. 647 = A.I.R. 1941 Mad. 484 = (1941) 1 M.L.J. 788 (F.B.).

——**S. 84**—*Tender—Validity—Objection to correctness of amount—Waiver—Refusal of tender on ground of its being premature—Effect of—If amounts to waiver of objection to correctness of amount.*

Where by a *bona fide* miscalculation a tender of the amount due under a mortgage falls short of the correct amount by Rs. 41, but the mortgagee refuses to accept the same not because the amount offered is short of what is then due but because he maintains that the time for payment has not yet arrived, he must be deemed to have waived the objection as to the correctness of the amount, and he cannot later on object to the validity of the tender on that ground. Further when there is an unequivocal wrongful refusal to accept a tender the law does not require a tender to be made.

Quaere.—Whether the maxim *de minimis non curat lex* can be applied to a tender. (*Leach, C.J., Mockett and Krishnaswami Ayyangar, JJ.*) BHAGAVANTU-

T. P. ACT (1882), S. 92.

LAYYA DHORA *v.* VENKANDHORA.

I.L.R. 1941) Mad 767 = 195 I.C. 862 = 14 R.M. 236 = 1941 M.W.N. 460 = 53 L.W. 647 = A I.R. 1941 Mad. 484 = (1941) 1 M.L.J. 788 (F.B.).

——**S. 92**—*Applicability—Mortgage paid off by two persons—Person making final payment—If excludes other—Principles.*

There is no principle that when a mortgage has been paid off by more persons than one, only the person who makes the final payment in point of time is entitled to the right of subrogation. The one essential proviso for the coming into existence of the right of subrogation is that a mortgage shall have been redeemed in full. If the mortgage has been paid off by two persons neither of whom would have been able to pay it off without the help of the other, there is no principle on which one of them should be granted and the other denied the right of subrogation. Both of them would be entitled to the right of subrogation. (*King, J.*) SINNASWAMI GOUNDAN *v.* RAMA GOUNDAN.

I.L.R. (1941) Mad 924 = 1941 M.W.N. 313 = 53 L.W. 454 = A.I.R. 1941 Mad. 563 = (1941) 1 M.L.J. 519.

——**S. 92 (as amended)**—*Applicability—Punjab.*

Even if general principles of subrogation are applicable in the Punjab, the law as stated in the amended S. 92 of the T. P. Act holds good. If a principle is to be imported from a statute and acted upon in a province where the statute does not apply it is not fair to pick and choose, for, that would always lead to arbitrary results. The principle of subrogation as it stands, is now embodied in S. 92 and must be applied on the lines indicated there. (*Din Mahomed J.*) SHAM LAL *v.* CHAJJU RAM.

194 I.C. 297 = 13 R.L. 525 = 42 P.L.R. 812 = A.I.R. 1941 Lah. 53.

——**S. 92**—*Applicability—Purchaser of property charged to Government for a tagai loan after attachment in execution of money decree—Part consideration retained for payment to Government—Sale in execution—Claim to subrogation—Maintainability—Absence of registered agreement of subrogation—Effect of—Claim to recover amount under S. 69, Contract Act—Sustainability—Remedy.*

R, the father of defendant No. 1 borrowed in 1927, Rs. 1,000 from Government under the Land Improvements Loans Act for the improvement of a plot of land *A*. He also gave plots *B*, *C* and *D* of which also he was owner as collateral security. In 1929, *R* mortgaged plots *B* and *C* to the 3rd defendant. On 25th January, 1932, he sold plots *A* and *D* to the plaintiff for Rs. 5000 out of which Rs. 1000 was kept with the plaintiff for discharging the tagai debt to Government. Prior to this in 1930, the second defendant obtained a money decree against *R*, and attached plot *A* four days before the purchase by the plaintiff, and on 4th February, 1933, he purchased that plot in execution of his decree. Plaintiff paid off the tagai debt due to Government in three instalments, on 23—5—1932, 18—3—1933 and 13—11—1934. On 23—3—1933, plaintiff brought a suit against the 2nd defendant for possession of plot *A*, but it was dismissed on the ground that the 2nd defendant had a prior claim as attaching decree-holder, having attached it prior to the sale to plaintiff. In June, 1935 he brought the present suit, claiming a charge on plots *A*, *B* and *C*; and claiming to recover the amount paid by him to the Government from defendants 1, 2 and 3 relying on S.92, T. P. Act and S. 69, Contract Act.

Held, (1) that by virtue of S. 59-A, T. P. Act, the word "mortgagor" would include the plaintiff as a person deriving title from the mortgagor, and he did not fall under S. 92, T. P. Act, as there was no mortgage to

T. P. ACT (1882), S. 92.

Government but only a statutory charge in respect of plot *A* and plots, *B*, *C* and *D* given as collateral security; (2) that since part of the consideration for the sale was retained by the plaintiff for the discharge of incumbrance on the land, that money had to be regarded as the money of his vendor, and hence he had no right of subrogation under the first paragraph of S. 92, T. P. Act; (3) that the 3rd paragraph of S. 92 did not also apply as there was no registered agreement giving him the right of subrogation; (4) that S. 69 of the Contract Act did not apply so as to entitle the plaintiff to a personal decree against the defendants; because in the first place the payment to the Government had to be regarded as the act of the plaintiff's vendor and not the act of the plaintiff, and in the second place, it was a payment which he was bound to make under the terms of his agreements with *R* under the sale-deed, and it was not therefore open to him to say that it was a payment which another was bound to make under S. 69, Contract Act; (5) that the plaintiff's only legal remedy was to sue his vendor for damages and that present suit was misconceived. (*Broomfield and Macklin, JJ.*) VITHALDAS BHAGWANDAS *v.* TUKARAM VITHOBA.

194 I.C. 632=14 R.B. 3=43 Bom.L.R. 225=A.I.R. 1941 Bom. 153.

——**S. 92**—*Voluntary payment—Effect.*

An officious or voluntary payment carries with it no right of reimbursement or of subrogation. (*Bennett and Ghulam Hasan, JJ.*) RAJ BAHADUR SINGH *v.* NARSINGH MISRA. **192 I.C. 712=13 R.O. 397=1941 A.W.R. (C.C.) 54=1941 O.W.N. 204=1941 O.A. 17=1941 O.L.R. 217=1941 A.L.W. 193=A.I.R. 1941 Oudh 226.**

——**S. 95 (prior to amendment)**—*Co-mortgagor's rights on redemption.*

Under S. 95 of the T. P. Act, prior to its amendment, a co-mortgagor who redeems the mortgage is not subrogated to the rights of the mortgagee whom he redeems but has only the rights conferred on him by S. 95 as it stood then (*i.e.*) he has a right to contribution from each of his own co-mortgagors which creates a charge on the share of each co-mortgagor. (*Pollock and Digby, JJ.*) ABDUL SATTAR *v.* BHIKARILAL

I.L.R. (1941) Nag. 434=1941 N.L.J. 439.

——**(as amended in 1929), S. 100**—Applicability—Charge created by compromise decree after 1929—If one falling under S. 100—Question of notice—If material. *See* 1940 Dig., Col. 1176. BASUMATI KUAR *v.* HARBANSI KUER. **20 Pat. 86=192 I.C. 866=7 B.R. 545=13 R.P. 528=A.I.R. 1941 Pat. 95.**

——**S. 100**—Applicability—Charge created by decree. *See* 1940 Dig., Col. 1177. GHASIRAM *v.* KUNDANBAI **I.L.R. (1941) Nag. 513=194 I.C. 861=14 R.N. 17.**

——**S. 100**—Application—Sale in execution of decree on simple mortgage—Purchase by mortgagee decreeholder—Maintenance charge in favour of Hindu female—Enforceability against purchaser—Plea of *bona fide* purchase without notice—Sustainability—Simple mortgagee without notice—If protected. *See* 1940 Dig., Col. 1177. SURAYYA *v.* VENKATARAMANAMMA.

192 I.C. 47=13 R.M. 518=(1940) 1 M.L.J. 831.

——**S. 100**—Charge—*Bona fide* purchaser—Notice—Onus—Decree declaring charge, if operates as notice. *See* 1940 Dig., Col. 166. GHASIRAM *v.* KUNDANBAI. **I.L.R. (1941) Nag. 513=194 I.C. 861=14 R.N. 17.**

——**S. 100**—Charge—Creation—Form of words—Necessity—Expression of intention to make land a security for payment—Sufficiency. *See* 1939 Dig., Col.

T. P. ACT (1882), S. 101.

1115. GANGA PRASAD *v.* RATAN CHAND.

I.L.R. (1941) Nag. 356.

——**S. 100**—Charge—Creation of—Payment by lambardar of the arrears of land revenue of defaulting co-sharers. *See* CO-SHARER — LAND REVENUE — ARREARS OF. **1941 N.L.J. 311.**

——**S. 100**—Charge—Decree declaring—Purchaser without notice—If takes free of charge. *See* 1940 Dig., Col. 167. GHASIRAM *v.* KUNDANBAI.

I.L.R. (1941) Nag. 513=194 I.C. 861=14 R.N. 17.

——**S. 100**—Charge — Requisites— Creation—Construction of document. *See* 1940 Dig., Col. 1177. DAU BHAIROPRASAD *v.* JUGAL PRASAD. **194 I.C. 761=14 R.N. 11=A.I.R. 1941 Nag. 102.**

——**S. 100** — *Charge—Essentials — Charge under decree over all properties of defendant, both movable and immovable—If void for uncertainty—Enforceability of charge.*

Where a decree directs that all the property of the defendant, both movable and immovable, should be charged for the amount due, it cannot be said that the charge is void for uncertainty or that the property to which the charge relates is not specific. The words "all the property of the defendant, both movable and immovable" are sufficiently specific. There is no reason why description of property by survey number, extent, boundaries, etc., should be insisted upon on pain of the charge being held to be void for uncertainty. The charge given by the decree is therefore valid and is enforceable. (*Pandrang Row and King, JJ.*) NARASIMHAMURTHI *v.* SATYANANDAM. **54 L.W. 213=1941 M.W.N. 976=A.I.R. 1941 Mad. 794=(1941) 2 M.L.J. 386.**

——**S. 100**—*Charge—Nature of—Difference between charge and simple mortgage.*

Per *Iqbal Ahmad, C.J.*—The right created by a charge is something more than a personal obligation, for it is not a *jus ad rem* (*i.e.*) a right to payment out of the property specified. There is very little difference between a charge and a simple mortgage. In both the creditor is entitled to follow the property for the satisfaction of his debt with this difference that a simple mortgage being a right *in rem* is good against subsequent transferees while a charge is only good as against a subsequent transferee with notice or a volunteer with or without notice. (*Iqbal Ahmad, C.J., Allsop and Yorke, JJ.*) U. P. GOVERNMENT *v.* MANMOHAN DAS.

196 I.C. 425=14 R.A. 161=1941 A.L.J. 518=1941 O.A. (Supp.) 727=1941 A.L.W. 880=1941 A.W.R. (H.C.) 269=A.I.R. 1941 All. 345 (F.B.).

——**Ss. 100 and 58**— Construction of deed—*A* borrowing sum from *B* and mortgaging certain properties—Consent decree creating charge in favour of *C* on same properties—Further advance by *B* to *A* secured by instrument called further charge—Instrument incorporating provision in first mortgage regarding transfer of property to mortgagee—*B's* right of priority over *C*. *See* T. P. ACT, SS. 58 AND 100. **A.I.R. 1941 Cal. 436.**

——**S. 100**—Maintenance charged on two properties—Loss of remedy against one—Extent of liability of the other property. *See* T. P. ACT, SS. 82 AND 100.

1940 O.W.N. 1249=A.I.R. 1941 Oudh 203.

——**Ss. 100 and 2 (d)**—Scope and object of amendment of S. 100—Effect of S. 2 (*d*)—S. 100, if applies to Court auction sales. *See* 1940 Dig., Col. 1178. MUNICIPAL BOARD, CAWNPORE *v.* ROOPCHAND JAIN.

I.L.R. (1940) All. 669=191 I.C. 148=13 R.A. 217.

——**S. 101**—*Applicability—Purchaser under charge decree—Mortgagee subsequent to charge decree—Relative rights of.*

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Where a person purchases a property in execution of a charge decree and a mortgagee of the property subsequent to the charge decree and before the Court auction, sues on his mortgage, the purchaser under the charge decree cannot claim priority to the extent of the charge. S. 101, Transfer of Property Act, has no application. In the cases governed by the section, the one having his own interest to protect buys out the interest of the other, that is to say, the owner buys up the charge, or the chargeholder buys up the property and steps into the shoes of the owner. But each has an interest to protect at the date of the purchase. That is not the position where a stranger having no interest to protect, deliberately, with eyes open, purchases in order to enable the owner and chargeholder to extinguish the charge between them. In such a case the stranger purchaser is not in a position to act in either of two ways. He is not protecting his interest and is only in the position of a money-lender who advances to pay off the charge and then after the charge is extinguished, purchases in lieu of his own debt. (*Stone, C.J. and Bose, J.*) NEMA SAO *v.* MADHORAO GANESH. **1941 N L.J. 634**

——**S. 102**—*Two mortgages on same property—Foreclosure decree on second mortgage—Subsequent purchase in Court auction by assignee of first mortgage in execution of his own money decree—Dismissal of his suit for redemption of the second mortgage—Suit on the first mortgage—Plea of merger in defence, if open.*

There were two mortgages on the same property and a foreclosure decree was obtained on the second mortgage. Subsequently an assignee of the first mortgage purchased the property of the mortgagor in auction in execution of a money decree of his own. Then he sued for redemption of the second mortgage, but his claim was disallowed as his purchase was subsequent to the foreclosure decree. In a suit on the first mortgage where it was contended that the assignee of the first mortgagee by suing for redemption of the second mortgage had elected to give up his rights under the earlier mortgage, it was *held* that there could be no merger as the assignee was held not to have acquired any interest in the property by his auction purchase, and that the filing of the second suit was a clear indication of his intention to keep alive his rights under the prior mortgage. (*Stone, C.J. and Bose, J.*) JAILAI SAO *v.* GOPALDAS. **1941 N.L.R. 639.**

——**S. 105**—Construction—Right to enjoy such property—Meaning of. *See* 1940 Dig., Col. 1178. COMMISSIONER OF INCOME-TAX, B. & O. *v.* KUMAR KAMAKSHA NARAYAN SINGH. **20 Pat. 13 = 191 I.C. 340 = 13 R.P. 295 = 1940 P W.N. 1044 = 7 B.R. 172 (S.B.).**

——**S. 106**—*Lease for building purposes—If to be deemed permanent.*

The lease of land for the purpose of putting up a permanent construction cannot be deemed to be a permanent lease. Such a lease in the absence of any contract or local law or usage must be deemed to be a lease from month to month. (*Allsop, J.*) BAJRANG SAHAI *v.* MT. MULIA. **1941 A W.R. (Rev.) 903 = 1941 A.L.W. 931 = 1941 O.A. (Supp) 777 = 1941 A L.J. 557 = 1941 R.D. 927 = A.I R. 1941 All. 399.**

——**S. 106**—*Nature of tenancy—Rent mentioned as so much per year—If necessarily yearly tenancy or monthly tenancy.*

Merely because the rate of rent in respect of a tenancy is mentioned to be as so much per year, it cannot be held that it is an annual tenancy. A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year. (*Harries, C.J. and Fazl Ali, J.*) CHINTI KAHARIN *v.* KRIPA SHANKAR WARRAH. **194 I.C. 300 = 13 R P. 698 = 7 B.R. 750 = 1941 P.W.N. 513 = A.I.R. 1941 Pat. 488.**

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——**Ss. 106 and 116**—Notice—When necessary—Tenant under invalid lease—Position of—Continuance in possession after expiry of term—Nature of tenancy—Notice to quit—Necessity. *See* 1940 Dig., Col. 1179. BANSIDHAR *v.* RAM CHARAN. **16 Luck. 44.**

——**S. 107**—*Agricultural lease—Oral agreement not accompanied by delivery of possession—Sufficiency—Right of lessee to eject trespasser—Suit on basis of unregistered lease—Inadmissibility of lease—Right to set up oral lease—Practice—Pleadings.*

An oral lease of agricultural land cannot be complete or valid without delivery of possession. Where there has been no delivery of possession the oral lease can only be regarded as an agreement to lease. The lessee under such an oral lease cannot alone maintain an action in ejectment against a person in possession and not claiming under the lessor. Where a plaintiff specifically sets up a written unregistered lease in his favour which is inadmissible for want of registration, he cannot be allowed to set up the case of an oral lease, although he can, apart from the unregistered lease, rely on his tenancy right had he been let into possession. (*Fazl Ali, J.*) MAHOMED HANIF *v.* KHAIRAT ALI. **20 Pat. 346 = 192 I.C. 451 = 7 B.R. 399 = 13 R.P. 484 = 1941 P.W.N. 38 = 22 Pat.L T. 971 = A.I.R 1941 Pat. 577**

——**S. 107**—*Applicability—Lease of fishery rights—Registration, necessity.*

Fishery rights constitute immovable property and the provisions of S. 107 of the T. P. Act excludes the possibility of an oral lease of such rights for a term exceeding one year. To be valid it must be in writing registered. (*Bennett and Madeley, JJ.*) THAKUR *v.* JAGDAMBIKA PRATAP NARAIN SINGH. **196 I.C. 237 = 1941 R.D. 883 (2) = 14 R O 141 = 1941 O A. 757 = 1941 O.L.R. 660 = 1941 O.W.N. 1065 = 1941 A.W.R. (Rev.) 823.**

——**S. 107**—*Lease—Registration—Necessity—Fixed monthly rent payable for five years on a contingency happening.*

Where the lease of a rice mill is executed for one month with a condition that if there was paddy left unmilled at the expiry of the lease a fixed monthly rent would be paid every month for five years, the lease is a lease for over one year and requires registration. (*Mya Bu and Mosely, JJ.*) U MIN SIN *v.* KO KYE. **194 I.C 31 = 13 R.R. 274 = A.I.R. 1941 Rang. 117.**

——**S. 108**—*Applicability—Contract to the contrary—Lease for term—Lessee undertaking to surrender vacant possession on expiry of term and to remove structures erected by him—Termination of tenancy—Lessee vacating without removing structures—If retains interest in land or structure.*

A clause in a lease required the lessees to deliver over possession of the demised premises at the determination of the tenancy in the same good condition as it was at the time the lessees entered into possession subject to wear and tear. Another clause provided that on the determination of the tenancy the lessees shall be entitled to remove the structure or shed which they might have erected during the continuance of the tenancy. The term of the lease began from 1st September, 1931 and ended on 31st September, 1939. The lessees vacated but without removing the structures they had erected. On 13th September, 1939, a creditor of

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their lessees attached their interest in the land and structures.

Held, (1) that the second clause in the lease relating to the removal of the structures amounted to a contract to the contrary within the meaning of S. 108, T. P. Act, and therefore the provisions of S. 108 did not apply; (2) that by reasons of the first clause which made it obligatory on the lessees to deliver over possession at the determination of the tenancy, the lessees had no right to remain in possession after the termination of the tenancy; (3) that if the lessees wished to remove the structures they were obliged to provide for their removal by severing them from the soil or by taking the necessary steps so that they could remove them on the expiry of the tenancy, and not having done so they lost all rights to remove them or to demand possession of the same from the lessor; and (4) that therefore they had no interest which could be attached in execution of a decree against them (*Blackwell, J.*) KHIMJEE THAKARSEE *v.* PIONEER FIBRE CO., LTD.

43 Bom L.R. 576 = A.I.R. 1941 Bom. 337.

——**S. 108**—Applicability—Original lease for agricultural purposes—Under-lease by lessee for non-agricultural purposes—Law applicable—Transfer of Property Act or Tenancy Act, *See* BIHAR TENANCY ACT, S. 48. **22 Pat.L.T. 821.**

——**S. 108**—Lease—Assignment—Privity of estate—Applicability—Actual possession by assignee—If condition precedent to liability for rent. *See* 1940 Dig., Col. 1180. JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **192 I C. 17 = 13 R.P. 362 = 7 B.R. 283.**

——**S. 108 (m) and (o)**—*Destruction of leased property by fire—Liability of lessee—Principles governing—Negligence—Onus—Presumption of negligence, when arises.*

The liability of a lessee when the premises are destroyed or damaged by fire in his occupation is to be determined with reference to S. 108, T. P. Act, Cls. (*m*) and (*o*). A lessee is not liable for a damage caused to the leased property by fire while the property was in lessee's occupation unless negligence of the lessee was proved. In an action for damages caused to a building by fire as a result of negligence of the defendant the burden of proof is on the plaintiff to establish negligence of the defendant. In certain circumstances and in proof of certain facts a presumption of negligence may be raised against the defendant. Where a fire was proved to have started from a room used as a kitchen in the first floor (a pucca room) of a house and it was also definitely proved that the right of the occurrence was calm and that the fire was not an act of God or an act of an incendiary, it was held that it was for the occupant of the house to establish how the fire got into the room and how it burnt the house and in the absence of an explanation on the occupant's part it should be presumed that there must have been some negligence on his part. (*Dar, J.*) DEPUTY LAL *v.* REOTI PRASAD GUPTA.

196 I.C. 234 = 14 R.A. 141 = 1941 O.A. (Supp.) 588 = 1941 A W.R. (Rev.) 634 = 1941 A.L W. 686 = 1941 A.L.J. 361 = A.I.R. 1941 All. 327.

——**S. 108 (o)**—*Lease for cultivation—Lessee's right to collect and sell surface stones.*

Where property is leased out for the purpose of cultivation and settling tenants thereon, the lessee is only entitled to a reasonable right of user in the soil, but is not entitled to dig or quarry stone or to collect and sell surface stones. A right to collect and sell surface stones can be established only by custom, which must be pleaded and proved. (*Harries, C.J and Fazl Ali, J.*)

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KUSAM KAMINI DEBYA *v.* JAGDISH CHANDRA DEO DHABAL DEB. **20 Pat. 96 = 193 I.C. 760 = 7 B.R 618 = 13 R P. 623 = 22 Pat.L.T. 1009 = 1941 P.W.N. 202 = A I.R. 1941 Pat. 13.**

——**S. 109**—*Lessor, transferee and lessee agreeing as to amount of rent payable to transferee—Right of lessor or transferee to sue for his rent without impleading other.*

If the lessor, the transferee and the lessee have agreed as to the amount of rent payable to the transferee, there is no reason why the lessor or the transferee will not be entitled to sue for the rent payable to him without impleading the other. (*Harries, C.J. and Chatterji, J.*) BHUDEB CHANDRA ROY *v.* BHIK SHANKAR PATTANIK **196 I.C. 837.**

——**S. 116** —*Applicability—Lease governed by S. 107—Neither acceptance of rent nor agreement by lessor.*

S. 116 of the T. P. Act is not applicable to the case of a lease governed by S. 107 and not by S. 106 of the Act, where there has been neither an acceptance of rent by the lessor nor any agreement by him that the former lessee should remain in possession without the execution of a lease. (*Bennett and Madeley, JJ.*) THAKUR *v.* JAGDAMBIKA PRATAP NARAIN SINGH.

196 I.C. 237 = 1941 R.D. 883 (2) = 14 R.O. 141 = 1941 O.W.N. 1065 = 1941 O.A. 757 = 1941 O.L.R. 660 = 1941 A.W.R. (Rev.) 823.

——**S. 123**—Dedication of property to deity of asthal—Registration—If gift. *See* RELIGIOUS ENDOWMENT—MUTT OR ASTHAL. **1941 P.W.N. 75 = 22 Pat.L.T 239.**

——**S. 123**—Gift of movables—Conditions—Person owning assets in business crediting amounts in accounts in favour of relatives—Effect—If creates gift or trust in respect of amounts in favour of such relatives—Trusts Act, S. 6. *See* 1940 Dig., Col. 1183. IDA L. CHAMBERS *v.* K. H. CHAMBERS. **I L.R. (1941) Mad. 232 = 195 I.C 507 = 14 R.M. 198 = A.I.R. 1941 Mad. 154 = (1940) 2 M.L.J. 963.**

——**S. 128**—*Applicability—Donor retaining equity of redemption in property other than gifted—Owning house and movables—Donee if a universal donee under such circumstances.*

Where a donor at the time of gift still owns a house, holds certain ex-proprietary tenancy rights and has grains, bullocks, etc., and also has still vested in him the equity of redemption in respect of a property other than that gifted, the donee is not in such circumstances a universal donee and S. 128, T. P. Act, does not apply. (*Thomas, C.J. and Ghulam Hasan, J.*) RAM RAJ SINGH *v.* LAL CHANDRA PRATAP SINGH.

192 I.C. 619 = 13 R.O. 376 = 1941 A.W.R. (C.C.) 46 = 1941 R D. 42 = 1941 O.L.R. 210 = 1941 O.W.N. 56 = 1941 O.A. 9 = A.I.R. 1941 Oudh 205.

——**S. 130**—*Applicability—Mahomedan widow—Release of dower debt—Written document—Necessity for validity.*

S 130, T. P. Act, applies to Mahomedans, and a Mahomedan woman wishing to release her husband from his liability to pay her dower, must, if the release is to be valid and binding, do so by means of an instrument in writing. Such a transaction cannot be effected orally. (*Meredith and Shearer, JJ.*) SHAIKH MAHOMED ZOBAIR *v.* MT. BIBI SAHIDAN. **20 Pat. 798.**

——**S. 130**—*Applicability—Punjab.*

It is settled law that though the T. P. Act is not, as a whole, applicable to the Punjab, its principles as distinct from its technicalities should be applied in this province. It would follow, therefore, that S. 130 of the Act can be invoked to justify the assignment of a debt as an action-

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able claim. (*Dalip Singh and Sale, JJ.*) RAM-KRISHEN MOHAN LAL *v.* GURDIAL MAL SAGAR MAL. **43 P.L.R. 439 = A.I.R. 1941 Lah. 337.**

——S. 130—Applicability—Sale of land—Sale set aside as vendor had no title—Right of vendee to get back purchase price from vendor—If actionable claim—Assignment of—Validity. *See* T. P. ACT, SS. 6(*e*) AND 130. **(1941) 2 M.L.J. 695.**

——S. 130—Hypothecation of actionable claim—If assignment. *See* 1940 Dig., Col. 1183. KARNIDAN SARDA *v.* SAILAJA KANTA MITRA. **192 I.C. 187 = 13 R.P. 416 = 7 B.R. 330.**

——S. 130—*Oral assignment of Hundi—Validity—Punjab and N. W. F. P.*

In provinces where the Transfer of Property Act does not apply, hundi can be assigned orally subject to all equities as a chose in action independently of the Negotiable Instruments Act so as to give the assignee a *locus standi* to sue thereon. (*Almond, J.C. and Mir Ahmad, J.*) KALU RAM *v.* FEROZE SHAH. **195 I.C. 185 = 14 R. Pesh. 10 = A.I.R. 1941 Pesh. 45.**

——S. 130—*Part assignment of debt—Validity.*

In equity, a part assignment of a debt is valid and a suit brought thereon is maintainable provided the assignor and possibly other assignees, if any, are made parties to the suit. There is nothing in S. 130 of the T. P. Act to prevent the application of this equitable rule. (*Dalip Singh and Sale, JJ.*) RAM KRISHEN MOHAN LAL *v.* GURDIAL MAL SAGAR MAL. **43 P.L.R. 439 = A.I.R. 1941 Lah. 337.**

——S. 130—*Part assignment of debt—Validity.*

A part assignment of a debt is valid in law, and an action can be maintained thereon by the transferee provided he makes both the transferor and any other transferee that may be concerned, parties to the suit. 43 P.L.R. 439, Foll. (*Dalip Singh and Sale, JJ.*) MURLIDHAR JAGANNATH *v.* RIKHI RAM HARI CHAND. **43 P.L.R. 444.**

——S. 130—Transfer—Pledge of life insurance policy with creditor—Effect—If operates as assignment—Letter reciting pledge of policy—Effect of—Rights of creditor. *See* 1940 Dig., Col. 1184. OFFICIAL ASSIGNEE, MADRAS *v.* HUKUMCHAND KHIMSURA. **I.L.R. (1941) Mad. 378 = 195 I.C. 422 = 14 R.M. 187 = A.I.R. 1941 Mad. 147 = (1940) 2 M.L.J. 891.**

——S. 130 (2)—*Partnership—Partner's rights and obligations—Right to recover share in partnership property—Assignability.*

The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned. But the share of a partner in a partnership is property and the right to recover it is a chose in action assignable under the Transfer of Property Act. (*Davis, C.J. and Lobo, J.*) MULCHAND TAGIOMAL *v.* SHAMDAS JETHANAND. **194 I.C. 380 = 13 R.S. 271 = A.I.R. 1941 Sind 73.**

UST—*Co-trustee—Right to sue for accounts.*

One trustee may sue another for accounts when he is not given custody or control of the trust property or there is a breach of trust committed by the other. (*Mukherjea and Biswas, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD. **I.L.R. (1941) 2 Cal 128 = 73 C.L.J. 453 = 45 C.W.N. 709 = A.I.R. 1941 Cal. 562.**

——*Decree against trustee on contract on behalf of trust—Form.*

In a suit on a contract by the manager of a Dharamsala in respect of the supply of an article to the Dharamsala, the decree could be passed against the manager

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personally. An addition in the decree that the manager would be entitled to reimburse himself from the trust property is both unnecessary and improper. (*Braund, J.*) SHYAM SONDER DAS *v.* GOURI NATH SETH. **1941 A.W.R. (H.C.) 352 = 1941 A.L.W. 1027 = 1941 O.A. (Supp.) 885 (1).**

——Duties of trustees regarding investments. *See* 1940 Dig., Col. 1185. OFFICIAL TRUSTEE *v.* RAEBURN. **193 I.C. 61 = 13 R.R. 199.**

——*Liability of — Manager of temple—Loan by manager on promissory note—Suit against temple—Maintainability—Liability of temple.*

Where the manager of a temple borrows money for the expenses of some festival in the temple on a promissory note which contains only a personal covenant to pay without any stipulation that the creditor should look to the temple properties for repayment of his money, a suit on the promissory note against the temple is not maintainable, and no decree can validly be passed against the temple. (*King, J.*) EKAMBARESWARA AND DHANDAYUDAPANI SWAMI TEMPLES *v.* VEERAPPA GOUNDAR. **1941 M.W.N. 877 = 54 L.W. 470 = (1941) 2 M.L.J. 568.**

——Money standing in a bank to credit of trust—Appropriation to wipe out personal overdraft account of trustee with same bank—Duty of bank to restore the money to trust. *See* BANKER AND CUSTOMER. **A.I.R. 1941 P.C. 1 = (1941) 1 M.L.J. 393.**

——*Power conferred by will on trustees—Construction—Power when exercisable by survivor alone.*

There is a distinction between a bare power and power attached or annexed to a trust or office. In the former case the power can be exercised by the donees of the power conjointly or not at all, whereas in the latter case the power can be exercised by the survivor. Where in a will four persons were named as trustees but the power was given to them not as *persona designata* but as holders of the office of trustees, it was held that the survivor of those trustees could exercise the power conferred. (*Iqbal Ahmad, C.J. and Collister, J.*) SOM GIRI *v.* RAM RATAN GIRI. **1941 O.A. (Supp.) 770 (2) = 1941 A.L.W. 921 = 1941 A.W.R. (H.C.) 283 = 1941 A.L.J. 660 = A.I.R. 1941 All. 387.**

——Powers of trustee—Provision for co-option in case of vacancy—Directory or mandatory—Surviving trustee, if can carry on trust. *See* WILL—CONSTRUCTION. **1941 A.W.R. (H.C.) 283.**

——*Public and private trust—Difference between—Wakf in favour of Shias or sub-sect of shias—Nature of*

Per *Mitter, J.*—The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons—either the public at large or some considerable portion of it answering a particular description. The fact that an uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion (*e.g.*) Shias or even a sub-sect of Shias, would not make any difference in the matter and would not make the wakf a trust of a private character. (*Mitter and Khundkar, JJ.*) HAJI MAHOMED NABI *v.* PROVINCE OF BENGAL. **46 C.W.N. 59.**

——*Trustee—Joint trustee—Powers of—Loan for trust on promissory note—Joinder of all trustees in note—If essential.*

There is no rule of law which requires all the trustees of an institution actually to sign a promissory note under

which money is borrowed for the trust. It would be enough if those trustees who do not sign have authorised the transaction. (*King, J.*) EKAMBARA AND DHANDAYUDHAPANISWAMI TEMPLES *v.* ARUNACHALA GOUNDAR. **1941 M.W.N. 876 (2)= 54 L.W. 472=(1941) 2 M.L.J. 587.**

——Trustee—Loan by—Scheme prohibiting lending and borrowing—Person managing trust as agent of trustee advancing moneys for necessaries of trust—Promissory note by trustee—Enforceability against trust—Contract Act, S. 65—Applicability—*Quantum meruit. See* 1940 Dig. Col, 1186. GOPALASWAMI MUDALIAR *v.* VAITHILINGA PANDARASANNADHI.

194 I.C 105= 3 R.M. 740=(1940) 1 M.L.J. 547.

——*Trustee—Powers of—Special trust for performanceof charity in temple—Failure of special trustee to perform—Right of general trustee to perform and sue special trustee for recovery of expenses.*

Feeding of devotees in temples is a well-known charitable purpose, and when there is such a trust performable in a temple, the general trustee of the temple is entitled to perform it if the persons who are primarily to do it do not do so, and recover the cost from the properties charged in their hands. Where the performance of *santharpana* (feeding) in a temple on particular occasions is made a charge on certain properties, the general trustee of the temple is sufficiently interested in the performance of the charities, and in fact it is his duty to see that all the festivals and duties are properly performed; and where the special trustee in possession of the properties charged with the performance of the charities does not perform a particular festival or charity which he is bound to do, the general trustee can perform it out of the funds of the temple and recover it from the special trustee and the properties over which there is a charge. (*Somayya, J.*) LINGESHWARA DEVARA BHANDARAM *v.* NAGAPPA. **1941 M.W.N. 881=54 L.W. 408= (1941) 2 M.L.J. 636.**

——Trusteeship—Succession — Founder's right to alter line of devolution. *See* 1940 Dig., Col. 1187. NALLASIVAN PILLAI *v.* GANAPATHI MUDALIAR. **192 I.C. 847=13 R.M. 596.**

——Trust fund deposited with trustee—Trustee permitted to invest same in any security he liked and to pay interest on it to beneficiary—Effect of—Relation ship of creditor and debtor—If substituted—Insolvency of trustee—Beneficiary's claim to priority. *See* 1940 Dig., Col. 1187. KRISHNA DAS GOVARDHAN DAS *v.* RATANBAI GOKULDAS. **I.L.R. (1941) Bom. 42= 193 I.C. 718=13 R.B. 328=A.I.R. 1941 Bom. 41.**

——*Validity—Indefiniteness or uncertainty—Test.*

Indefiniteness or uncertainty in relation to the objects of a trust may render the entire trust void. To determine uncertainty or indefiniteness in relation to trusts one of the rules of the English Courts of equity is that the Court must be in a position to supervise the trust and administer it in case of a breach of trust or in case of any of the circumstance arising in connection with it in which such a course becomes necessary and where the Court is not in a position to administer the trust by reason of the vagueness of the objects of the trust, the trust is void. On a construction of the deed in question it was held that the trust was for national education and for the establishment and maintenance of a school where national education was to be imparted and for a boarding house and for giving scholarships for foreign studies and that hence the trust deed could not be attacked on the ground either that it was vague or non-charitable or opposed to public policy. (*Baipai and Dar, JJ.*)

TRUSTS ACT (1882), S. 82.

HIDAYAT BEG *v.* BEHARI LAL. **I.L.R. (1941) All. 377=196 I.C. 3=14 R.A. 132= 1941 A.L.W. 472=1941 A.L.J. 295= 1941 O.A. (Supp.) 312=1941 A.W.R. (H.C.) 147= A.I.R. 1941 All. 225.**

——Validity—Test—Object or purpose of trust, *See* MAHOMEDAN LAW—WAQF—VALIDITY. **1941 A.L.J. 269.**

TRUST AND CONTRACT—*Distinction*—A *agreeing to pay* B *debt due by* C *to* B *in consideration of* C's *transfer of his property to* A—*Nature of transaction.*

There is always a fiduciary relationship between trustee and beneficiary, but none between the parties to a contract. The beneficiary is clothed with title to the property—not indeed a legal title because that resides in the trustee, but an equitable one. He is possessed of what is called an equitable estate. No trustee can use trust property for his own benefit. He is bound to hold it for the benefit of the beneficiary and is liable to account to him for it. Where before the Debt Conciliation Board *A* and *B* two debtors of *C* agree that *A* should pay *B* the debt due by *C* to *B* in consideration of *C's* transfer of his property to *A* the transaction represents a contract between the parties and no question of trust arises. (*Bose, J.*) MOHAMMAD HUSSAIN KHAN *v.* BALA LAXMAN. **196 I.C. 201=14 R.N. 88= 1941 N.L.J. 324=A.I.R. 1941 Nag. 261.**

TRUSTS ACT (II OF 1882), S. 5—Essentials of trust—Provident Fund of employees of companies—Moneys standing to credit of member—If "trust" money—Liability to attachment and sale in execution of decree against member. *See* C. P. CODE, S. 60 (1). **I.L.R. (1941) Kar. 401.**

——**S 6**—*Creation of trust—Transfer of ownership—Necessity—Absence of intention to part with ownership—Effect.*

The Trusts Act lays considerable stress on the necessity of a transfer of ownership for the effective creation of a trust. Though it is true that no particular words of transfer are required, the document must aim at effecting a transfer. Where, far from being a transfer in favour of the trustees, there was every indication that the author of the trust had no intention of parting with the ownership of property, it was *held* that no valid trust was created. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. **196 I.C. 787=1941 A.W.R. (C.C.) 274= 1941 O.L.R. 764=1941 O.W.N. 906= 1941 O.A. 621=A.I.R. 1941 Oudh 529.**

——**S.** 6—Trust of movables—Essentials—Bank forming company for chit funds—Subscriber of chit fund depositing prize money in Bank and authorising bank to appropriate same for payment of future subscriptions—Effect—Trust—If created—Liquidation of bank—Claim to preferential payments. *See* 1940 Dig., Col. 1188. TRAVANCORE NATIONAL BANK SUBSIDIARY CO., LTD. *v.* T. N. AND Q. BANK, LTD. **A.I.R. 1941 Mad. 256=(1940) 2 M.L.J. 566.**

——**S.** 20 (e)—Value of the property—Meaning. *See* 1940 Dig., Col. 1188. OFFICIAL TRUSTEE *v.* RAEBURN. **193 I.C. 61=13 R.R. 199.**

—— **Ss. 77 and 78**—Security deposits—Nature of—Trust created, when extinguished—Demand for return of deposit, if operates as revocation of trust. *See* 1940 Dig., Col. 1188. DINSHAW & CO. *v.* KRISHNA PIARY. **16 Luck. 241=1941 Comp. C. 138= 191 I.C. 178=A.I.R. 1941 Oudh 126.**

——**S. 82**—*Effect on burden of proof in benami transactions.*

TRUSTS ACT (1882), S. 88.

S. 82 of the Trusts Act, though it may not have really altered the burden of proof, has made it much clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so. (*Yorke and Agarwal, JJ.*) SARDAR JAHAN *v.* AFZAL BEGAM.

16 Luck. 341 = 192 I.C. 873 = 1941 A.W.R. (C.C.) 93 = 1941 O.L.R. 240 = 1941 A.L.W. 328 = 13 R.O. 415 = 1941 O.W.N. 208 = 1941 O.A. 154 = A.I.R. 1941 Oudh 288

——**Ss. 88 and 90**—Applicability—Application for darkhast grant—Payment of price of survey stones and tree—Death of applicant before grant—Fresh application by widow for grant—Grant to widow—If in trust for or for benefit of husband's estate—Attachability for debt of husband. *See* 1940 Dig., Col. 1189. NALLANGAL *v.* ARASAPPA-PILLAIPATTI CO-OPERATIVE SOCIETY. **193 I.C. 314 = 13 R.M. 643.**

——**Ss. 88 and 90**—Scope—If exhaustive—Constructive trustee—Who is—S. 94. *See* 1940 Dig., Col. 1189. NALLANGAL *v.* ARASAPPA-PILLAIPATTI CO-OPERATIVE SOCIETY. **193 I.C. 314 = 13 R.M. 643.**

——**Ss. 94 and 95**—*Applicability—Separation between Hindu coparceners—Possession of common properties and collection of rents and profits by one—Acquisition made by him after separation—If self acquisitions—Mingling of funds—Effect of—Burden of proof.*

Where a co-sharer who has separated from the other joint owners and who is a constructive trustee of the latters share of the propertyheld in co ownership and of the income thereof chooses to mix up his separate property with the property held in co-ownership and deliberately mingles the funds of both, the burden lies heavily on him to prove that acquisitions made by him after the separation have been acquired from his own separate funds and not out of the income of the property held by him in co-ownership with the other co owner. Ss. 94 and 95 of the Trusts Act apply to such a case, and the other co-sharer can therefore claim a partition of all the properties including those purchased after the separation and of the entire income thereof, in the absence of clear proof that the subsequent acquisitions have been made out of the separate funds of the co-owner in possession. (*Lobo, J.*) KHEM CHAND *v.* DAYARAM.

I.L.R. (1940) Kar. 534 = 194 I.C. 137 = 13 R.S. 249 = A.I.R. 1941 Sind 50.

——**S. 94**—Beneficial interest—Meaning of—Nature of mortgagee's interest—Coparcener undertaking on partition to pay mortgag debt of another coparcener—Nature of obligation incurred. *See* 1940 Dig., Col. 1190. ATMARAM SAO *v.* BHUPENDRA NATH.

I.L.R. (1941) Nag. 677 = 194 I.C. 537 = 3 R.N. 374.

UNITED PROVINCES ACTS.

Agriculturists' Relief Act (XXVII of 1934).
Boards Circular.
Co-operative Societies Rules.
Court of Wards Act (IV of 1912).
Debt Redemption Act (XIII of 1940).
District Boards Act (X of 1922).
Encumbered Estates Act (XXV of 1934).
Excise Manual
Land Records Manual
Land Revenue Act (III of 1901).
Municipalities Act (II of 1916).
Partition Manual.
Prevention of Adulteration Act (VI of 1912).

U. P. AGRIC. REL. ACT (1934), S. 7.

Regularisation of Remissions Act (XIV of 1938).
Regulation of Sales Act (XXVI of 1934).
Revenue Court Manual.
Stayed Arrears of Rent (Remissions) Act (XVIII of 1939).
Stay of Proceedings (Revenue Courts) Act, 1937.
Temporary Postponement of Execution of Decrees Act (X of 1937).
Tenancy Act (XVII of 1939).
Town Improvement Act (VIII of 1919).
Village Panchayat Act (VI of 1920).

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934), S. 2 (2) and Sch. I—*'Servant of village community'—Who is—Test—Tailor—If one such.*

Generally a 'servant of the village community' is a person who is not paid separately for the individual work he does, but receives periodical remuneration from the community, whether at the time of harvest or otherwise. A tailor finds no place in the list given in Sch. I of the U. P. Agriculturists' Relief Act and if he is to be regarded as an agriculturist within the meaning of the term in S. 2 (2) of the Act, he has to show that he is not paid by the job, but is recompensed by some customary mode of periodical payment. (*Collister, J.*) TAQI HUSAIN *v.* HAFIZULLAH.

I.L.R. (1941) All. 165 = 192 I.C. 839 = 1941 A.W.R. (H.C.) 12 = 1941 O.A. (Supp.) 20 = 13 R.A. 369 = 1941 R.D. 165 = 1941 A.W.R. (Rev.) 31 = 1941 O.W.N. 343 = 1941 A.L.W. 247 = 1940 A.L.J. 874 = A.I.R. 1941 All. 92.

——**Ss. 2 (2), Expl. (ii) and 5**—Scope of Expl. 2 to S. 2 (2)—Benefit of S. 5—Availability—Applicant having a share in ancestral property—Father's name only appearing in khewat. *See* 1940 Dig., Col. 1190. RAZA HUSAIN *v.* SHANKERY SARAN.

16 Luck. 500 = 191 I.C. 784 = 13 R.O. 289 = 1941 O.L.R. 6 = A.I.R. 1941 Oudh 121.

——**S. 2 (2) (f)**—'Agricultural land', meaning of—Grove land, if agricultural land. *See* 1940 Dig., Col. 1191. GANGA SAGAR *v.* REOTI PRASAD.

I.L.R. (1940) All 771 = 191 I.C. 365 = 13 R.A. 226 = 1941 A.L.W. 7.

—— **S. 3 (2)**—*Declaration of charge—Request for if can be made in appellate Court.*

Where no request appears to have been made in the trial Court for the declaration of a charge under S. 3 (2) of the Agriculturists' Relief Act, it is too late in the day to entertain such request in the appellate Court, for it is not then possible to find either the circumstances of the defendant or the items of property on which the charge could be created. (*Bajpai and Dar, JJ.*) MAHOMED MOHTASHIM *v.* JOTI PRASAD.

I.L.R. (1941) All. 360 = 1941 O.A. (Supp.) 237 = 1941 A.W.R. (Rev.) 306 = 194 I.C. 801 = 1941 A.L.J. 246 = 1941 R.D. 460 = 1941 A.L.W. 359 (2) = 14 R.A. 7 = 1941 O.W.N. 502 = 1941 A.W.R. (H.C.) 128 = A.I.R. 1941 All 277.

—— **S. 7**—*Person claiming benefit of—Facts to be proved.*

Where there are more defendants than one, if benefit of S. 7 of the U. P. Agriculturists' Relief Act is claimed, the onus is on those claiming it to prove that all the defendants were agriculturists, for if one of them was not an agriculturist, S. 7 has no application by virtue of the third proviso to Cl. (2) of S. 2 of the Act. (*Bennett and Ghulam Hasan, JJ.*) HET RAM *v.*

U. P. AGRIC. REL. ACT (1934), S. 10.

SUBHAG CHAND. 1941 O.W.N. 527= 194 I.C. 168=1941 O.L.R. 419= 1941 A.W.R. (Rev.) 300=1941 R.D. 279= 1941 A.L.W. 380=13 R.O. 554= 1941 O.A. 331=A.I.R. 1941 Oudh 376.

——**Ss. 10 and 12**—*Mortgage money of Rs. 599 paid by two persons—Intention of parties—Application to redeem against one person alone—Forum.*

Where the mortgage amount of Rs.599 is shown in the deed to be made up of payments of 300 and 299 by two persons respectively and the intention of the parties was really to create two mortgages, an application under S.12 of the U.P. Agriculturists' Relief Act against one of the two alone for redemption can be filed in the Revenue Court, for, under S. 10 the amount secured by the mortgage so far as that person is concerned is only the amount which he actually advanced and not the total of the two sums paid by both. (*Ghulam Hasan, J.*) MAHABIR *v.* RAM LAL. 196 I.C. 501=14 R.O. 184= 1941 O.L.R. 696=1941 R.D. 904= 1941 O.W.N. 1119= 1941 A.W.R. (Rev.) 887=1941 O.A. 819.

——**S. 12**—Application under—Maintainability—Mortgagee's possession changed into vendee's possession. *See* 1940 Dig., Col. 1193. TAUQIR ALI *v.* RAM RATTAN SINGH. 16 Luck. 99= A.I.R. 1941 Oudh 41.

——**S. 12**—*Court-Fees Act, Sch. I. Art. 2 B (U. P. Amendment Act, 1938)—Application under S. 12 of the Agriculturists Relief Act—Decree for redemption on payment of sums due under other deeds of further charge—Appeal—Court-fee payable.*

Where on an application under S. 12 of the U. P. Agriculturists' Relief Act redemption was decreed on payment of a sum of Rs. 2121-5-6 made up of Rs. 271 due on the suit mortgage and a sum of Rs. 1850-5 6 due under two other deeds of further charge and the plaintiff appealed against the decree only in so far as the further charge was concerned, it was held that what the appellant was seeking was a reduction of the amount on payment of which he could redeem the property from Rs. 2121-5-6 to Rs. 271 and that he was challenging the amount of Rs. 1850-5-6 and that was the amount or value of the subject-matter in dispute, and he was bound to pay *ad valorem* Court fee under Art. 2-B of Sch. I, Court-Fees Act. (*Yorke and Bennett, JJ.*) SURJAN SINGH *v.* MASHAL SINGH. 1941 O.W.N. 789= 194 I.C. 425=13 R.O. 603=194 R.D. 443= 1941 A.W.R. (Rev.) 534=1941 O.A. 498= 1941 A.L.W. 634=A.I.R. 1941 Oudh 447.

——**S. 23**—*Competency of revision.*

The language of S. 23 of the Agriculturists' Relief Act does not divest the Chief Court of the power of interference in revision if the case fulfils the requirements of S. 115, C. P. Code. (*Ghulam Hasan, J.*) AMJAD HUSAIN *v.* RAIZUNNISA. 194 I.C. 855=14 R.O. 45= 1941 O.L.R. 534=1941 O.W.N. 669= 1941 R.D. 387=1941 O.A. 462= 1941 A.W.R. (Rev.) 408=A.I.R. 1941 Oudh 433.

——**S. 23**—If bars revision also. *See* 1940 Dig., Col. 1193. LALTA SINGH *v.* SRIDHAR SUKUL. 16 Luck. 24=13 R.O. 472= 193 I.C. 214=1941 O.L.R. 294.

——**S. 33**—*Requisite as to debtor being an agriculturist—Point of time.*

For the purpose of S. 33, U. P. Agriculturists' Relief Act, an agriculturist debtor must be an agriculturist both at the date of the loan as well as at the date when the suit is brought. (*Bennett, J.*) KAZIM HUSAIN *v.* MANGALA DEVI. 16 Luck. 429=193 I.C. 59= 13 R.O. 426=1941 O.L.R. 253=1941 R.D. 90=

U. P. AGRIC. REL. ACT (1934), S. 33.

1941 O.W.N. 242=1941 O.A. 195= 1941 A.W.R. (Rev.) 143=A.I.R. 1941 Oudh 252.

——**S. 33**—*Suit under—Costs—Guiding principle in the awarding of.*

In a case where there are no special circumstances making it equitable that the creditor should bear the costs, it would be unjust to permit the debtor, by availing himself of the provisions of the Agriculturists' Relief Act which are designed primarily for his own benefit to throw an additional burden on the creditor which he has not deserved through any misconduct or impropriety. The only fair thing under such circumstances is for the debtor to bear his own costs. (*Braund, J.*) SHIVA SHANKAR LAL SHARMA *v.* RAMJI LAL. 195 I.C. 781=14 R.A. 81=1941 A.L.J. 290= 1941 A.W.R. (Rev.) 405=1941 O.A. (Supp.) 331= 1941 A.W.R. (H.C.) 166=1941 R.D. 312= 1941 A.L.W. 428=A.I.R. 1941 All. 285.

——**S. 33**—Suit under—If a proceeding within the meaning of S. 7 of the U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, S. 7—PROCEEDING. 1941 O.A. 801.

——**S. 33**—*Suit under—Maintainability—One of the heirs of a mortgagor applying under Encumbered Estates Act—Another heir, if and when can file a suit under S 33, Agriculturists' Relief Act.*

Where an application is made under U. P. Encumbered Estates Act by one of the heirs of a deceased mortgagor, the other heirs are persons who come under S. 9 (5) or (6) of the Encumbered Estates Act and unless and until there is a splitting up of the mortgage and the mortgage debt as contemplated by S. 9 of the Act, it is not competent to such heirs to institute a suit under S. 33 of the Agriculturists' Relief Act with respect to those debts which are common to them and the applicant under the Encumbered Estates Act. The applicant himself cannot institute such a suit, nor could the other heirs make him a defendant to such a suit. But, when once the apportionment has been made by the Special Judge under S. 9 (6), it will be open to any member of the family who have not applied under the Encumbered Estates Act to institute a suit under S. 33 of the Agriculturists' Relief Act, for it would become their separate debts thereafter in respect of which they can institute suits for accounting. (*Yorke and Ghulam Hasan, JJ.*) JAI SHANKAR *v* MAQBUL-UR RAHMAN. 16 Luck. 533=192 I.C. 264=1941 O.L.R. 98= 1941 A.W.R. (Rev.) 54=13 R.O. 336= 1940 O.W.N. 1223=1940 O.A. 1204= 1940 R.D. 598=A.I.R. 1941 Oudh 119.

——**S. 33**—Suit under—Nature of for purposes of court fees—Appeal—Valuation—Procedure in case appellant obtains relief for larger amount. *See* 1940 Dig., Col. 1195. BHARAT SINGH *v.* CHHOTEY SINGH. 16 Luck. 398=13 R.O. 272= 191 I.C. 732=1941 A.W.R. (C.C.) 1= 1941 O.L.R. 20=A.I.R. 1941 Oudh 100.

——**Ss. 33 and 2 (8)**—Suit under S. 33 in the case of usufructuary mortgage—Maintainability—Interest' in S. 2(8) if includes profits from such property. *See* 1940 Dig., Col. 1194. DIGBIJAI SINGH *v* BUDH SEN. I.L.R. (1940) All. 707=192 I.C. 298= 13 R.A. 306.

——**S. 33 and Court Fees Act, S. 7 (4) and Art. 17 (iii) of Sch. II**—Suit under S. 33 of Agriculturists Relief Act—Nature—Court-fee payable in suit and in appeal from decree in such suit—Value of such suit. *See* 1940 Dig., Col. 1194. HARENDRA SHANKAR *v.* KHIALI RAM. I.L.R. (1940) All. 762= 191 I.C. 337=13 R.A. 219.

U. P. AGRIC. REL. ACT (1934), S. 33.

——**S. 33 (2)**—Decree on a mortgage—If can be passed under. *See* 1940 Dig., Col. 1195. BEHARI LAL *v.* DURGA. **16 Luck. 188.**

——**(as amended), S. 33 (3)**—*Court-Fees Act* (1870), *S.* 7 (iv) (b)—*Construction of S.* 33 (3)—*Plaint in suit*—*Memorandum of appeal, if included in*—*Court-fee payable on appeal in suit under S.* 33 (3).

The words 'plaint in suit' in S. 33 (3) of the U. P. Agriculturists' Relief Act cannot be so liberally construed as to include a memorandum of appeal. Hence in appeals in suits under that section *ad valorem* Court-fee has to be paid and not the fee payable on an application under that section. (*Bennett, J.*) GIRJAWATI *v.* QUDRATULLAH KHAN. **193 I.C. 300 = 13 R.O 443 = 1941 O.L.R. 271 = 1941 O W.N. 479 = 1941 O A. 311 = 1941 R D. 236 = 1941 A.W.R. (Rev.) 280 = A.I.R. 1941 Oudh 304**

——**S. 39**—*Document evidencing loan—Requirements—'Written document', meaning of—Receipt for loan, if falls under.*

S. 39 of the U. P. Agriculturists' Relief Act does not prescribe any particular form of a written document to evidence the loan. The words 'written document' used in the section are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor. A receipt showing the receipt of money in consideration of a promissory note executed, evidences the loan by a written instrument as required by S. 39 of the U. P. Agriculturists' Relief Act. (*Ghulam Hasan, J.*) BRIJ LAL *v.* SURAJMAN. **194 I.C. 662 = 14 R.O. 32 = 1941 O.L.R. 519 = 1941 O.A. 562 = 1941 A.W.R. (Rev) 583 = 1941 O.W.N. 832 = A.I.R. 1941 Oudh 420.**

——**S. 40**—*Applicability—Execution and registration—Necessity.*

Per *Full Bench.*—S. 40 applies only to documents which are executed by agriculturists and also registered. Consequently, S. 40 cannot be availed of where the document is not registered even though executed by an agriculturist within the meaning of the Act.

Per *Iqbal Ahmad, Ag. C.J.*—The word 'and' in the sentence "executed by an agriculturist and registered" in S. 40 should be read as "or" and therefore S. 40 can be availed of by an agriculturist who executes a bond but fails to get it registered. (*Iqbal Ahmad, Ag. C.J., Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI. **I.L.R. (194) All. 471 = 1941 A.L.J. 427 = 1941 A.W.R. (Rev.) 704 = 1941 O.A. (Supp.) 636 = 1941 A.L.W. 693 = 195 I.C 791 = 14 R.A 84 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).**

——**S. 40 and Sch. V**—*Applicability.*

S. 40 is not restricted to bonds pure and simple but applies to instruments which besides being a bond embodies some other transaction as well such as a mortgage. (*Iqbal Ahmad, Ag. C.J., Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI. **I.L.R. (1941) All. 471 = 941 A.L.J. 427 = 1941 A.W.R. (Rev.) 704 = 1941 O.A. (Supp.) 636 = 1941 A.L.W. 693 = 195 I.C. 79 = 14 R.A. 84 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).**

——**S. 40**—*Scope and effect of.*

S. 40 and Sch. 5, Agriculturists' Relief Act, amends only Art. 15, Stamp Act. The rest of the Stamp Act retains its binding force. (*Iqbal Ahmad, Ag. C.J., Bajpai, Verma, Mulla and Dar, JJ.*) L. H. SUGAR FACTORY, PILIBHIT *v.* MOTI. **I.L.R. (1941) All. 471 = 1941 A.L.J. 427 = 1941 A.W.R. (Rev.) 704 = 1941 O.A. (Supp.) 636 =**

U.P. COURT OF WARDS ACT (1912), S. 3.

1941 A.L.W 693 = 195 I.C. 791 = 14 R.A. 84 = 1941 R.D. 611 = A.I.R. 1941 All. 243 (F.B.).

UNITED PROVINCES BOARD'S CIRCULAR 2-1—*Scope of.*

Board's Circular 2-1 does not lay down substantive law but is only for the guidance of settlement officers, who have to proceed under S. 99 of the Land Revenue Act. It is therefore only explanatory. (*Harper, S.M. and Sathe, J.M.*) ALLAH TALA *v.* SURAJ BIKRAM SINGH. **1941 O.W.N. 89 = 1941 R.D. 57 = 1941 A.W.R. (Rev.) 222 = 1941 O.A. (Supp.) 157.**

——**8-1, R. 18 (1)**—*Remission of Revenue—Justification for rejection of recorded rent.*

Where the remission of land revenue is in question recorded rents which are genuine cannot be rejected for inadequacy. They can only be rejected if they are not genuine or if they are too high. (*Harper, S.M. and Sathe, J.M.*) RAM KISHORE *v.* EMPEROR. **1941 R.D. 302 = 1941 A.W.R. (Rev.) 403 = 1941 O.A. (Supp.) 352.**

UNITED PROVINCES CO-OPERATIVE SOCIETIES RULES, R. 20 (7) (i) (ii) and (iii)—Non-compliance with—Award—Validity. *See* U. P. CO-OPERATIVE SOCIETIES RULES, RR. 20 (8) (*iii*) AND 20 (7) (*i*) (*ii*) AND (*iii*). **1941 O.W.N 404.**

——**R. 20 (8) (iii) and 20 (7) (i) (ii) and (iii)**—*Scope and effect of R.* 20 (8) (*iii*)—*Award in violation of R* 20 (7) (*i*), (*ii*) *and* (*iii*)—*Validity.*

R. 20 (8) (*iii*) of the U. P. Co-operative Societies Rules seems to indicate that the provisions of R. 20 (7) (*i*), (*ii*) and (*iii*) refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities. (*Yorke and Ghulam Hasan, J.*) BELAHARI CO-OPERATIVE SOCIETY *v.* PUTTU LAL. **16 Luck. 658 = 193 I.C. 524 = 3 R.O. 466 = 1941 A.L.W. 299 = 1941 O.L.R. 297 = 1941 O.W.N. 404 = 1941 O.A. 285 = 1941 A.W R (Rev.) 236 = A.I.R. 1941 Oudh 315.**

——**R. 20 (12) (ii)**—*Competency of civil suit.*

In spite of R. 20 (12) (*ii*), a Civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction. (*Yorke and Ghulam Hasan, JJ.*) BELAHARI CO-OPERATIVE SOCIETY *v.* PUTTU LAL. **16 Luck. 658 = 193 I.C. 524 = 13 R.O. 466 = 1941 A.L.W. 299 = 1941 O L.R. 297 = 1941 O W.N. 404 = 1941 O A 285 = 1941 A.W.R. (Rev.) 236 = A.I.R. 1941 Oudh 315.**

——**R. 20 (12) (ii)**—*Effect of.*

Even if an award has violated the R. 20 (7), (*i*) (*ii*) and (*iii*), the proper course for setting it aside is by means of an appeal to the Assistant Registrar under R. 20 (12) (*i*). If no such appeal is filed, by the operation of R. 20 (12) (*ii*), the award becomes final and conclusive between the parties. (*Yorke and Ghulam Hasan, JJ.*) BELAHARI CO-OPERATIVE SOCIETY *v.* PUTTU LAL. **16 Luck. 658 = 193 I.C. 524 = 13 R.O. 466 = 1941 A.L.W. 299 = 1941 O.W.N. 404 = 1941 O.A. 285 = 1941 A.W.R (Rev.) 236 = 1941 O.L.R 297 = A.I.R. 1941 Oudh 315.**

UNITED PROVINCES COURT OF WARDS ACT (IV OF 1912), S. 3—*Proprietor—If includes beneficiaries under Trusts Act—Proprietor executing revocable trust—Act, if applicable to him.*

The definition of proprietor in S. 3 of the U. P. Court of Wards Act is wide enough to cover the cases of beneficiaries under the Indian Trusts Act, provided only that the estate concerned is such that the Court of Wards Act is otherwise applicable. A proprietor who executes a deed of trust though it be one revocable at

U. P. COURT OF WARDS ACT (1912), S. 6.

the notice of the executant does not cease but continues to be a person entitled as proprietor to a beneficial interest in a mabal and consequently the other provisions of the Act are still applicable to him and the Court of Wards can enforce the Act and assume superintendence of the property and call upon the trustees to surrender that possession. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. **196 I C. 787 = 1941 A.W.R (C C.) 274 = 1941 O.L.R. 764 = 1941 O.A. 621 = 1941 O W.N. 906 = A.I.R. 1941 Oudh 529.**

——**S. 6 (3)**—*Scope of.*

Cl. (3) of S. 6 of the U. P. Court of Wards Act could not operate to extend the powers given by Cl. (1) of the same section. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA.

196 I C. 787 = 1941 A.W R (C.C.) 274 = 1941 O.L R. 764 = 1941 O.W.N. 906 = 1941 O A. 621 = A.I.R. 1941 Oudh 529.

——**Ss 11, 13 and 53**—*Bar of suit--If applies to suits by third parties.*

Ss. 11, 13 and 53 of the U. P. Court of Wards Act do not prevent the institution of suits by third persons of whose property superintendence has been assumed on the supposition that it was the property of a disqualified proprietor. Where a proprietor executed a deed of trust and his property was subsequently taken by the Court of Wards under its superintendence, it was *held* that a suit by the trustees to assert their title to the property could not be barred by Ss. 11, 13 and 53 of the Act. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER. GONDA. **196 I.C. 787 = 1941 A.W.R. (C.C.) 274 = 1941 O.L.R. 764 = 1941 O.A. 621 = 1941 O.W.N. 906 = A.I.R. 1941 Oudh 529.**

——**Ss. 44 and 5**—*Release of estate—Limits to the power of the Court of Wards*

What S. 44 of the Court of Wards Act provides is that although the Court of Wards may release at any time any person or property from its superintendence subject to the control of the Local Government under S. 5, it shall not so release any property the proprietor of which has been disqualified under Cl. (*b*) or (*d*) of sub-S. (1) of S. 8 without the *previous* sanction of the Local Government. In other words, an order of the Court of Wards for the release of any estate from superintendence is always subject to the control of the Local Government. that is the Local Government has the last word always in the matter, but that in cases to which Cls. (*b*) or (*d*) of sub-S (1) of S 8 applies the Court of Wards may not even pass a resolution for the release of the property without the sanction of the Local Government previously obtained. (*Yorke, J.*) HUZUR ARA BEGAM *v* DEPUTY COMMISSIONER, GONDA.

196 I.C. 787 = 1941 A W.R (C.C.) 274 = 1941 O L.R. 764 = 1941 O.W.N. 906 = 1941 O.A. 621 = A I.R. 1941 Oudh 529

——**S. 61 (2)**—Scope —Covenant by warranty of title in sale by Court of Wards—Liability of ward—Nature and extent. *See* 1940 Dig., Col 1197 MAN SINGH *v.* BABU LAL. **16 Luck 369 = 191 I.C. 448 = 13 R O 242 = A.I.R. 1941 Oudh 114.**

UNITED PROVINCES DEBT REDEMPTION ACT (XIII of 1940). S. 2 (9) and (17)—*Loan—Conditions necessary—Act when can apply*

An advance in order to be a loan' under S. 2 (9) of the U. P. Debt Redemption Act, must be one recoverable from an agriculturist and must also be an advance to an agriculturist. To claim the benefit of the Act, it must be shown that the advance was originally made to an agriculturist and it was recoverable from an agriculturist. (*Yorke, J.*) HUZUR ARA BEGAM *v* DEPUTY COMMISSIONER, GONDA.

196 I.C. 787 = 1941 A W.R (C.C.) 274 = 1941 O L.R. 764 = 1941 O.W.N. 906 = 1941 O.A. 621 = A I.R. 1941 Oudh 529

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turist. (*Ghulam Hasan and Agarwal, JJ.*) TAJAMMUL HUSAIN *v.* AMIRUDDIN. **1941 O A. 951 = 1941 A.W.R. (Rev.) 1078 = 1941 O.W.N. 1239.**

UNITED PROVINCES DISTRICT BOARDS ACT (X OF 1922), S. 109—*Local rate—Basis.*

S. 109 of the U. P. District Boards Act shows that the local rate is to be based not on the land revenue but on the annual value of the assets. (*Shirreff, S.M. and Sathe, J.M.*) GOKUL DASS *v.* HURULNISA BIBI. **1941 O.A. (Supp.) 606 = 1941 R.D. 687 = 1941 A.W.R. (Rev.) 666.**

——**S. 138 (4) and Penal Code (1860), S. 186**—*Attachment—Weighment of articles—Proper procedure—Obstruction to improper procedure—If an offence under S. 186, I. P. Code.*

It is the duty of the attaching officer to be as accurate as possible. Irreparable mischief might be done to the owner of the goods attached if only approximate weights are given. Therefore the attaching officer should weigh the goods and note the actual weight in the inventory. And where the attaching officer gives only the approximate weight and the owner insists that actual weight should be given and prevents the officer from removing the goods unless that is done, the owner is not guilty under S 186, Penal Code. (*Bajpai, J.*) MAHOMED SHAFI *v.* EMPEROR. **196 I.C. 477 = 42 Cr L.J. 877 = 1941 A.Cr C. 194 = 1941 A.L.J. 419 = 1941 A.W.R. (H C.) 250 = 1941 O.A. (Supp.) 680 = 1941 A.L W 830 = A.I.R. 1941 All. 344.**

UNITED PROVINCES ENCUMBERED ESTATES ACT (XXV OF 1934)—Appeal in proceedings under—Death of one of the opposing creditor respondents—Legal representative not added—Appeal, if abates *in toto*. *See* C. P. CODE, O. 22, R. 4 AND U. P. ENCUMBERED ESTATES ACT, S. 4. **1941 O.W.N. 418 (F.B.).**

——*Decree under, against debtor alone—Liability joint and several with another—Decree against other if barred in regular civil proceedings—Proper decree to be passed.*

The liabilities of an auctioneer and a seller to refund the deposit to the purchaser in respect of sale which had gone off owing to the default of the seller, are joint and several, though arising out of one transaction. Hence a decree obtained against the seller alone in respect of such a liability under the U. P Encumbered Estates Act is no bar to the purchaser obtaining a fresh decree in the regular proceedings against the auctioneer with regard to the deposit. There is no objection to the two decrees being granted subject to the condition that if any money is realised in execution of one decree, it will have to be credited in the other and the purchaser will not have any right to recover the amount twice over. (*Dar, J.*) KALKA PRASAD *v.* SARJU PRASAD. **1941 A.W.R. (H.C.) 365 = 1941 A.L.W. 1110.**

——*Liquidation proceedings—Scheme of—Payment to creditors—Procedure.*

In the scheme of liquidation envisaged by the Encumbered Estates Act all payments to the creditor have to be made by the Court and not by the debtor applicant direct. Hence an order directing such direct payment cannot be allowed to stand. (*Harper, S.M. and Sathe, J.M.*) SITA RAM *v.* SHEO RANI, **1941 R.D. 520 = 1941 O.A. (Supp.) 572 = 1941 A.W R. (Rev.) 615.**

——Orders under—If revisable under S. 115, C. P. Code. *See* C. P. CODE, S. 115—APPLICABILITY. **1941 O.A. 673.**

——*Proceedings under—Nature of.*

Encumbered Estates Act proceedings are insolvency proceedings without a receiver and there is a radical

difference between insolvency and Encumbered Estates Act proceedings on the one hand and ordinary suits on the other. (*Bennett and Madeley, JJ.*) LACHMI NARAIN *v.* MUSADDI LAL. **1941 O.W.N. 1195 = 1941 A.W.R. (Rev.) 1010 = 1941 O.A. 891.**

——*Rules—R. 6 and C. P. Code, S. 114—Power of review in a case under Encumbered Estates Act.*

Though old R. 6 of the Encumbered Estates Act Rules applied only to proceedings before the Special Judge, the new rule applies to all proceedings under the Encumbered Estates Act. The power of review cannot be said to be a matter of substantive law. The power of review given by S. 114, C. P. Code, is given to all Courts and consequently it is not a power for which a specific provision in the Act itself need be insisted upon when the whole of the C. P Code has been extended to proceedings under the Encumbered Estates Act by R. 6. Hence the Sub Divisional Officer is legally competent to review any of his own orders passed under the Encumbered Estates Act. (*Harper, S.M. and Sathe, J.M.*) SURAJ BALI *v.* RAM NANDAN RAI. **1940 R.D. 604 (2) = 1941 A.W.R. (Rev.) 96 = 1941 O.A. (Supp.) 84.**

——Who are entitled to benefits under the Act. *See* 1940 Dig., Col. 1198. BRAHMDEO PRASAD TEWARI *v.* MAKHAN TEWARI. **192 I.C. 746 = 13 R.A. 363 = 1941 O.A. (Supp.) 108 = A.I.R. 1941 All. 94.**

——**(as amended in 1939), Ss. 2 and 22**—*Scope and intention of—Concealment of initial mistake—If a ground for refusing amendment.*

The intention of the U. P. Encumbered Estates Amendment Act as contained in S. 2 and in S. 22 is that applicants should not be bound by an illegality in the matter of statements in the application and the incidental consequence of this is that they should not be penalized for trying to avoid what were then the consequences of that illegality. Hence though the applicants might have done everything in their power to conceal the initial mistake, an amendment when sought for should not be refused. (*Harper, S.M. and Sathe, J.M.*) FAQIR BAKSH SINGH *v.* HARKARAN SINGH. **1941 R.D. 256 = 1941 A.W.R. (Rev.) 351 = 1941 O.A. (Supp.) 265 = 1941 A.L.J. (Supp.) 74.**

——**Ss. 2 and 7**—*Suit for profits—Stay—Propriety.*

Per *Harper, S.M.*—In an ordinary suit for profits the liability is neither agreed nor decreed. It accordingly is not a debt within the terms of the Encumbered Estates Act and there should be no stay in such a case. (*Harper, S.M. and Sathe, J.M.*) NAVINCHANDRA *v.* RADHEY SHYAM. **1941 A.W.R. (Rev.) 376 = 1941 R.D. 340 = 1941 O.A. (Supp.) 336.**

——**Ss. 2 (a) and 7 (1) (b)**—*Claim for profits by one co-sharer against another—If a debt—Suit for such profits, if barred by S. 7 (1) (b).*

The profits claimed by a co-sharer from another co-sharer or from a lambardar are in the nature of unliquidated damages and are not an ascertained figure before the suit is disposed of. Consequently they do not fall within the definition of debt in S. 2 (*a*) of the Encumbered Estates Act and such a suit is not barred by S. 7 (1) (*b*) of the Act. (*Harper, S.M. and Sathe, J.M.*) MAKHAN SINGH *v.* KISHAN LAL. **1941 A.W.R. (Rev.) 177 = 1941 O.A. (Supp.) 121 = 1941 R.D. 254 = 1941 A.L.J. (Supp) 49.**

——**S. 2 (a)**—*Debt—Costs.*

Once costs have been declared and ascertained they constitute a debt. Whether a decree for costs has been obtained on the basis of a debt is a different question. (*Yorke and Bennett, JJ.*) HARI SARAN DAS *v.* HARI KISHAN DAS. **1941 O.W.N. 632 = 1941 O.A. 403 = 1941 R.D. 349 = 1941 A.L.W. 501 = 1941 A.W.R. (Rev.) 369 = A.I.R. 1941 Oudh) 299.**

——**S. 2 (g)**—*Landlord—Muafidar in possession paying profits and land revenue to grantor.*

Where according to the terms of a Muafi grant the grant is for the life of the grantee who will pay the profits and the local rates and the land revenue to the grantor, the grantee's possession is not that of a proprietor or an under-proprietor within the meaning of S. 2 (*g*) of the U. P. Encumbered Estates Act, but rather of a tenant on favourable rate of rent. (*Harper, S.M. and Shirreff, J.M.*) KULSUM BEGUM *v.* IBNE HASAN. **1941 A.W.R. (Rev.) 586 = 1941 O.A. (Supp.) 541 = 1941 R.D. 453 (2).**

——**S. 2 (j) Proviso (1)**—*Applicability—Settlement coming into force after application under S. 4 though revision started before the application.*

Where the settlement actually came into force only after the date of the application under S. 4 of the U. P. Encumbered Estates Act, though the proceedings for revision started before the date of the application S. 2 (*j*), proviso 1 of the Act does not apply to such application. (*Shirreff, J.M.*) SAHAI LAL *v.* KUNWAR PRATAP SINGH. **1941 O.A. (Supp.) 608 (2) = 1941 R.D. 673 = 1941 A.W.R. (Rev.) 668 (2).**

——**S. 4**—Applicant under—If saved from forfeiture of his bond under S. 514, Cr. P. Code. *See* CR. P. CODE, S. 514 AND U. P. ENCUMBERED ESTATES ACT, S. 4. **1941 O.W.N. 357 = 1941 A.W.R. (Rev.) 219.**

——**S. 4**—*Competency to apply under—Auction-purchaser subject to encumbrances.*

The whole scheme of the Act shows that the debts must be those of the landlord and not of any one else. If a vendee or auction-purchaser purchases a property subject to encumbrances, he knows full well at the time of the purchase what amount in cash he will have to pay to the mortgagees before he becomes the full owner of the property and so there is no reason why he should be allowed any of the benefits given by the Encumbered Estates Act. Such a purchaser is not entitled to apply under S. 4 in respect of the encumbrances. (*Harper, S.M. and Sathe, J.M.*) ABDUL QADIR *v.* RADHA MOHAN. **1941 O.A (Supp.) 202 = 1941 R.D. 249 = 1941 O.W.N. 500 = 1941 A.W.R. (Rev.) 253 = 1941 A.L.J. (Supp) 56.**

——**S. 4**—*Joint applications contemplated by—Mere existence of a single joint decree—If justifies joint application.*

S. 4 of the U. P. Encumbered Estates Act contemplates joint applications by (1) members of a joint Hindu family and (2) heirs of a deceased debtor. There might also be a joint application where all the debts of the applicants are joint though their properties may be separate. But the existence of one joint decree or debt cannot entitle persons holding different properties and owing other different debts of their own, to join in one application under S. 4 of the Act. (*Sathe, J.M.*) ABU BAKER *v.* SUBHANI MYIAN. **1941 R.D. 246 = 1941 O.W.N. 497 = 1941 O.A. (Supp.) 207 = 1941 A.W.R. (Rev.) 258.**

——**Ss. 4 (3) and 14 (4) (c)**—*Successive proceedings under Agriculturists' Relief Act or Encumbered Estates Act, if permissible—Decision under Agriculturists' Relief Act—If can be ignored by Special Judge—Private settlement of mortgage account—Special Judge, if can reopen accounts.*

The provisions of sub-S. (3) of S. 4 of the U. P. Encumbered Estates Act clearly contemplate the possibility of proceedings being taken by a landlord first under the Agriculturists' Relief Act and later under the Encumbered Estates Act. S. 14 (4) (*c*) of the Encum-

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bered Estates Act does not rule out of consideration a decree passed under the Agriculturists' Relief Act. The proper construction to be placed on that provision, is that the Special Judge, while disposing of a matter under the Encumbered Estates Act, shall not apply the provisions of the Agriculturists' Relief Act, and not that he shall ignore a decision already arrived at under that Act. The fact that parties have come to an arrangement out of Court on the basis of the provisions of the Agriculturists' Relief Act cannot affect the legal position. Where the parties have somehow arrived at a settlement of their mortgage account, executed a receipt and made an endorsement respectively in accordance therewith, if the transaction so evidenced is valid and legally proved, it is not open to the Special Judge under the Encumbered Estates Act to reopen the question of the mortgagor's liability under the mortgage, ignoring the receipt and the endorsement. (*Bennett and Ghulam Hasan, JJ.*) MAHOMED HUSAIN *v.* BABU DIN.

16 Luck 538 = 192 I.C. 434 = 13 R O. 362 = 1940 R.D. 616 = 1941 A.W.R. (Rev.) 8 = 1941 O L.R 152 = 1940 O.A 1231 = 1940 O.W.N. 1293 = A.I.R. 1941 Oudh 193.

——**S. 4 (5) (as amended by Act XI of 1939)**—*Defective application under S. 4—Cancellation of order under S. 6, after publication under Ss. 9 and 11—Subsequent amendment of Act—Defective application amended—Fresh publication—Necessity.*

Where an order under S. 6 of the Encumbered Estates Act passed on a defective application under S. 4 is cancelled after publication of notices under Ss. 9 and 11 of the Act and the Act is subsequently amended and the defect in the application is corrected and amended, it is necessary that fresh notices under Ss. 9 and 11 should be published. (*Thomas, C.J. and Agarwal, J.*) RAGHURAJ SINGH *v.* HARI KISHEN DAS.

192 I.C. 708 = 13 R O. 401 = 1941 O.W.N 113 = 1941 O.L.R. 215 = 1941 A.L.W. 97 = 1941 A.W.R. (Rev.) 73 = 1941 O.A. 28 = A.I.R. 1941 Oudh 225.

——**S. 6**—*Order under, passed on a holiday—If a nullity.*

If the order under S. 6 of the U. P. Encumbered Estates Act is passed on a local holiday, it is not on that account a nullity. (*Bennett and Ghulam Hasan, JJ.*) KAILASH KUNWAR *v.* RAGHUBAR DAYAL.

196 I C. 694 = 1941 O.L.R. 742 = 1941 O.W.N. 1109 = 1941 A.W.R. (Rev.) 875 = 1941 R.D. 859 = 1941 O.A. 801.

——**S. 7**—Applicability — Proceedings after a final decree for foreclosure, if can be stayed. *See* 1940 Dig., Col. 1200. MURLI DHAR *v.* GIRJA KUER.

16 Luck. 70

——**S. 7**—*Applicability—Suits both by creditor and debtor.*

S. 7, Encumbered Estates Act bars suits relating to debts incurred prior to the passing of an order under S. 6 of the Act, whether they be suits by the creditors or suits instituted by debtor applicant. (*Yorke and Ghulam Hasan, JJ.*) JAI SHANKAR *v.* MAQBUL UR-RAHMAN.

16 Luck 533 = 192 I C. 264 = 13 R.O. 336 = 1941 O L R. 98 = 1941 A.W.R (Rev.) 54 = 1940 O.W N 1223 = 1940 O.A. 1204 = 1940 R.D 598 = A.I R. 1941 Oudh. 119.

——**Ss. 7 and 13**—*Pecuniary liability in respect of costs—When arises—Order for costs after Collector's order under S. 6—Claim in respect of, if barred by Ss. 7 and 13.*

In the case of costs of a suit, the liability is not incurred until the suit is decided and orders passed about costs. Where prior to an appeal to the Privy Council, by the appellant, the other party files an application under S. 4, Encumbered Estates Act and orders are passed under S. 6 and thereafter the Privy Council allows the appeal with costs, an application for restitution in respect of costs already paid to the other party is not barred by Ss. 7 and 13 of the Encumbered Estates Act inasmuch as the debt or pecuniary liability for costs incurred by the other party was incurred only after the order under S. 6 had been passed (*i.e.*) when the order for costs was passed by the Privy Council. (*Bennett and Ghulam Hasan, JJ.*) MAHOMED SADIQ ALI KHAN *v.* FAKHR JAHAN BEGAM.

16 Luck. 591 = 192 I.C. 272 = 13 R.O. 346 = 1941 O.W.N. 126 = 1941 O.L R. 102 = 1941 R.D. 82 = 1941 A.W.R. (Rev.) 70 = 1941 O.A. 25 = A I.R. 1941 Oudh 297.

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——**Ss. 7 and 35**—*Pendency of proceedings under the Act—Auction sale of debtor's property—Validity—Rights of auction purchaser against debtor.*

An auction sale of the debtor's property during the pendency of proceedings under the Encumbered Estates Act is null and void. The purchaser has no legal title to retain it and cannot object to its possession being transferred to the debtor under S. 35 of the Act. (*Sathe, A.M.*) BABU RAM *v.* RAM LAL.

1941 A.W.R. (Rev.) 1083 (2) = 1941 O.A. (Supp) 871 (2) = 941 R.D. 1122.

——**S. 7**—*Proceedings referred to in—Mere pronouncement of judgment, if included in.*

The mere pronouncement of judgment is included in the proceedings referred to in S. 7 of the U. P. Encumbered Estates Act. (*Bennett and Ghulam Hasan, JJ.*) KAILASH KUNWAR *v.* RAGHUBAR DAYAL.

196 I.C. 694 = 1941 O L R. 742 = 1941 O.W.N. 1109 = 1941 A.W.R (Rev.) 875 = 1941 R.D. 859 = 1941 O.A. 801.

——**S. 7**—*Proceeding—Suit under S. 33 of the Agriculturists' Relief Act, if a proceeding within the meaning of S. 7.*

A suit by an agriculturist debtor under S. 33 of the U. P. Agriculturists' Relief Act for an account of money lent to him is a proceeding within the meaning of S. 7 of the U. P. Encumbered Estates Act. (*Bennett and Ghulam Hasan, JJ.*) KAILASH KUNWAR *v.* RAGHUBAR DAYAL.

196 I.C. 694 = 1941 O.L.R. 742 = 1941 O.W N. 1109 = 1941 A.W.R. (Rev.) 875 = 1941 R.D. 859 = 1941 O.A. 801.

——**S. 7**—*Sanction for sale under—One of the parties, if can resile from agreement for sale.*

No property of the debtor can be transferred without the sanction of the Collector and until such sanction is given there cannot possibly be a binding contract between the debtor and a creditor or his agent which can create rights and liabilities between them. Hence it is open to a creditor to repudiate an agreement for sale between his mukhtaram and the debtor, before the Court given sanction. (*Sathe, A.M.*) LALTA PRASAD *v.* DHARAM DASS.

1941 R.D 824 = 1941 O.A. (Supp.) 753 = 1941 A.W.R. (Rev.) 852.

——**S. 7 (b)**—Strict construction—Application under the Encumbered Estates Act during pendency of partition proceedings in Civil Court—Proceedings in trial Court in pursuance of order of remand by District Judge—If barred by S. 7 (*b*). *See* 1940 Dig., Col. 1203. RAMMAN LAL *v.* BABU RAM.

I.L.R. 1941 All. 132 = 13 R.A. 373 = 1941 O.A. (Supp.) 109 = 192 I.C. 883 = A.I.R. 1941 All. 50.

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——**S. 7 (1) (a)**—Applicability—Debtor purchasing property *pendente lite*—If can ask for stay of execution against such property *See* 1940 Dig., Col. 1201. INAYAT BEG *v.* ABDUL RAHMAN BEG.

I.L.R. (1941) All. 149 = 194 I.C 69 = 13 R.A. 470 = 1940 A.L.J. 902 = A.I.R 1941 All. 39.

——**S. 7 (1) (a)**—Applicability—Proceedings both by debtor and creditor. *See* 1940 Dig., Col. 1202. DILDAR HUSAIN *v.* BABOOLAL. **16 Luck 287 = 191 I.C. 415 = 13 R O. 241 = A.I R. 1941 Oudh 80.**

——**S. 7 (1) (a)**—*Proceedings referred to in—If includes proceedings pending at the instance of the landlord.*

The proceedings referred to in S. 7 (1) (*a*) of the U. P. Encumbered Estates Act include proceedings pending at the instance of the landlord. (*Bennett and Ghulam Hasan, JJ.*) KAILASH KUNWAR *v* RAGHUBAR DAYAL. **196 I.C 694 = 1941 O.L.R. 742 = 1941 O.W.N. 1109 = 1941 A.W R (Rev.) 875 = 1941 R.D. 859 = 1941 O A 801.**

——**S. 7 (1) (b)**—*Bar of suit under—Suit for profits.*

S. 7 of the U. P. Encumbered Estates Act applies only to debts and so it cannot bar a suit for profits which is neither a debt nor a liability for liquidated damages until the suit for profits is decreed. (*Harper, S.M. and Sathe, J.M.*) PYARE LAL *v.* DHARAM PAL. **1941 R.D. 338 (1) = 1941 A W.R. (Rev.) 423 = 1941 O.W.N. 672 = 1941 O.A. (Supp.) 360.**

——**S. 7 (1) (b) (2) and (3) and Civil Procedure Code (1908), S. 144**—*Proceedings on application for restitution—Nature of—Provisions of U. P. Encumbered Estates Act applicable.*

Proceedings on an application under S. 144, C P. Code, are not proceedings in execution to which the provisions of sub Ss. (2) and (3) of S. 7 of the Encumbered Estates Act would be applicable, but rather proceedings to which the provisions of Cl. (*b*) of sub-S. (1) must be applied. (*Bennett and Ghulam Hasan, JJ.*) MAHOMED SADIQ ALI KHAN *v.* FAKHR JAHAN BEGAM. **16 Luck 591 = 192 I.C. 272 = 13 R.O. 346 = 1941 O.W.N 126 = 1941 O.L.R. 102 = 1941 R.D. 82 = 1941 A.W.R. (Rev.) 70 = 1941 O.A. 25 = A.I.R. 1941 Oudh 297.**

——**S. 7 (1) (b) (2) and (3)**—*Relative scope of.*

Different considerations apply in cases falling under Cl. (*b*), sub-S. (1) of S. 7 of the Encumbered Estates Act from cases to which sub Ss. (2) and (3) are applicable. Cl. (*b*) of sub-S. (1) refers only to proceedings for the recovery of debts incurred before the passing of the order under S. 6; sub Ss. (2) and (3) bar the execution of decrees obtained on the basis of private debts incurred after the passing of the order. (*Yorke and Bennett JJ.*) HARI SARAN DAS *v* HARI KISHAN DAS. **1941 O.A. 403 = 1941 O.W N 632 = 1941 A.W R (Rev) 369 = 1941 R.D. 349 = 1941 A L.W. 501 = A.I R. 1941 Oudh 299.**

——**S 7 (1) (b)**—*Scope and applicability—Processes for ejectment for arrears of rent, if entertainable subsequent to order under S. 6.*

S. 7 (1) (*b*) of the U. P. Encumbered Estates Act does allow processes for ejectment for arrears of rent to be undertaken in certain circumstances after an order has been passed under S. 6 of the Encumbered Estates Act.

Per *Harper, S.M.*—Such processes can be taken out only in cases where the debtor applicant has a tenant's interest in the property from which ejectment is sought, and has no proprietary interest left in it whatsoever.

Per *Sathe, J M.*—It cannot be held that although sub-S. (*b*) of S. 7 (1) permits process for ejectment to be taken out for arrears of rent, it does so only where the debtor applicant possesses no other interest in the property than that of a tenant. Though such a restriction is desirable, the language is clear and does not permit this restriction being read into it. (*Harper, S. M. and Sathe, J.M.*) SURJI *v.* LAKHOO. **1941 A W.R. (Rev.) 1 = 1941 O.A. (Supp.) 8 = 1941 O W N. 98 = 1941 R.D. 67.**

——**S. 7 (1) (b)**—Suit for profits by one co-sharer against another—If barred. *See* U. P. ENCUMBERED ESTATES ACT, SS. 2 (*a*) AND 7 (1) (*b*). **1941 A.W.R. (Rev.) 177 = 1941 R.D. 254.**

——**S. 7 (2)**—*Order staying execution proceedings—Appealability.*

Where an order staying execution proceedings is passed in spite of the decree-holder's objection that S. 7 (2) of the U. P. Encumbered Estates Act was inapplicable, it is appealable to District Judge. (*Ismail J.*) RAMKISHORE *v.* YASHPAL KUNWAR. **94 I.C. 568 = 14 R.A. 1 = 1941 A.L J. 258 = 1941 O A. (Supp.) 311 = 1941 R D. 310 = 1941 O W.N. 599 = 1941 A W.R. (H.C) 146 = 1941 A.L.W. 427 = 1941 A.W R. (Rev.) 336 = A.I.R 1941 All. 224.**

——**S. 7 (2)**—*Sanction for private sale—Considerations before the Court.*

A sale by private negotiations between a creditor and the debtor applicant is not one of the recognized modes of liquidation under the Act. It is an abnormal procedure which can be sanctioned under S 7 (2), Encumbered Estates Act, only if it can be shown that it is in the interests of all parties concerned. Where the lower Court has found that a particular proposal is not in the interests of the debtor himself, it will not be interfered with in appeal. (*Sathe, A M.*) IMTIAZ HUSAIN *v.* HAR PRASAD. **1941 O.A. (Supp.) 783 = 1941 A.W.R. (Rev.) 909 = 1941 R.D. 919.**

——**S. 7 (3)**—*Encumbered Estates Act Rules—R. 84—Leave to create charge—Objection by creditor—Duty of Court.*

According to R. 84 of the Encumbered Estates Act Rules there can be no sanction in the case of a transfer which would prejudice the interest of the creditors collectively or individually. Where a creditor objects it should be presumed to be against his interests and sanction should not be granted. (*Harper, S.M. and Sathe, A M.*) KAZIM HUSAIN *v* HASAN ALI. **1941 R.D. 875 (2) = 1941 A.W.R. (Rev.) 1016 (1) = 1941 O A. (Supp.) 844 (2).**

——**S. 7 (3)**—*Permission to sell—Money necessary to make more property available to debtors—If a good ground.*

Where a debtor applies for permission to sell a part of his property, in order to utilise the amount for purposes of litigation which would result in making more property available for liquidation purposes, it is to the interests of the creditors and is reasonable and hence the permission could be granted. (*Harper, S.M. and Sathe, J.M.*) RAM PHERAN *v* BADRI PRASAD. **1941 R.D. 427 = 1941 A.W.R. (Rev.) 480 = 1941 O A. (Supp.) 439 (1).**

——**S 7 (3)**—*Scope of—Decree for costs subsequent to order under S 6—S. 7 (3), if applies.*

A decree-holder must wait where execution is barred by S. 7 (3) of the Encumbered Estates Act, but the section cannot mean that execution of all decrees is barred pending the proceedings under the Encumbered Estates Act. A decree for costs obtained after the passing of an order under S. 6 of the Encumbered Estates Act is

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not one obtained on the basis of a private debt and S. 7 (3) would not apply to it.

Per *Bennett, J.*—It was not intended by S. 7 (3) to alow execution through the medium of a receiver in the lase of a decree obtained on the basis of a private debt incurred after the passing of an order under S. 6 (*Yorke and Bennett, JJ.*) HARI SARAN DAS *v.* HAR KISHAN DAS. **16 Luck 566 = 192 I.C. 300 = 13 R.O. 343 = 1941 O W N. 103 = 941 R.D. 72 = 1941 O.L.R. 105 = 1941 A.W.R. (Rev.) 67 = 1941 O.A. 22 = A.I.R. 1941 Oudh 242.**

——**S. 7 (4)**—*Scope of relief that could be given under—Declaration as to a lease being void—If could be given.*

S. 7 (4) of the U. P. Encumbered Estates Act states that any transfer in contravention of the provisions of the Act is void. No further declaration on the subject can be given by the Collector. A mere declaration under Encumbered Estates Act by the Collector is not provided for by any of the provisions in the Act. (*Shirreff, J.M. and Sathe, A.M.*) UMA PRASAD *v.* ROOP NARAIN MISRA. **1941 A.W.R. (Rev.) 1085 (2) = 1941 O.A. (Supp.) 875 (2) = 1941 R.D. 1114.**

——**Ss. 8 and 20-A**—*Dismissal for default—Power to restore—Application for restoration and amendment—Collector, if competent to dispose of.*

Applications dismissed in default under S. 8 are not liable to be restored under S. 20-A of the amended Encumbered Estates Act where an application contains two prayers one for restoration and another for amendment, though the first request is not within the competence of the Collector, the second is, and so the Collector is competent to dispose of such application. (*Sathe, J.M.*) RAMJI KHAGI *v.* RAM PADARATH KHAGI. **1941 A.W.R. (Rev.) 794 = 1941 O.A. (Supp.) 705 = 1941 R.D. 717.**

——**Ss. 9 and 10**—Benamidar, position and rights of—Death, after filing of written statement—Application for substitution by heirs of beneficial owner—Nature of—Limitation. *See* 1940 Dig., Col. 1203 RAJ NARAIN *v.* AHMADI JAN. **192 I C. 737 = 13 R.A. 364 = 1941 O.A. (Supp.) 101 = A.I R. 1941 All. 81.**

——**Ss. 9 and 13 and Court-Fees Act, Sch. II, Art. 2**—*Rejection of time barred written statement—Appeal—Court-fee payable.*

Where a written statement is rejected by a Special Judge as time barred, the aggrieved creditor is entitled to appeal on payment of court-fee payable under Art. 2, Sch. II, Court-Fees Act. Until such order is declared to be a decree by the Act itself, higher court-fee need not be paid. (*Ismail, J.*) GANGA KUER *v.* SUKHJIT SINGH. **I.L.R. (1941) All. 323 = 193 I.C 867 = 13 R A. 461 = 1941 R D. 80 = 1941 A.W.R. (Rev.) 171 = 1941 A.L.W. 92 = 1941 A.W.R. (H.C.) 59 = 1941 O.A. (Supp.) 99 = 1941 A.L J. 109 = A.I.R. 1941 All. 163.**

——**S. 9 (c)**—*Receiver—Appointment—Grounds—Transaction likely to deteriorate capital value of property—Creditor's security not imperilled—Appointment, if justified.*

Though a transaction does detract from the capital value of the property, the question to be considered when an appointment of a receiver is sought is, whether the circumstances of the case are such that it detracts to such an extent as to justify the taking of the property out of the hands of the debtor. Where the difference between the debts and the total valuation is very great and the transaction is not such as in any way to imperil the creditor's security, it does not afford sufficient justification for the transfer of the whole of the debtor's property to a receiver. (*Harper, S.M. and Sathe, J.M.*)

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LACHMI NARAIN *v.* GAURI SHANKER. **1941 O.A. (Supp. 347 (1) = 1941 A.W.R. (Rev.) 389 = 1941 O W.N. 601 = 1941 R.D. 287.**

——**S. 9 (1) (3)**—Scope of—Filing of written statement before the starting point of limitation—If not filed within limitation. *See* 1940 Dig., Col. 1204. RAMESHWAR BAKSH SINGH *v.* GOVIND PRASAD. **16 Luck. 153 = A.I.R. 1941 Oudh 60.**

——**S. 9 (5)**—Applicability—Joint and several debts. *See* 1940 Dig., Col. 1204. MAHOMED IHTISHAM ALI *v.* LACHMAN PRASAD. **15 Luck. 641.**

——**S. 9 (5) (a)**—*Apportionment of liability—Powers of Court—Debt or decree imposing joint and several liability—Joint debt—Meaning.*

In a case where the debt or the decree imposes a joint liability against several persons one or more of whom apply for proceedings under S. 4 of the U. P. Encumbered Estates Act and others do not. S. 9 (5) (*a*) of the Act enjoins that the liability of those debtors who had applied under S. 4 shall be determined and the liability of the joint debt will be apportioned separately against the debtors who had applied and against those who had not applied under S. 4 of the Act. This power given under S. 9 (5) (*a*) of the Act applies not only to cases where the liability is joint. but also to cases where the decree or debt imposes a joint liability as well as several liability upon the debtors, because the words 'joint debt' in Cl. (5) (*a*) of S. 9 include debts which are both joint and several. (*Iqbal Ahmad, C.J., Yorke and Das, JJ.*) PUNJAB NATIONAL BANK, LTD. *v.* VISHWA NATH KHANNA. **196 I.C. 716 = 1941 A.L.W. 942 = 1941 R D. 909 = 1941 A.W.R. (Rev.) 987 = 1941 O.A. (Supp.) 831 = 1941 A.L J. 549 = A.I.R. 1941 All. 363 (F.B.).**

—— **S. 9 (5) (a)**—Scope of — Addition of joint debtors, if contemplated. *See* 1940 Dig., Col. 1206. DWARKA NATH SINGH *v.* RAJ RANI. **16 Luck. 110.**

——**S. 9-A**—*Maintenance—Money decree—Separate liquidation—Competency.*

S. 9-A of the U. P. Encumbered Estates Act prescribes a special procedure to be followed in respect of maintenance decrees. Where the Special Judge has passed a simple money decree for arrears of maintenance, it can be liquidated separately from other decrees under S. 9-A. (*Sathe, J.M.*) ABDUL AZIZ KHAN *v.* NUR JAHAN BIBI. **1941 A.W.R. (Rev.) 273 = 1941 O.A. (Supp.) 222 = 1941 R.D. 109.**

——**S. 9-A**—Receiver—Application for appointment by maintenance holder—Time for payment—Necessity. *See* 1940 Dig., Col. 1206. ANIS JEHAN BEGUM *v.* SHAFI AHMAD KHAN. **1941 A.W.R. (Rev.) 56 = 1941 O.A. (Supp.) 43.**

——**S. 9-A**—Receiver—Appointment without an application therefor—Propriety—Consent of parties—Sufficiency. *See* 1940 Dig., Col. 1207. IFTIKHAR AHMAD KHAN *v.* SHAMSHAD ALI KHAN. **1941 A.W.R. (Rev) 63 (2) = 1941 O A. (Supp.) 50 (2).**

——**S. 9-A**—*Scope of.*

S. 9-A of the U. P. Encumbered Estates Act makes provision for satisfaction of a claim for future maintenance and though the application is only for arrears, a receiver could be appointed. (*Shirreff, J.M.*) MAHOMED ASHRAF ALI KHAN *v.* KUBRA BEGAM. **1941 A.W.R. (Rev.) 595 (1) = 1941 R.D 519 = 1941 O.A. (Supp.) 549 (1).**

——**S. 9-A (1)**—*Scope of—Liquidation of claim for maintenance—Receiver.*

S. 9-A (1) of the U. P. Encumbered Estates Act permits action to be taken for liquidation of a claim for

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maintenance which falls due after the issue of notices under S. 9, provided the claim is based on a decree passed before that date. Appointment of a receiver for this purpose, which is only a mode of execution, can be made, if the application for it is made within the time limited for the recovery of the amount due under the decree. (*Harper, S.M.*) JAGANNATH PRASAD *v.* DURGA KUNWAR. **1941 A.W.R. (Rev.) 805 (1)= 1941 O.A. (Supp.) 716 (1)=1941 R.D. 759 (1).**

——**S. 9-A (1) (i)**—*Liquidation of maintenance claim for period subsequent to issue of notice under S. 9—Competency.*

S. 9-A (1) (*i*) of the U. P. Encumbered Estates Act permits action to be taken for the liquidation of a claim for maintenance which falls due after the issue of notices under S. 9, provided the claim is based on a decree passed before that date. (*Sathe, J.M.*) ABDUL AZIZ KHAN *v.* NUR JAHAN BIBI.

1941 A.W.R. (Rev.) 273=1941 O.A. (Supp.) 222= 1941 R.D. 109.

——**Ss. 9-C and 9-D**—*Receiver—Appointment—Respective grounds.*

To justify the appointment of a receiver under S. 9-C, evidence of mismanagement is necessary. Where there is no marked disparity between the valuation and the debts as to indicate that the creditor's interests are jeopardized, there is no ground for the appointment of a receiver under S. 9 D (*Harper, S.M. and Sathe, J.M.*) ZAHIRUDDIN *v.* CHHEDA LAL. **1941 R D. 322= 1941 O.W.N. 675 (1)=1941 A.W.R. (Rev.) 450= 1941 O.A. (Supp.) 382.**

——**S. 9-D**—*Condition as to security in case of debtor receiver—Propriety.*

It is both unnecessary as well as unreasonable to demand security when one of the debtor applicants is appointed a receiver; for, the whole of his property is already under the possession of the Court and can serve as security (*Harper, S.M. and Sathe, J.M.*) GHULAM HUSAIN *v.* LACHMAN PRASAD. **1941 O.W.N. 699= 1941 R.D. 383 (1)=1941 A.W.R. (Rev.) 468= 1941 O.A. (Supp.) 427.**

——**S. 9-D**—*Debtor as receiver—Order directing him to furnish security—Propriety.*

As long as the proceedings under the U. P. Encumbered Estates Act are not finished the debtor applicant is incapable himself of giving any security either personal or in property. Hence, where the debtor applicant himself is appointed receiver, it is unnecessary to insist on his giving security, for the whole of his property is already under the control of the Collecter for the purpose of liquidation. (*Harper, S.M and Sathe, J.M.*) RAJ KISHORE DUBE *v.* HARBANS PRASAD DUBE.

1941 O.W.N 257=1941 R.D. 87= 1941 A.W.R. (Rev.) 268=1941 O.A. (Supp.) 217.

——**S. 9-D**—*Debtor receiver—Right to collection charges—Disentitling circumstances.*

Collection charges can be allowed even when the debtor is the receiver. But where he has been in possession for over a year before he was appointed the receiver and has enjoyed all the profits which would not be available for liquidation of debts, there is no need in such a case to allow the receiver any remuneration. (*Shirreff, J.M.*) ANRUDH SINGH *v.* SURAJ BUX SINGH.

1941 A.W.R. (Rev.) 1051=1941 O.A. (Supp.) 860.

——**S. 9-D**—*Permission of Court to incur expenses—Proper order to make.*

Where an order appointing a receiver directs him to take the permission of the Court to incur expenses, it will be inconvenient both to the Court and the receiver. Certain expenses like collection charges have to be incurred. The usual procedure in such cases is to fix a

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certain percentage on the collections for collection charges; and ordinarily this percentage is 10 per cent. (*Harper, S.M. and Sathe, J.M.*) GULAM HUSAIN *v.* LACHMAN PRASAD. **1941 O.W.N. 699= 1941 R.D. 383 (1)=1941 A.W.R. (Rev.) 468= 1941 O.A. (Supp.) 427.**

——**S. 9-D**—*Receiver—Appointment — Discretion—Exercise of.*

Under S. 9-D of the U. P. Encumbered Estates Act the Assistant Collector dealing with a case has full discretion no doubt, but it must be exercised judicially. A short assertion that an appointment will be in the best interests of the debtor cannot take the place of a reasoned argument justifying such an order. Where there is neither evidence of disparity between the value of the property and the debts nor evidence of likelihood of misuse, an order for appointment of receiver cannot be supported. (*Shirreff, S.M. and Sathe, J.M.*) SUMESARI PRASAD *v.* BANARSI RAM. **1941 R.D. 756= 1941 A.W.R. (Rev.) 801=1941 O.A. (Supp.) 712= 1941 O.W.N. 1012.**

——**S. 9-D**—*Receiver—Appointment for the whole of debtor's property—Validity.*

An order for the appointment of a receiver not only for the property the possession of which was transferred under S. 35 of the Encumbered Estates Act, but of the whole property belonging to the debtor applicant cannot be passed under S. 9-D of the Act. (*Harper, S.M. and Sathe, J.M.*) MAHABIR PRASAD *v.* RAM CHARAN.

1940 O W N. 1231=1940 R.D. 581= 1941 A.W.R. (Rev.) 80 (1)= 1941 A.L.J. (Supp.) 23=1941 O.A. (Supp.) 57.

——**S. 9-D**—*Receiver — Appointment—Grounds—Debtor failing to pay debt out of profits—Security sufficient.*

Where the debtor is in possession of property and in receipt of profits and does not pay anything towards the debts, a case would exist for the appointment of a receiver if the debt were not adequately secured. Where the debt is secured and liquidation proceedings well started, there is no necessity for the appointment of a receiver. (*Harper, S.M.*) RAM DOOLARI *v.* SHEO PRASAD SINGH. **1941 R.D. 269=1941 O.W.N. 553= 1941 A L.J. (Supp.) 61=1941 O.A. (Supp.) 342.**

——**S. 9-D**—*Receiver—Appointment — Grounds—Debtor's property not saleable under Redemption Act.*

Where the property is not saleable under the Debt Redemption Act, it cannot on that ground be said that it should not also be subject to the appointment of a receiver. On the other hand, it is all the more important in such a case that its management should be good so as to produce the assets liable for liquidation. Further in such a case as the creditor is deprived of his main security for his debt very much less evidence is required to justify his claim to the appointment of a receiver. (*Harper, S.M.*) RAM NATH *v.* MAHESH PRASAD.

1941 R.D. 324 (1)=1941 O.W N. 673= 1941 A.W.R. (Rev.) 444= 1941 O.A. (Supp.) 365 (1).

——**S. 9 D**—*Receiver—Appointment — Grounds—Debts exceeding valuation.*

The fact that the valuation of the property is less than the debts, though a ground for appointment of a receiver, is not by itself sufficient when the debtor objects to the appointment. (*Harper, S.M. and Shirreff, J.M.*) SHEODARSHAN SINGH *v.* BRIJRAJ KUER. **1941 O.A (Supp.) 805= 1941 A.W.R. (Rev.) 931.**

——**S. 9-D** — *Receiver—Appointment — Grounds—Valuation exceeding debt—Property not saleable under Debt Redemption Act.*

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Where though the valuation of the property exceeds the debt the creditor is likely to lose his security by reason of the Debt Redemption Act which renders certain property unsaleable, a receiver should be appointed, if asked for. But in such a case the debtor should be the receiver. (*Harper, S.M. and Sathe, J.M.*) GAYA PRASAD *v.* SURAJ BUX SINGH.

1941 R.D. 296 (1)=1941 O.A. (Supp.) 242=1941 O.W.N. 595 (1)=1941 A.W.R. (Rev.) 335=1941 A.L.J. (Supp.) 64.

——S. 9-D—*Receiver appointed under—Property affected.*

Where a receiver is appointed under S. 9-D of the U. P. Encumbered Estates Act, the order can only apply to or affect property the possession of which is transferred under S. 35 of the Act. (*Harper, S.M. and Sathe, J.M.*) FIDA HUSAIN *v.* BALA DIN.

1941 O.W.N. 695=1941 R.D. 377=1941 A.W.R. (Rev.) 499=1941 O.A. (Supp.) 458.

——S. 9-D—*Receiver — Appointment under—Circumstances—For what property.*

Where the valuation of the property is very much less than the amount of the debts and there is no disagreement between the two sets of debtors nor is there any allegation of mismanagement or evidence of it, an order appointing a receiver in such a case must be regarded as an order under S. 9 D of the U. P. Encumbered Estates Act and not under S. 9-C. In such a case a receiver is only to be appointed for property possession of which has been or might be delivered under S. 35. (*Harper, S.M. and Shirreff, J.M.*) GAYA BUX SINGH *v.* LAKSHMI NARAIN.

1941 R D. 734=1941 O.A. (Supp.) 714=1941 A.W.R. (Rev.) 803=1941 O.W.N. 1008.

——S. 9-D—*Receiver — Circumstances for and against appointment of.*

Per *Harper, S.M.*—The discretion given to the Collector under S. 9-D of the U. P. Encumbered Estates Act is general. It is not necessary for the creditor to show, as in S. 9-C that the debtor is causing the property to deteriorate so as to affect its value in liquidation.

Per *Sathe, J.M.*—Where the ability of the debtor's estate to satisfy all the debts is undoubted and the creditor's money is not in jeopardy, it is not necessary to appoint a receiver, and particularly when the application is made in respect of only a small portion of the property. (*Harper, S.M. and Sathe, J.M.*) RAMESHWAR SARAN *v.* MOHAMMAD TASLIM HUSSAIN.

1941 A.L.J. (Supp.) 30=1941 A.W.R. (Rev.) 263=1941 O.A. (Supp.) 212=1941 O.W.N. 97=1941 R.D. 65.

——S. 9-D—*Receiver—Debtor, when to be appointed.*

Even when there are no other relevant facts, if a creditor applies for the appointment of a receiver, the application should be granted, but in such a case the receiver should be the debtor himself, unless there are good reasons to the contrary. (*Harper, S.M. and Shirreff, J.M.*) RAMESHWAR BUX SINGH *v.* RIDH KUER.

1941 O.A. (Supp.) 808 (1)=1941 A.W R. (Rev.) 934 (1).

——S. 9-D—*Receiver—Grounds—Debts exceeding value of security—If a good ground when debtor objects.*

Where the valuation of the debtor's property is substantially less than the debts, it is a ground for the appointment of a receiver but by itself it is not sufficient where the debtor objects to such appointment. (*Harper, S.M.*) JOTI PRASAD *v.* DEBI SINGH.

1941 A.W.R. (Rev.) 451=1941 O.A (Supp.) 383=1941 R.D. 516 (2).

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——S. 9-D—*Receiver—Grounds—Debt in excess of value—Debtor, good manager—Creditor if can be appointed.*

The fact that the debt is much in excess of the value, is not by itself a reason for the appointment of a receiver. Where during the time the debtor was in possession, he has shown himself to be a good manager it is he that should be appointed receiver and not the creditor, if at all a receiver is to be appointed. (*Harper, S.M. and Shirreff, J.M.*) SURAJ BUX SINGH *v.* RAJ SURAJ BUX SINGH.

1941 A.W.R. (Rev.) 580=1941 O.A. (Supp.) 538=1941 R.D. 662 (1).

——S. 9-D—*Receiver—Grounds—Delivery conditional on deposit of interest—Default.*

Where delivery of possession to the judgment-debtor under S. 35 of the U. P. Encumbered Estates Act is made conditional on his depositing the interest, but the judgment-debtor declines to so deposit the interest, that is not a valid reason for appointing a receiver. (*Harper, S.M. and Shirreff, J.M.*) INAYAT HUSAIN *v.* RAFIQUNNISA.

1941 R.D. 521 (1)=1941 O.A. (Supp.) 489=1941 A.W.R. (Rev.) 558=1941 O.W.N. 846.

——S. 9 D—*Receiver—Grounds for appointment—Debtor's incapacity to manage—Presumption as to, drawn from mere existence of debt—If justified.*

From the mere fact that a debtor allowed himself to be submerged in debt, it cannot be presumed that he is incapable of managing his property and that hence a receiver should be appointed. If that were so a receiver would have to be appointed in every case under Act. There should be something more tangible than this before a receiver could be appointed. (*Harper, S.M. and Sathe, J. M.*) MAHABIR PRASAD *v.* RAM CHARAN.

1941 A W.R. (Rev.) 80 (1)=1940 O.W.N. 1231=1940 R.D. 581=1941 O.A. (Supp.) 57=1941 A.L.J. (Supp.) 23.

——S. 9 D—*Receiver—Grounds for appointment—Failure to provide for deposit of interest prior to starting of liquidation proceedings.*

Where liquidation proceedings have not yet started, and the debtor applicant is not called upon to pay any thing towards liquidation, the fact that the debtor has made no arrangement for the deposit of interest, is no ground for the appointment of a receiver. Where the area is small it would be most inadvisable to appoint a receiver for it. (*Harper, S.M. and Sathe, J.M.*) BITTAN KUAR *v.* SATROHAN SINGH.

1941 A.W.R. (Rev.) 79=1941 O.A. (Supp.) 56=1940 O.W.N. 1230=1940 R D. 579=1941 A.L.J. (Supp.) 27.

——S. 9-D—*Receiver—Grounds for appointment—Slight difference between valuation and debt.*

Where there is only little difference between the valuation and the debt, if the debtor opposes the appointment of a receiver, it is incumbent on the creditor to prove something more than mere difference between valuation and debt in order to justify the appointment of a receiver. (*Harper, S.M.*) MATHURA PRASAD *v.* JADUNATH SINGH.

1941 A.W.R. (Rev.) 344 (1)=1941 O.A. (Supp) 258 (1)=1941 R.D. 161.

——S. 9-D—*Receiver — Grounds for refusal to appoint.*

Where the valuation of the property of the debtor is less than the total debt and the appointment of a receiver would involve undue expense, there is no ground for the appointment of a receiver and particularly so in case where it is open to the applicant to apply for the sale of the property in liquidation proceedings. (*Harper, S.M. and Shirreff, J.M.*) SWAMI DAYAL *v.*

U. P. ENCUM. EST. ACT (1934), S. 9-D.

DURGA. **1941 A.W.R. (Rev.) 573 (1)= 1941 O.A. (Supp) 531 (1)=1941 R. D. 453 (1).**

——**S. 9-D**—*Receiver—Grounds—Loss of security owing to property not being saleable—Creditor, when to be appointed.*

Where the creditor is liable to lose his security by reason of the property not being subject to sale under the provisions of the Debt Redemption Act, it is reasonable that a receiver should be appointed. Where in such a case the debtor has not made any of the payments he was directed to make, the creditor is to be appointed receiver in preference to the debtor. (*Shirreff, J.M.*) MANGAL SINGH *v.* SURAJ BAKSH SINGH.

1941 A.W.R (Rev.) 470=1941 O.A. (Supp) 429= 1941 O.W.N. 711 (1)=1941 R.D. 400 (1).

——**S. 9-D**—*Receiver—Grounds—Security, sufficiency of.*

There is no need for the appointment of a receiver in a case where the valuation exceeds the debt and the security is therefore sufficient. (*Harper, S.M. and Shirreff, J.M.*) JAIPATRA KUER *v.* GANGA DHAR.

1941 A.W.R. (Rev.) 570=1941 O.A. (Supp.) 501= 1941 R.D. 426 (2).

——**S. 9-D**—*Receiver—In respect of what property, can be appointed.*

An order appointing a receiver not only in respect of the plots mortgaged with possession to the creditor, but also of the entire property of the debtor is clearly *ultra vires.* S. 9-D of the U. P. Encumbered Estates Act enables a Court to appoint a receiver only in respect of the property the possession of which has been or is liable to be transferred under S. 35 of the Act. (*Harper, S.M. and Sathe, J.M.*) RAM LAL *v.* LAKSHMI NARAIN. **1941 A.W.R. (Rev.) 591= 1941 O.A. (Supp.) 545=1941 R.D. 478.**

——**S. 11 and R. 1**—*Claim under S. 11 (2)—Duty of Court—Entry in Khewat, if to be taken as deciding factor.*

Where an objector prefers a claim under S. 11 (2) of the U. P. Encumbered Estates Act in respect of a property which is mentioned by the applicants as belonging to them, the Special Judge has to determine whether the property belongs to the applicants or to the objector. He is in error if he does not decide the title to the property upon the evidence produced and relies mainly on R. 1 of the Rules as precluding the applicants' claim to the property by reason of the absence of the Khewat in his name. (*Ghulam Hasan and Agarwal, JJ.*) BRIJRAJ SINGH *v.* GANGA CHARAN. **195 I.C. 605= 14 R.O. 103=1941 O.L.R. 607=1941 R.D 704= 1941 A.W.R. (Rev) 655=1941 O.W.N. 961= 1941 O A. 681=A.I.R. 1941 Oudh 559.**

——**Ss. 11 and 13**—*Mortgage rights—If and how affected by failure to prefer claim under S. 11 or by discharge of claim under S. 13.*

The U. P. Encumbered Estates Act does not lay down that the effect of failure to put forward a claim under S. 11 or of the discharge of a claim under S. 13 will be to extinguish rights of mortgage, but those rights can no longer be asserted, if the claim has been discharged. (*Shirreff, J.M.*) MAHOMED RAZA *v.* INDER SINGH. **1941 A.W.R. (Rev.) 812= 1941 O.A. (Supp.) 736=1941 R D. 869.**

——**S. 11 (2)**—Claim under, when to be filed—Claim filed before notification—Court, if debarred from adjudicating upon it. *See* 1940 Dig., Col. 1209. RAMMAN LAL *v.* RAGHUNATH SHANKAR.

I.L.R. (1941) All. 17=194 I C. 347=13 R.A. 495= 1941 A.L.J. 55=1941 O.W.N. 388=1941 R.D. 180= 1941 A.L.W. 277=A.I.R. 1941 All. 56.

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——**S. 11 (2)**—Objections contemplated by—Hindu widow applying under the Act to liquidate mortgage debt—Reversioners if can intervene. *See* 1940 Dig., Col. 1209. LAL GANGA KANT SINGH *v.* GIKRAJ KUER. **16 Luck. 168.**

——**S. 14**—*Amendment regarding* pendente lite *interest—If retrospective.*

The provision that has been added by the Amending Act of 1939 to S. 14 of the U.P. Encumbered Estates Act to the effect that no *pendente lite* interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt, has a retrospective effect. (*Yorke and Agarwal, JJ.*) MAHOMED EJAZ RASUL *v.* SAIYID ALI MAHOMED. **194 I.C. 615= 1941 O A. 506=14 R.O. 18=1941 R.D. 431= 1941 A.L.W. 613=1941 A.W.R. (Rev.) 518= 1941 O.L.R. 512=1941 O.W.N. 768= A.I.R. 1941 Oudh 498.**

——**S. 14**—*Decree under—Proceedings if can be quashed thereafter.*

Where once a decree has been passed by the Special Judge under S. 14 of the U. P. Encumbered Estates Act without any objection from the creditors, they must be taken to have acquiesced in the claim of the debtor applicant to proceed under the Encumbered Estates Act and thereafter the proceedings cannot be quashed even on the ground that the applicant was not a landlord under the Act (*Sathe, A.M.*) DWARKA BAQQAL *v.* ASHIK ALI KHAN. **1941 A.W.R. (Rev.) 1038= 1941 O A. (Supp.) 847.**

——**S. 14 (before amendment)**—*Inquiry into claim—Nature of—Other claimants, if can be made parties—C. P. Code, O. 1 R. 10 (2)—Applicability.*

The proceedings under the Encumbered Estates Act must be considered to be a suit and the Court has to make a list of all the creditors. In order to see that no bogus creditors come on the list it is necessary to make the other creditors parties. Even before the amendment of S. 14 of the Act the Special Judge had the power to add all creditors. The provisions of O. 1, R. 10 (2) C.P. Code, are not inconsistent with S. 14 of the Act and hence it applies to such proceedings. (*Agarwal, J.*) KANIZ ZOHRA BEGAM *v.* TEJ NARAIN.

1941 R. D. 441=1941 O A. 540=1941 O.W.N. 778= 1941 A.W.R. (Rev.) 531=1941 A L.W. 623= A.I.R. 1941 Oudh 466.

——**Ss. 14 and 15**—*Inquiry under—Decree and findings in earlier proceedings under S. 33, Agriculturists' Relief Act—Binding nature—Duty of Special Judge—Reopening the whole matter—Revision.*

Where in certain proceedings under S. 33 of the Agriculturists' Relief Act a decree has been passed in favour of the creditor, the decree and the findings in those proceedings must be taken as binding between the parties in subsequent proceedings under the Encumbered Estates Act. According to S. 15 of the latter Act, the Judge in proceeding under the Act is to take those findings and decree and on their basis pass a fresh decree. It is not open to the Judge to reopen the whole matter and come to a fresh decision for himself. If he does go behind those findings and the decree, there is a material irregularity in the exercise of jurisdiction and his order is certainly open to revision. If in the prior decree a lesser amount has been fixed for interest between debtor and creditor than what is allowed under the Encumbered Estates Act, it cannot be said that there is any inconsistency between the decree and the provisions of S. 14 of the Encumbered Estates Act. (*Iqbal Ahmad, C.J. and Dar, J.*) AYUB ALI SHAH *v.* KALI

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CHARAN. 1941 O.A (Supp.) 812= 1941 A.L.W. 950=1941 A.W.R. (Rev.) 960= 1941 A.L.J. 607=A I.R. 1941 All. 400.

——**S. 14 (2)**—Scope of enquiry—Advances to debtor after application under S. 4—If can be adjudicated upon. *See* 1940 Dig., Col. 1210. RAMJATAN PANDEY *v.* SOMESHWARI PRASAD DUBE. I.L.R. (1941) All. 127=192 I.C. 818= 13 R.A. 366=1941 A.L.J. 60=1941 R.D. 178= 1941 O.W.N. 386=1941 A.L.W. 275= A.I.R. 1941 All. 68.

——**S. 14 (4) (a)**—*Applicability.*

Sub-Cl. (*a*) of sub-S. (4) of S. 14 of the U. P. Encumbered Estates Act can apply only to those cases in which as a result of his finding, the Special Judge comes to the conclusion that a certain amount is due to a claimant on account of principal and interest on the date of the application under S. 4. Hence it can have no application to a case where the Special Judge finds that no amount is due to the claimant. (*Iqbal Ahmad, A.C.J. and Verma, J.*) SAHI MAL MANOHAR DAS *v.* ILTIFATUNNISSA BEGAM. I.L.R. (1941) All. 567= 196 I.C 158=1941 A.W.R. (H.C.) 204= 1941 A.L J. 366=1941 A L.W. 547=14 R A. 129= 1941 O.W.N. 701=1941 O A. (Supp.) 374= 1941 R.D. 391=1941 A.W.R. (Rev.) 457= A.I.R. 1941 All. 293.

——**S. 14 (4) (c)**—Construction—Decision under Agriculturists' Relief Act—If can be ignored by Special Judge—Private settlement of account—Special Judge, if can re-open account. *See* U. P. ENCUMBERED ESTATES ACT, SS. 4 (3) AND 14 (4) (C). 1940 O.A. 1231.

——**S. 14 (5) Expl.**—Decree amount increased by amendment in virtue of—Appeal against order of amendment—Court-fee payable. *See* COURT-FEES ACT, SCH. I, ART. 1 AND U. P. ENCUMBERED ESTATES ACT, S. 14 (5) EXPL. 1941 O.W.N. 355= 1941 A.W.R. (Rev.) 217.

——**S. 14 (7)**—*Application under the Act—Effect on mortgages—Nature of proceedings.*

An application under the Encumbered Estates Act is not in itself an application for the redemption of a mortgage. But the proceedings under the Act ripening into a decree under S. 14 (7) are at the same time proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under S. 4, and also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the Act the debtor applicant has instituted proceedings for redemption of all his mortgaged properties. (*Yorke and Agarwal, JJ.*) KIRAT SINGH *v.* RAM SARAN. 194 I C. 405=13 R.O. 600= 1941 O.L.R. 463=1941 A.L.W. 534= 1941 O.W N. 687=1941 O.A. 472= 1941 R.D. 369=1941 A.W.R. (Rev.) 430= A.I.R. 1941 Oudh 380.

——**S. 14 (7)**—*Pendente lite* and future interest—If should be granted. *See* 1940 Dig., Col. 1211. BAIJNATH MARWARI *v.* GANESH SINGH. 192 I.C. 212= 13 R.A. 299.

——**S. 15**—Decretal debt—Interference—Limits. *See* 1940 Dig., Col. 1211. RAMESHWAR BAKSH SINGH *v.* GOVIND PRASAD. 16 Luck. 153= A I R. 1941 Oudh 60.

——**S. 19 (2)**—Amendment of list after order for sale —Effect. *See* U. P. ENCUMBERED ESTATES ACT, SS. 24 AND 19 (2). 1941 R D. 539 (1).

——**Ss. 19 (2) and 35**—*List sent under S. 19 (2) —If exhaustive as to property to which debtor is entitled to possession*—*Right of debtor to apply under S. 35, regarding property not included in such list.*

The list sent by the Special Judge under S. 19 (2) of the Encumbered Estates Act is only in respect of the property against which action can be taken for attachment, sale or mortgage in satisfaction of the debts decreed by the Special Judge. But it is by no means an exhaustive list of the whole property to possession over which the debtor applicant is entitled under the Act. Consequently the debtor applicant is not prevented from applying under S. 35 in respect of property over which he is entitled to retain possession but which has not been included in the list sent by the Special Judge. (*Sathe, A.M.*) JOTI PRASAD *v.* MANDU KHAN.

1941 A.W.R. (Rev.) 1047=1941 O.A. (Supp.) 856.

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——**S. 20**—*Costs—Recovery—Procedure.*

S. 20 of the U. P. Encumbered Estates Act is a special provision and meets a case in which the proceedings before the Special Judge are due to be quashed. There can be no execution proceedings in the case of costs awarded under S. 20. Unless these costs are deposited in Court within a month from the Special Judge's order the order simply does not take effect and the proceedings under the Act must continue. (*Harper, S.M. and Sathe, J.M.*) KEDAR NATH *v.* RAM PAL SINGH. 1941 R.D. 242=1941 O.W.N 496= 1941 O.A. (Supp.) 203=1941 A.W R. (Rev.) 254.

——**S. 20-A**—Scope of—Restoration of dismissal for default under S. 8—Competency. *See* U.P. ENCUMBERED ESTATES ACT, SS. 8 AND 20-A. 1941 R.D. 717.

——**Ss. 23 to 28**—*Liquidation—Procedure—Private and individual agreements—If and when permitted.*

Under the scheme of the United Provinces Encumbered Estates Act liquidation of all debts has to be done together by the Collector according to the procedure laid down in the Act. A private sale by the debtor to a creditor is not one of the regular methods of procedure permitted by the Act. It could be allowed if all the parties agree to it. In the absence of such an agreement liquidation must proceed according to the methods prescribed by the Act. (*Sathe, A.M.*) LAI TA PRASAD *v.* DHARAM DASS. 1941 R.D. 824= 1941 O.A. (Supp.) 753=1941 A.W.R. (Rev.) 852.

——**S. 24**—*Collector's position in proceedings under —Stay of sale—Who can order.*

The Collector when he proceeds to act under S. 24 of the U. P. Encumbered Estates Act is in the position of an execution Court and he is bound to carry out the orders of the Special Judge as conveyed under S. 19 of the Act. Hence it is for the Special Judge to issue an order for stay to the Collector. (*Harper, S.M.*) BEHARI LAL *v.* SHIV CHANDRA. 1941 A.W.R. (Rev.) 593 (1)=1941 R.D. 532 (1)= 1941 O.A. (Supp,) 547 (1).

——**Ss. 24 and 19 (2)**—*Limits to the Collector's power to sell—Items not included in the list sent under S. 19 (2)—Proper procedure.*

S. 24 of the U. P. Encumbered Estates Act limits the Collector's power to sell only that movable property which has been reported to him by the Special Judge under S. 19 (2) of the Act. Where certain ornaments pledged with a creditor are not included in the list, the Collector would be perfectly right not only in refusing to sell those ornaments but also in ordering their return to the debtors' applicants under S. 35 of the Act. The only remedy open to the aggrieved creditor in such a case is to get the list sent under S. 19 (2) corrected by Civil Courts. Till this is done the Collector has no jurisdiction to sell them. (*Sathe, J.M.*) JAGANNATH PRASAD *v.* CHANDERJI MAL. 1941 O.A. (3upp.) 123= 1941 A.W.R. (Rev.) 179=1941 R.D. 162.

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——**Ss. 24, 27 and R. 31 (ii)**—*Objection to calculation of instalment value—Decision on if obligatory prior to order for sale.*

If the question whether the debt could be liquidated under S. 27 of the U. P. Encumbered Estates Act depends on the objections to the calculation of instalment value then, no doubt, the objections should be decided before any order for sale is passed under S. 24. (*Shirreff, S.M. and Sathe, J.M.*) CHANDRA KUMAR *v.* BANSIDHAR.

1941 R D. 685 = 1941 A.L.J. (Supp.) 107 = 1941 A.W.R (Rev.) 560 (2) = 1941 O.A. (Supp) 491 (2).

——**S. 24**—*Order allowing execution against all but one item—Legality.*

An order by the Collector allowing execution as regards all except one of the houses of the debtor is not in any way contrary to the provisions of S. 24 of the U. P. Encumbered Estates Act. (*Harper, S.M.*) BIHARI LAL *v.* SHIV CHANDRA.

1941 A.W.R. (Rev.) 593 (1) = 1941 R.D. 532 (1) = 1941 O.A. (Supp.) 547 (1).

——**Ss. 24 and 19 (2)**—*Order for sale—Subsequent amendment of list by Special Judge—Effect.*

Where the Collector directs the sale of certain houses under S. 24 of the U. P. Encumbered Estates Act on the basis of the list prepared by Special Judge under S. 19 (2),and such list is subsequently amended by the Special Judge, the order for sale cannot stand. (*Harper, S.M. and Shirreff, J.M.*) GAJENDRA SHAH *v.* RAMDEI KUNWAR. **1941 A.W.R. (Rev.) 587 = 1941 R.D. 539 (1) = 1941 O.A. (Supp.) 542 (1).**

——**S. 24 second proviso**—*Scope of—Residential house—Sale, when could be ordered.*

What the second proviso to S. 24 of the U. P. Encumbered Estates Act means is that the house must be left to the debtor if it is free from mortgage. The order for its sale can only be justified on the ground that liquidation by instalments is not possible without sale. The Collector should before ordering sale of the residential house of the debtor, ascertain the result of the sale of other items of property. (*Shirreff, S.M. and Sathe, J.M.*) CHANDRA KUMAR *v.* BANSIDHAR.

1941 R.D. 685 = 1941 A.L.J. (Supp.) 107 = 1941 A.W.R. (Rev.) 560 (2) = 1941 O.A. (Supp.) 491 (2).

——**S. 24 (1), Provisos 1 and 2**—Scope of—Order of sale prescribed by section—Departure from—Justification. *See* 1940 Dig., Col. 1212. HAR PRASAD *v.* GAYA PRASAD. **1941 A.W.R. (Rev.) 57 = 1941 O.A. (Supp.) 44.**

——**S. 26 and R 26, and 54-A**—*Liquidation award—Proper procedure.*

The S. D. O. before he gives a liquidation award, must pass definite orders regarding multiples, and transfer and instalment values after giving the parties an opportunity to have their say about the preliminary valuations made by the tahsil authorities. Then he must wait till all the appeals filed against the special Judges decrees are disposed of. Then he should draw up a preliminary award, as far as possible in the presence of the parties, and give them ten or fifteen days' time to file objections, if any. If their objections are disposed of between 21st April and 30th November, he should wait till 1st December, and then declare his final award. R. 54-A with reference to this is mandatory. (*Shirreff, S. M. and Sathe, J.M.*) BISHAMBAR NATH *v.* DHARAM PAL SINGH.

1941 R.D. 806 = 1941 A.L.J. (Supp.) 130 = 1941 A.W R. (Rev.) 788 = 1941 O.A. (Supp.) 699.

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——**S. 30**—*Issue of Government bonds to creditors—Fixation of number of instalments due to Government—If can be objected to by creditor.*

Where Government bonds are decided to be given to the creditors in respect of their decrees any order fixing the number of instalments in which the money is to be recouped to the Government cannot be objected to by the creditors, because their getting the money at the end of the term fixed in the Government bonds is not at all affected by the number of instalments payable by the debtor to Government. (*Shirreff, J.M. and Sathe, A. M.*) MAKHAN LAL *v.* HARI KISHAN SINGH.

1941 R.D. 895 = 1941 O.A. (Supp.) 765 = 1941 A.W.R. (Rev.) 872.

——**S. 30 and R. 49**—*Requirements of R. 49—Compliance with—Necessity.*

R. 49 of the U.P. Encumbered Estates Act requires that where the value of the bonds to be given to any creditor is not an exact multiple of lowest value of the bonds, the Collector should arrange with either the debtor or the creditor in such a way that the value of the bonds comes up to a round figure which is an exact multiple of the lowest denomination of the bonds, and this rule should be complied with. (*Shirreff, J.M. and Sathe, A. M.*) MAKHAN LAL *v.* HARI KISHAN SINGH.

1941 R.D. 895 = 1941 O.A. (Supp.) 765 = 1941 A W.R. (Rev.) 872.

——**S. 35**—Appeal under, based on an order of review—O. 47, R. 7—C. P. Code, if applies. *See* C. P. CODE, O. 47, R. 7 AND U. P. ENCUMBERED ESTATES ACT, S. 35. **1941 R.D. 428.**

——**S. 35**—Application under—If can refer to property not included in list sent under S. 19 (2). *See* UNITED PROVINCES ENCUMBERED ESTATES ACT, SS 19 (2) AND 35. **1941 A.W.R. (Rev.) 1047.**

——**S. 35**—*Delivery in respect of joint property.*

Where the debtor is owner of only $\frac{3}{4}$ of the property while the other $\frac{1}{4}$ belongs to another co-sharer, possession which should be given to the debtor over $\frac{3}{4}$ of the property will be symbolical possession. (*Shirreff, S.M. and Sathe, J. M.*) RAM ACHAL *v.* PALAKDHARI MISRA. **1941 A.W R. (Rev.) 799 = 1941 O.A. (Supp) 710 = 1941 R.D. 739 (1).**

——**S. 35**—*Delivery of possession—Mode—Debtor only part owner*

Where the debtor is only part owner of property mortgaged, he can only be given symbolical possession of his share in it. (*Shirreff, J.M.*) MAHOMED RAZA *v.* INDER SINGH. **1941 O.A. (Supp.) 736 = 1941 A.W.R. (Rev.) 812 = 1941 R D. 869.**

——**S. 35**—*Delivery of possession—Objections by creditors—Proper procedure.*

Where in proceedings for delivery of possession under S. 35 of the U. P. Encumbered Estates Act, the various creditors raise different objections according to how their respective rights are affected, there should be an enquiry and determination of the respective rights of the creditors on the facts available. An order without any such enquiry that proprietary possession should be given of the mortgaged property and that this should not affect the tenancy rights of the objectors, is not a proper one. (*Harper, S M. and Shirreff, J. M.*) MATHURA SINGH *v.* AIN ULLAH. **1941 R D. 878 = 1941 A.W R. (Rev) 1092 = 1941 O.A. (Supp) 885 (2).**

——**S. 35**—*Delivery of possession of mortgaged property*—Theka *given by mortgagee, how affected.*

When a mortgagee gives a *theka* of the proprietary rights held by him, he cannot give a *theka* of more than that to which he was entitled. When the mortgagor applies under S. 4 of the U.P. Encumbered Estates Act

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and in due course a simple money decree is passed and as a result the mortgage is extinguished, the mortgagee rights are terminated and automatically the *theka* also is terminated. The *thekadar* cannot claim to retain possession thereafter. (*Harper, S.M.*) RAM CHANDER MAL *v.* RAJA RAM. **1941 R.D. 232= 1941 A.W.R. (Rev.) 337=1941 O.A. (Supp.) 251.**

——**S. 35**—*Delivery of possession—Pendency of appeal challenging amount decreed—If adequate reason for postponement of delivery.*

The pendency of an appeal which merely challenges the amount of the money decreed is not an adequate reason for postponing the delivery of possession. (*Shirreff, J.M.*) RAGHUNATH *v.* SHEO NARAIN. **1941 R.D. 663 (1)=1941 A.W.R. (Rev.) 548 (2)= 1941 O.A. (Supp.) 479 (2).**

——**S. 35**—*Delivery of possession—Refusal—Pendency of appeal against Special Judge's order—If an adequate reason.*

The mere filing of an appeal against the Special Judge's decree is not by itself an adequate reason to refuse to transfer possession under S.35, U.P. Encumbered Estates Act. The Collector or the S. D. O. has however the discretion to decide each case on merits and see if possession should be delivered at once or should be postponed until the appeals are disposed of finally. (*Sathe, A M.*) DALJIT SINGH *v.* PARAS NATH SHAH. **1941 R.D. 918=1941 A.L.J. (Supp.) 132= 1941 O.A. (Supp.) 779=1941 A.W.R. (Rev.) 905.**

——**S. 35**—*Delivery of possession—Right to standing crops.*

Under S. 35 of the U. P. Encumbered Estates Act though a debtor applicant is entitled to possession of the property, he cannot claim the crops sown by the creditor and standing in the fields at the time of transfer of possession. (*Harper, S.M. and Sathe. J M.*) SURAJ BALI *v.* RAM NANDAN RAI. **1940 R D. 604 (2)= 1941 A.W R. (Rev.) 96=1941 O.A. (Supp) 84.**

——**S. 35**—*Delivery of possession—Standing crops—Proper procedure.*

Delivery of possession should take place after the crops have been cut. If this is not so done there is no provision of law under which compensation for the crops could be assessed. (*Shirreff, J.M.*) BABU LAL *v.* MAHOMED AQUIL. **1941 A.W.R. (Rev.) 590 (2)= 1941 R.D. 531=1940 O.A. (Supp.) 544 (2).**

——**S. 35**—*Delivery of possession, when decree had not been sent to Collector—Legality.*

It is clearly contrary to the provisions of S. 35 of the U. P. Encumbered Estates Act for the Collector to order delivery of possession when the decree granted by the Special Judge had not yet been sent to him. (*Harper, S.M. and Sathe J.M.*) GANGA SAHAI *v.* MUZAFFAR ALI KHAN. **1941 R.D. 164=1941 O.W N. 470= 1941 A.W.R. (Rev.) 338=1941 O.A. (Supp.) 252.**

——**S. 35**—*Delivery under—Who can claim.*

Delivery under S. 35 of the U. P. Encumbered Estates Act can be given only to a person entitled under the provisions of the Act. A claim to retain possession by a creditor under some legal rights, is possession which is not under the provisions of the Act, and hence could not be allowed. (*Harper, S.M.*) MAHOMED ABBAS *v.* ABDUL HAMID **1941 O W.N. 594= 1941 A.W.R. (Rev.) 384=1941 O.A. (Supp.) 344= 1941 R.D. 298.**

——**S. 35**— Expenses of suit for possession—If can be recovered by mortgagee in proceedings under the Act. *See* T. P. ACT, S. 72 AND U. P. ENCUMBERED ESTATES ACT, S. 35. **1941 O.W.N. 768.**

U. P. ENCUM. EST. ACT (1934), S. 35.

——**S. 35**—*Joint mortgage by two co-sharers—One of the mortgagors applying under Encumbered Estates Act—If can obtain delivery of possession.*

Where one out of the two co-sharer mortgagors applies under the United Provinces Encumbered Estates Act and his mortgage is extinguished and the mortgagee remains in possession of the share of the other mortgagor, there could be no delivery of possession to the debtor without partition. The delivery can only be symbolical. (*Harper, S.M and Shirreff, J.M.*) TULA RAM *v.* JAGAT SINGH. **1941 A.W.R. (Rev.) 496= 1941 R.D. 547=1941 O.A. (Supp.) 455.**

——**S. 35**—*Right to possession—Disallowance of mortgage in favour of occupancy tenant—If can affect tenancy rights.*

Where a mortgage in favour of an occupancy tenant is disallowed by the Special Judge, it is only the claim on basis of the mortgage that is wiped out. But the rights of the tenant as an occupancy tenant long prior to the mortgage, could not be wiped out and they will still survive after the extinguishment of the mortgagee rights. In such a case there can be no question of restoration of possession to the debtor. (*Harper, S.M. and Sathe, J.M.*) TULSI RAM *v.* BALDEO PRASAD PANDEYA. **1941 R.D. 289=1941 A.W.R. (Rev.) 418= 1941 O.A (Supp.) 355.**

——**S. 35 and Rule 6 of Rules under the Act**—*Scope of R. 6 of the Rules—Extent of powers of Collector under—No fear of mismanagement—Order to deposit amount for future interest—If justified.*

R. 6 of the rules framed under the U. P. Encumbered Estates Act has a very wide application. Under that rule the Collector is entitled to exercise the very considerable powers sanctioned by R. 1 of O. 39, C. P. Code. But where the Collector in an application under S. 35 of the U. P. Encumbered Estates Act has found that there was no fear of the property being mismanaged in any way, there is no justification for proceedings under R. 6 of the Act and ordering that a certain amount should be deposited for future interest. (*Harper, S.M. and Sathe, J.M.*) BEHARIJI *v.* RAM NARAIN. **1941 A.W.R. (Rev.) 428=1940 R.D. 625.**

——**S. 35**—*Standing crops—Delivery of land to debtor—If can be delayed.*

The general principle is that as no compensation can legally be ordered delivery of possession should be delayed until the crops have been cut by the creditor. Though he had sown only at about the time of the simple money decree, he is entitled to be in possession till he has gathered the harvest. (*Harper, S.M. and Shirreff, J.M.*) TULA RAM *v.* JAGAT SINGH. **1941 A.W.R. (Rev.) 496=1941 R.D. 547= 1941 O.A. (Supp.) 455.**

——**S. 35 and Contract Act, S. 23**—*Transfer of possession under S. 35—If compulsory irrespective of any application by debtor—Contract not to claim possession—If void under S. 23, Contract Act.*

S. 35 of the U. P. Encumbered Estates Act does not require that in all cases the possession of the property should be transferred to the proprietor whether he applies for it or not. The right to apply for possession is only optional with the debtor and hence it is open to him to contract himself out of his right to claim possession under S. 35 of the Act and the agreement is not such as would defeat the provision of law and is not void under S. 23 of the Contract Act. (*Harper. S.M. and Sathe, J.M.*) CHANDRA KALI *v.* GAURI SHANKAR. **1940 O.W N. 1246=1940 R.D 585= 1941 A.W.R. (Rev.) 76=1941 A.L J. (Supp.) 24= 1941 O.A. (Supp.) 54.**

U. P. ENCUM. EST. ACT (1934), S. 45.

——**S. 45**—*Appeal—Cross-objections—If lie.*

Cross objections does not lie in an appeal under the U. P. Encumbered Estates Act. (*Harper, S.M. and Sathe, J.M.*) BEHARIJI *v.* RAM NARAIN.

1940 R.D. 625 = 1941 A.W.R. (Rev.) 428.

——**S. 45**—*Appeal—Parties—Absence of some of the creditors in appeal as parties—If fatal to maintainability of appeal.*

Where all the creditors who were originally impleaded as parties to the application under S. 4 of the U. P. Encumbered Estates Act are not impleaded in an appeal under S. 45 of the Act, the omission is fatal to the maintainability of the appeal. If the appeal was to be entertained, it would lead to conflicting orders being passed by the special Judge—namely, one in favour of the creditors not impleaded and another against the creditors impleaded. (*Ghulam Hasan and Madeley, JJ.*) RAMESHWAR *v.* AJODHIA PRASAD.

195 I.C. 761 = 15 R.O. 117 = 1941 O L.R. 620 = 1941 R.D. 752 = 1941 A.W R. (Rev.) 694 = 1941 O.A. 714 = 1941 O.W.N. 998 = A.I.R. 1941 Oudh 580.

——**Ss 45 and 46**—*Revision — Competency—Order removing person from list of parties.*

An order removing a particular person from the list of parties mentioned in an application under the U. P. Encumbered Estates Act is open to appeal and if an appeal is not filed, then a revision is incompetent. (*Harper, S.M.*) JAMNA KOER *v.* GAURI SHANKER.

1941 A.W.R. (Rev.) 596 = 1941 R.D. 529 (1) = 1941 O.A. (Supp.) 550

——**S. 45 and Act XI of 1939**—*Second appeal when lies under the amended Act—Revision after amendment against order passed prior thereto—Conversion into second appeal—Permissibility.*

A second appeal can lie only in respect of appellate orders or decrees passed after the amending Act XI of 1939 came into force and not to those passed before it. Where a revision is preferred after the amendment, against an appellate order passed prior thereto, no revision lies and it could not be treated as a second appeal. (*Agarwal, J.*) SHEO NATH *v.* TIRBENI SHANKAR.

193 I.C. 159 = 13 R.O 430 = 1941 A.W.R. (Rev) 168 (1) = 1941 R.D 96 = 1941 O.L.R. 258 = 1941 O W.N. 261 = 1941 O.A. 236 = A.I.R. 1941 Oudh 249

——**Ss 45 (2) and 46 and C. P. Code, S. 115**—*Appellate orders under S. 45 (2) or revisional orders under S. 46—If revisable under S. 115, C. P. Code.*

A revision is entertainable against appellate orders passed under S. 45 (2) or S. 46 of the U. P. Encumbered Estates Act by District Judge. (*Iqbal Ahmad, Allsop and Verma, JJ.*) ACHRAJ SINGH *v.* HARDWAR NATH.

193 I.C. 464 = 13 R.A. 433 = 1941 A.W.R. (Rev.) 170 = 1941 O.W.N. 350 = 1941 R.D. 173 = 1941 A.L.W. 254 = 1941 A.W.R (H C.) 58 = 1941 O.A. (Supp.) 98 = 1941 A.L J. 85 = A.I.R. 1941 All. 131 (F.B.).

——**S. 45 (2)**—*Right of appeal—Law governing—Amendment of Encumbered Estates Act after the decision by the Special Judge and before decision in appeal—Second appeal, if lies.*

A right of appeal in a suit is governed by the law prevailing at the date of the institution of the suit, and not by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal. The provision for a second appeal is not merely a matter of procedure. As S. 45 (2) of the U. P. Encumbered Estates Act is not retrospective, where though the amendment is after the decision of the Special Judge but before the decision of the District Judge in appeal, no second appeal lies. (*Bennett, J.*) KAILASH BAKSH SINGH *v.* AMAR KRISHNA NARAIN SINGH.

195 I.C. 773 = 14 R.O. 120 = 1941 A.W.R. (Rev.) 660 = 1941 R.D. 709 = 1941 O.L.R. 615 = 1941 O.A. 685 = 1941 O W N. 977.

——**Ss. 45 (2-a) and 11**—*Appeal—Parties—Dismissal of objection under S. 11—Absence of all creditors as parties—Effect.*

Where a claim by way of objections under S. 11 of the U. P. Encumbered Estates Act is dismissed and the aggrieved creditor appeals, all the creditors ought to be made parties to it. In their absence the appeal cannot proceed. (*Thomas, C.J. and Ghulam Hasan, J.*) BISHUNATH PRASAD *v.* SARJU SARAN TEWARI.

196 I C. 482 = 14 R O. 180 = 1941 O.L R. 707 = 1941 R.D. 900 = 1941 O.W.N. 1115 = 1941 A.W.R (Rev.) 884 = 1941 O.A. 816.

——**S. 45 (2) (a) (after amendment)**—If retrospective. *See* 1940 Dig., Col. 1215. ALI MAHOMED *v.* KHWAJA KHALIL AHMED. **15 Luck. 612.**

——**S. 45 (2 a)**—*Order of Special Judge prior to amendment—Appellate order subsequent thereto—Second appeal.*

If the original proceedings were started when S. 45 of the Encumbered Estates Act had not been amended and a decision had been given by the Special Judge thereon prior to such amendment, though the appellate order with reference to such a decision is passed after the amendment, no second appeal lies against it. (*Agarwal, J.*) SALIK RAM *v.* GOMTI. **196 I C. 338 = 14 R.O. 160 = 1941 O.W.N. 1094 = 1941 O.A. 813 (1) = 1941 R.D. 844 = 1941 O.L.R. 673 = 1941 A.W.R. (Rev.) 862 (1).**

——**S. 45 (2 a)**—*Right of second appeal—First appeals filed before amendment but disposed of after amendment—Inference of retrospective effect by implication.*

Where first appeals are filed before the amendment of S. 45, though orders thereon are passed after the date of the amendment, no second appeal lies under S. 45 (2-*a*) of the United Provinces Encumbered Estates Act. The finality attaching to certain orders could not be defeated by the passing of a subsequent Act unless the Act gave retrospective effect in express terms. An intention on the part of the Legislature to give retrospective effect to sub-S. (2-*a*) of S. 45 cannot be inferred by implication. (*Thomas, C.J. and Ghulam Hasan, J.*) KANIZ ABID *v.* ANRUDH SINGH. **1941 O.A. 834 = 1941 A.W.R. (Rev) 940 = 1941 O.W.N. 1213.**

——**S. 45 (2-a)**—*Right of second appeal—If retrospective—Original order prior to and appellate order subsequent to amendment.*

A right of appeal is a creature of the statute and unless the Act introducing the fresh right of appeal gives retrospective effect to the right, rights of the parties in the matter of appeal must be governed by the law which prevailed at the date of the institution of the suit. The provisions of S. 45 (2-*a*) of the U. P. Encumbered Estates Act relating to second appeal has not been made retrospective. Hence, where the original order of the special judge was prior to the amendment, even if the appellate order is subsequent to the amendment, no second appeal lies against it. (*Ghulam Hasan, J.*) LIAQAT HUSAIN *v.* MOHAMMAD RAZI.

1941 O.A. 731 = 1941 A.W.R. (Rev.) 753 = 1941 R.D. 776 = 1941 O.W.N. 1013.

U. P. ENCUM. EST. ACT (1934), S. 45.

——**S. 45 (2 a)**—*Right of second appeal—Suit prior to amendment giving right of second appeal—Appellate order subsequent to it.*

A right of appeal is governed by the law prevailing at the date of the institution of the suit and not by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal. Where an application under the U. P. Encumbered Estates Act is filed prior to the amendment of S. 45 of the Act giving a right of second appeal, though the decision in appeal in respect of such a case is given after the date of the amendment, no second appeal lies. (*Agarwal J.*) ANAND BEHARI LAL *v.* MATHURA PRASAD.

196 I C. 260 = 14 R.O 146 = 1941 O.L.R. 669 = 1941 R D. 883 (1) = 1941 O.A. 765 = 1941 A.W.R. (Rev.) 815 (1) = 1941 O.W.N. 1061 (1).

——**S. 45 (3)**—*Appealability—Orders of Assistant Collector.*

All orders passed by an Assistant Collector in charge of a sub-division in respect of Encumbered Estates Act cases pending in his Court are appealable to the Board. But S. 45 (3) of the Act applies to cases under the Encumbered Estates Act only and not also to cases under the Tenancy Act which may have to be postponed under the provisions of S. 7 (1) (*a*) of the Encumbered Estates Act. The appeals in such cases will be governed by the provisions in the Tenancy Act and not the Encumbered Estates Act. (*Harper, S.M. and Sathe, J.M.*) NAVIN CHANDRA *v.* RADHEY SHYAM.

1941 R.D. 340 = 1941 A.W.R. (Rev.) 376 = 1941 O.A. (Supp) 336.

——**S. 45 (3) and C. P. Code, S. 151**—Refusal to take action under C. P. Code, S. 151—Appealability *See* 1940 Dig., Col. 1215. JAGANNATH SINGH *v.* DRIGPAL SINGH **1941 A.L.J. (Supp.) 10.**

——**S. 45 (5)**—If bars revision under S 115, C. P. Code. *See* 1940 Dig., Col. 1215. ALI MAHOMED *v.* KHWAJA KHALIL AHMED. **15 Luck. 612.**

——**S. 45 (5)**—Scope—Appeal to Privy Council—If barred—C. P. Code, Ss. 109 and 110. *See* 1940 Dig., Col. 1215. DEPUTY COMMISSIONER, KHERI *v.* SHATRANJAI JI. **16 Luck. 91.**

——**S. 46**—*Powers under*—Suo motu *interference with wrong orders.*

Where it comes to the knowledge of the Board that a wrong order has been passed under the U. P. Encumbered Estates Act, though it has not been appealed against, it can in the exercise of the powers vested in the Board by S. 46 of the Act, interfere of its own accord and modify the order as required by law. (*Harper, S.M. and Sathe, J.M.*) SITA RAM *v.* SHEO RANI.

1941 R.D. 520 = 1941 O.A. (Supp.) 572 = 1941 A W.R. (Rev.) 615

——**S. 46**—*Revision—Competency — Correction by Special Judge after sending decree to Collector under S. 19.*

Under S. 46 of the U. P. Encumbered Estates Act a Court can call for the record of proceedings in any case which is pending in a subordinate Court Where the Special Judge sends the decree to the Collector under S. 19 of the Act, the case terminates from that date so far as the Special Judge is concerned. If he subsequently corrects the decree, a revision is not maintainable against such an order of correction. (*Ghulam Hasan and Agarwal, JJ.*) HARI RAM *v.* SHYAM BAHADUR. **1941 O.W.N. 948 = 1941 O.A. 673 = 1941 A.W.R. (Rev) 647 = 1941 R D. 708 = A.I R. 1941 Oudh 566.**

——**S. 46 and C. P. Code, S. 115**—*Revision—Competency—Decision of District Judge in appeal against decision of Special Judge of second grade—Proper forum for revision.*

U. P. ENCUM. EST. ACT (1934), S. 59.

The decision of the District Judge in appeal against the decision of a Special Judge of the second grade is final and bars interference by revision under S. 115, C. P. Code or S. 46 of the Encumbered Estates Act. The power of revision vests in the District Judge and such power can only be exercised by him in cases pending before the Special Judge and certainly not in cases which have already been disposed by him. (*Ghulam Hasan, J.*) KANCHAN PRASAD *v.* HANSA.

196 I.C. 701 = 1941 A.W.R. (Rev.) 998 = 1941 O.L.R. 752 = 1941 O.A. 879 = 1941 O.W.N. 1160.

——**S. 46**—*Revision—Long delay—Absence of explanation—Effect.*

When there is unexplained delay of more than four months in preferring a revision in a matter of the greatest urgency, the revision would not be ordinarily entertained. (*Shirreff, J.M.*) BABU LAL *v.* MAHOMED AQIL. **1941 O.A. (Supp) 544 (2) = 1941 A.W.R. (Rev.) 590 (2) = 1941 R D. 531.**

——**S. 49 (2)**—Applicability — Condition necessary for taking proceedings under S 49 (2)—Claim subsequent to application, if can be taken note of. *See* 1940 Dig., Col. 1215. KAYASTHA SCHOLARSHIP TRUST, SITAPUR *v.* RAJ RANI KUER. **16 Luck. 105.**

——**S. 50 and C. P. Code, O. 22**—If consistent—Substitution of legal representative of applicant under Encumbered Estates Act—Art. 176, Limitation Act, if applies. *See* 1940 Dig., Col. 1216. DAYARAM SINGH *v.* SURENDRA SINGH. **16 Luck. 72.**

——**S. 50 and Civil Procedure Code, O. 22**—*Substituti n of legal representative to applicant under the Act—Period of limitation—If applicable.*

The period of limitation fixed for the substitution of legal representatives, does not in view of S. 50 of the U.P. Encumbered Estates Act apply to the case of the death of an applicant under that Act. (*Harper, S.M. and Sathe, J.M.*) FAQIR BAKSH SINGH *v.* HARKARAN SINGH. **1941 R.D 256 = 1941 A.W.R. (Rev) 351 = 1941 O.A. (Supp.) 265 = 1941 A L.J. (Supp.) 74.**

——**S. 54**—Rules—R 6 and C. P. Code, O. 22 - Applicability of O. 22 to proceedings under United Provinces Encumbered Estates Act—Death of a creditor—Failure to implead legal representative within time—Effect. *See* 1940 Dig., Col 1216. GOKARAN SINGH *v.* BRIJ BHUKAN SINGH. **1941 R.D. 308.**

——**S. 54**—Rules under R. 6—Scope of—Extent of powers of Collector under. *See* UNITED PROVINCES ENCUMBERED ESTATES ACT, S. 35 AND R. 6 OF RULES UNDER THE ACT. **1940 R D. 625.**

——**S 54**—Rule 6 of Rules under—Scope of—Power of Special Judge to grant temporary injunction for preservation of property. *See* 1940 Dig., Col. 1216. NARAIN SINGH *v.* RADHEY SHYAM SETH.

I.L R (1941) All 69 = 13 R.A. 370 = 192 I C. 878 = A.I.R. 1941 All 76.

——**S. 59**—*Rules—Rr. 55 and 57—Proper rule to proceed under, in case of* taqavi *loans.*

Where in the case of *taqavi* loans the Collector is faced with the alternative of giving effect to either R. 55 or to R. 57 of the Encumbered Estates Act Rules, the Collector's choice must be decided by the application of S. 59 of the Act. It is a statutory provision which overrules the decrees of the Special Judge. (*Harper, S.M.*) AKHTAR ALI *v.* COLLECTOR OF MEERUT.

1941 O W.N. 96 = 1941 R D 64 = 1941 A.W.R. (Rev.) 159 = 1941 O A. (Supp.) 97 = 1941 A.L.J. (Supp.) 37.

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———Chap. V—*Joint application for liquidation—Cesses paid by all—If can be added together and taken into consideration.*

Where the application for liquidation under Chap. V of the U. P. Encumbered Estates Act is a joint one, all the applicants must be held to constitute one body. The total cess paid by all together should be taken into consideration and if it exceeds Rs. 100, proceedings could not be stayed, though individually each might be paying less than Rs. 100. (*Harper, S.M. and Sathe, J.M.*) BHAGWAN DIN *v.* RABI KARAN.

1941 O.W.N. 493 = 1941 O.A. (Supp.) 228 = 1941 A.W.R. (Rev.) 279 = 1941 R.D. 239.

UNITED PROVINCES ENCUMBERED ESTATES AMENDMENT ACT (II OF 1940), S. 2 (b)—*Post slump profits—Relevant year, for purposes of calculation of.*

Under S. 2(*b*) of the U. P. Encumbered Estates Amendment Act (II of 1940), the post slump profits have to be calculated with reference to the year immediately preceding that in which the Collector passes his order under R. 26 of the Encumbered Estates Act Rules. (*Harper, S.M. and Sathe, J.M.*) LAL RAJ RAJESHWARI PRASAD SINGH *v.* PITAMBAR DAS.

1941 O.W.N. 711 (2) = 1941 O.A (Supp.) 369 = 1941 R.D. 400 (2) = 1941 A.W.R. (Rev.) 439.

UNITED PROVINCES EXCISE MANUAL, Vol. 1, Rr. 357 (5) and 358 (8)—*Construction of—Resale in default of deposit—Date of resale not notified—Liability of purchaser, if affected—Sale, if* ultra vires.

According to a plain and reasonable construction of Rr. 357 (5) and 358 (8) of the U. P. Excise Manual the defaulting purchaser is bound to make good the deficiency on resale irrespective of the fact whether any notice is given to him of the date of the resale either at the time of the original sale or at any subsequent time. Sub-R. (8) of R. 358 does not make it obligatory on the part of the officer conducting the sale to notify then and there the date of the future sale. The words used are 'as he may then and there notify.' If the sales officer neither fixes any date of the future sale nor notifies it then and there, if he fixes one it cannot be said that that the resale held on that subsequent date is illegal or *ultra vires*. (*Ghulam Hasan, J.*) UNITED PROVINCES *v.* NARAIN SARUP. **196 I C. 344 = 14 R O. 153 = 1941 O.L.R. 675 = 1941 A.L.W 894 = 1941 R.D. 842 = 1941 O A. 761 = 1941 A.W.R. (Rev.) 827 = 1941 O.W N 1054.**

UNITED PROVINCES LAND RECORDS MANUAL, Para. 20—*Removal of assistant patwari—Requisition of patwari—Collector's powers—Reinstatement of removed person.*

Under para. 20, Land Records Manual, an assistant patwari has to be removed on the requisition of the chief patwari. A person so removed cannot be re-instated by the Collector, on an appeal by him, and such an order of re instatement is irregular. (*Shirreff, J.M. and Sathe, A.M.*) PUTTO LAL *v.* RAM CHANDRA.

194 O.A. (Supp) 794 = 1941 R.D. 937 = 1941 A.W.R. (Rev.) 920.

———**R. 116**—Zildar refusing to give information about collections—If guilty of an offence under S. 176, I. P. Code. *See* U. P. LAND REVENUE ACT, S. 46 AND U. P. LAND RECORDS MANUAL, R. 116.

1941 O A. 656.

———**Paras. 180, 320 and 322**—*Private land entered in Nazul register—If necessarily Nazul.*

Para. 320 of the U. P. Land Records Manual provides for a record of Nazul which is the property of Government, but Para. 322 makes a distinction and provides for the entry in the register also of

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local roads. Note (2) to paragraph 180 that the entry in the khewat should tally with the corresponding entry in Nazul register does not refer to these additional entries. Hence, though entered in the Nazul register, all are not necessarily Nazul. (*Harper, S. M.*) DISTRICT BOARD, GONDA *v.* MST. KANEEZ ALI BAQAR. **1941 R.D. 248 = 1941 O.W.N. 499 = 1941 O.A. (Supp.) 198 = 1941 A.W.R. (Rev.) 249.**

———**R. 236**—Written copy of charge—Necessity—Failure not resulting in injustice—Interference in appeal, if necessary. *See* 1940 Dig., Col. 1217, SRI RAM MISRA *v.* EMPEROR. **1941 A.W.R. (Rev.) 64 = 1941 O.A. (Supp.) 51 = 1941 A.L.J. (Supp.) 34.**

UNITED PROVINCES LAND REVENUE ACT (III OF 1901)—*Board's circular—7 1—R. 47 (4)—Scope and applicability of—Poverty of under proprietor, if a justification for going below 35%.*

R. 47 (4) of the Board's circular 7-1 says that the revenue may be assessed at less than 35% of the net assets in cases where the number and circumstances of the proprietors or the existence of heavy charges on account of *malikana* justify such a reduction. Where there is only one proprietor who is represented by an under-proprietor, though the circumstances of the latter may be poor, it is by itself not sufficient to comply with sub-cl. (4) of R. 47 and there is no justification in such a case for going below 35%. (*Harper, S.M. and Sathe, J.M.*) DHANPAT RAI *v.* SECRETARY OF STATE. **1940 O.W.N. 1315 = 1940 R.D. 607 (1) = 1941 A.W.R. (Rev) 78 = 1941 O.A (Supp) 55.**

———**S. 24**—*Patwari—Appointment—Custom—Departure—Justification.*

Where the local custom is that the heir of the deceased patwari should be appointed, it is satisfied when the heir of the deceased's predecessor in office is appointed in a case where the deceased was in office in that locality only for a short time on transfer. (*Shirreff, J. M.*) RAM NAIN PATHAK *v.* SHEO PUJAN LAL. **1941 A.W.R. (Rev.) 1091 = 1941 O.A. (Supp) 881 = 1941 R.D. 872 (2).**

———**S. 24**—*Patwari—Disappointed candidate for appointment of—Right of appeal—Parties to non-maintainable appeal—Right of further appeal.*

A disappointed candidate for the post of a patwari has no right of appeal. But if he had been allowed to do and the lambardars who supported him are made respondents, they are technically parties to the appeal, giving them a further right of appeal. An appeal by them should not be dismissed on the ground that they were not parties to the appeal in the lower Court, but should be disposed of on the merits. (*Shirreff, J.M.*) RAM NAIN PATHAK *v.* SHEO PUJAN LAL **1941 A.W.R. (Rev.) 1091 = 1941 O.A. (Supp.) 881 = 1941 R D. 872 (2).**

———**S. 24 (5)**—*Patwari—Nomination within time—Notice for fresh nomination—Legality.*

According to Board's circular letter No. 42/P 2, dated 6th August, 1937, Cl. (5) of S. 24 of the U. P. Land Revenue Act must be understood to mean that notices for fresh nomination should issue only if none of the lambardars nominates a successor to the patwari within 15 days from the occurrence of the vacancy. But where such a nomination is made within time, the Collector cannot issue notices for fresh nomination. (*Sathe, J. M.*) SUMESHAWARI PRASAD *v.* GAURI SHANKAR. **1941 A.W.R. (Rev) 188 = 1941 O.A. (Supp.) 132 = 1941 R.D. 108.**

———**S. 25**—Patwari—*Default in doing flood* partal—*Proper punishment.*

Where the failure of the *patwari* to do the flood *partal* is found to be due probably to laziness than to

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dishonesty then fine is an adequate punishment and not dismissal. (*Harper, S.M. and Shirreff, J.M.*) SHEO SHANKER LAL *v.* EMPEROR. **1941 R.D 597 (1) = 1941 O.A. (Supp.) 583 (1) = 1941 A.W.R. (Rev.) 626 (1).**

——**S. 33**—*Correction and mutation cases—Necessity for copy of current entry.*

All applications in correction and mutation cases should have a copy of the current entry attached, else they should be dismissed. (*Harper, S. M. and Sathe, J.M.*) DEEPA *v.* JUGAL KISHORE. **1941 R.D. 116 = 1941 O.A. (Supp.) 209 = 1941 A.W.R. (Rev.) 260.**

——**S.33**—Correction cases—Findings—*Res judicata See* C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS. **1941 A.W.R. (Rev.) 685 = 1941 R.D. 723.**

——**S. 33**—*Correction cases—Long established settlement entries—If can be interfered with.*

Long-established settlement entries cannot be interfered with by a mere application for correction. (*Harper, S.M.*) LACHMI NARAIN *v.* KAPURTHALA ESTATE. **1941 A.W.R. (Rev.) 390 = 1941 R.D. 297 = 1941 O.A. (Supp.) 347.**

——**Ss. 33 and 40**—*Correction of papers—Entries of over* 50 *years—Interference.*

The entries which have stood the test of one settlement and one partition and have lasted for nearly 50 years cannot be changed merely on a correction application in miscellaneous proceedings. (*Sathe, J. M.*) PEARY LAL *v.* HOTI LAL.
1941 A.W.R. (Rev.) 789 = 1941 O.A. (Supp.) 700 = 1941 R.D. 829 = 1941 A.L.J. (Supp.) 129.

——**S. 33 (2)**—*When can be availed of.*

S. 33 (2) of the U. P. Land Revenue Act can be used only to correct obvious mistakes and must not be used for the purpose of settling long standing disputes. Where an entry is based upon a Judge's order which was subsequently upset by the High Court, the entry is an obvious mistake and not in accordance with possession and so could be corrected under S. 33. (*Harper, S. M. and Sathe, J.M.*) DEEPA *v.* JUGAL KISHORE.
1941 R.D. 116 = 1941 O.A. (Supp.) 209 = 1941 A.W.R. (Rev.) 260.

——**S. 34**—*Mutation case on the basis of succession—Validity of waqf executed by deceased proprietor years before his death—If can be gone into.*

Where mutation proceedings are started for the substitution of names of the heirs of a deceased proprietor who had been entered in the khewat only as a proprietor and not as a mutawalli, it will be out of place to consider in such proceedings the validity of a waqf executed by the proprietor some 7 years before his death. A consideration of the waqf raises questions which are foreign to a mutation case on the basis of succession. (*Sathe, J. M.*) MOHAMMAD MASUD *v.* KANIZ FATEMA.
1941 R.D. 403 (2) = 1941 A.W.R. (Rev.) 419 = 1941 O.A. (Supp.) 356 = 1941 A.L.J. (Supp.) 80.

——**S. 34**—*Mutation—Delay in reporting—If an obstacle to mutation—Absence of explanation for delay—Effect.*

In a case for mutation, if it can be proved that the succession or transfer has really taken place, delay in reporting it is not a necessary obstacle to mutation. Even in such a case an explanation for the delay would be expected and its absence would be a strong argument against the reality of the transfer. (*Shirreff, J.M.*) RAM BILAS PATHAK *v.* MUNNERCHAND.
1941 A.W.R. (Rev.) 545 = 1941 O.A. (Supp.) 476 = 1941 R.D. 537

——**S. 34**—*Mutation—Mere declaratory decree—If justifies correction.*

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A mere declaratory decree could not justify an order of correction but the possession must be obtained from the Civil Court. (*Shirreff, J.M.*) BIND BASNI PRASAD *v.* RAMPATI DEI.
1941 A.W.R. (Rev.) 562 = 1941 O.A. (Supp.) 493 = 1941 R.D. 530.

——**S. 34 (5)**—*Scope and applicability.*

S. 34 (5) of the U. P. Land Revenue Act only debars Revenue Courts from entertaining suits and applications by persons who have not applied for mutation of names. It has no application to a case where payment of rent to such a person is pleaded as payment in good faith under S. 270, Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) LAL BEHARI *v.* BRAHMDEO PANDEY.
1941 R.D. 296 (2) = 1941 A.W.R. (Rev.) 400 = 1941 O.A. (Supp.) 349.

——**S. 36**—*Carving out of ex-proprietary holding—Ex-proprietor not in possession—Limitation—Possession of former co-*sir *holders—If can be relied upon to save limitation.*

Where an ex-proprietor is not in possession and loses his proprietary right, the possession of the former co-*sir* holders cannot be treated as the possession of the ex-proprietor after the loss of his proprietary rights for the purposes of limitation for the carving out of an ex-proprietary holding. (*Harper, S.M. and Sathe, J.M.*) RAM CHANDAR SINGH *v.* JADUNATH SINGH.
1941 A.W.R. (Rev.) 549 = 1941 O.A. (Supp.) 480 = 1941 R.D. 510.

——**S. 36**—*Demarcation of area in which ex proprietary rights have arisen—Proper procedure.*

When certain plots represent a person's half share of a *sir* holding which, before the transfer in which the ex-proprietary rights arose, had been joint between that person and another and it is a question of demarcating the area in which ex-proprietary rights had arisen, the right thing is to demarcate suitable plots and not half of the area of each plot. (*Shirreff, J.M.*) KUAR LAL *v.* DHANRAJI.
1941 R.D. 872 (1) = 1941 O.A. (Supp.) 737 (1) = 1941 A.W.R. (Rev.) 813 (1).

——**S. 36**—*Ex-proprietary rights—Declaration——When should be applied for—Transferor in possession and out of possession—Difference.*

A transferor can apply after a long interval for the declaration of ex proprietary rights provided he is in possession. But where he is not in possession and ex-proprietary rights are not claimed within six months of dispossession, they are extinguished. (*Shirreff, J.M.*) SHYAM RAJI *v.* PARAMHANS TAWARI.
1941 A.W.R. (Rev.) 557 (1) = 1941 O.A. (Supp.) 488 (1) = 1941 R.D. 674.

——**S. 36**—*Fixation of ex-proprietary rent—Right to—Determination as to existence of—Circumstances.*

Whether ex-proprietary rent should be fixed or not should be determined on the conditions existing when the proceedings started and not when the proceedings were disposed of by the trial Court. (*Harper, S. M. and Sathe, J.M.*) KAMTA RAM SHARMA *v.* ATIMULLAH. **1941 R.D. 259 = 1941 A.W.R. (Rev.) 354 = 1941 O.A. (Supp.) 268.**

——**S. 36**—*Liability for ex-proprietary rent—Starting point.*

According to S. 36 of the U. P. Land Revenue Act, the rent fixed shall be payable from the date the ex-proprietary tenancy arose. Hence the fact that mutation was effected later on cannot alter the date of the liability. (*Agarwal, J.*) DAYA SHANKAR *v.* BADRI PRASAD.
193 I.C. 150 = 13 R.O. 431 = 1941 R.D. 97 = 1941 A.W.R. (Rev.) 162 = 1941 O.L.R. 256 = 1941 O.W.N. 262 = 1941 O.A. 218 = A.I.R. 1941 Oudh 257.

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——S. 36—*Scope and applicability of.*

S. 36 of the U. P. Land Revenue Act deals only with ex proprietary rights accruing under S. 7 (*a*) of the Oudh Rent Act and hence it could not apply to a case where *sir* plots were allotted at a partition. (*Harper, S.M.*) HARAKH NARAIN SINGH *v.* BHAN SINGH.
1941 R.D. 348 = 1941 A.W.R. (Rev.) 449 = 1941 O.A. (Supp.) 381.

——S. 36 (4)—*Carving out of ex-proprietary holding—Limitation—How affected by ex proprietor not being in possession.*

There is no period of limitation fixed at all by the statute for filing applications claiming ex-proprietary rights and the question whether the application is belated or not has to be decided on the basis of who is in possession. If the ex-proprietor himself is in possession then according to S. 36 (4) of the U. P. Land Revenue Act, the ex-proprietary holding can be carved out at any time during the continuance of the ex-proprietary tenancy. But if somebody else is in possession then it has to be seen whether the ex-proprietor has lost his rights to sue that other person for possession. This will depend on who the man in wrongful possession is. If he happens to be the sole zamindar the period under Acts II of 1901 and III of 1926 will be six months and that under the U. P. Tenancy Act of 1939, three years. If however the wrongful possessor is not the sole zamindar then the period of limitation will be 12 years. (*Harper, S.M. and Sathe, J.M.*) RAM CHANDAR SINGH *v.* JADUNATH SINGH.
1941 A.W.R. (Rev.) 549 = 1941 O.A. (Supp.) 480 = 1941 R.D. 510.

——S. 39—*Correction case—Judgment—Contents.*

In a correction of papers case the preliminary enquiry has no doubt to be made by the Tahsildar. The S. D. O may rely upon the evidence so recorded when disposing of the case. But he has to write the judgment himself and that judgment must contain a concise statement of the case, the points for determination, the decisions thereon and the reasons for such decisions. If issues are framed there should be a finding on them with the reasons therefor. (*Harper, S.M. and Sathe, J.M.*) TAHERA BIBI *v.* ALIA BIBI.
1941 R.D 31 = 1941 A.W.R. (Rev.) 98 = 1941 O.A (Supp.) 86

——Ss. 39 and 40—*Correction—Entry of 40 years standing.*

An entry of 40 years standing and which has the sanction of a settlement cannot be changed merely on surmises. (*Sathe, A.M.*) KANCHAN SINGH *v.* ISHWAR KIRPAL SINGH. **1941 A.W.R. (Rev.) 993 = 1941 O.A. (Supp.) 837.**

——S. 39—*Correction of Khatauni—Maintainability—Tenant's claim to regain possession barred by limitation.*

Where in lieu of debts the defendants are by some arrangement in possession of an occupancy holding, a succeeding tenant who has allowed his claim to regain possession to be barred by limitation cannot sue for correction of the khatauni. The plaintiff in such a case cannot possibly be said to be in possession constructively through the possession of such defendants. (*Harper, S. M. and Shirreff, J.M.*) SANKATHA PRASAI *v.* BANSI. **1941 O.A. (Supp.) 828 = 1941 A.W.R. (Rev.) 984.**

——Ss. 39 and 40—*Correction of patwari papers case—Duty of S. D. O.—Evidence taken by Tahsildar—Value.*

Although in a correction of patwari papers case under the United Provinces Land Revenue Act, the evidence recorded by the Tahsildar or Naib Tahsildar can be

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taken into consideration, the responsibility of writing the judgment rests with the S.D.O.; and it must state all facts, the points in dispute and the Court's finding thereon. A judgment merely accepting the Naib Tahsildar's report is no judgment in the real sense. (*Sathe J.M.*) PARAGI *v.* MST PHULA. **1941 R.D. 375 = 1941 O.W.N. 693 = 1941 O.A. (Supp.) 494 = 1941 A.W.R. (Rev.) 563.**

——S. 39—*Proceedings under—Question of disputed title—If can be gone into—Correction—When justified.*

Questions of disputed title cannot properly be adjudicated upon in miscellaneous proceedings under S. 39 of the United Provinces Land Revenue Act. Before a correction is ordered it must be shown that the correction sought for is an obvious one. (*Sathe, J. M.*) BAHADUR SINGH *v.* JALPA SINGH. **1941 R.D. 367 = 1941 A.W.R. (Rev.) 471 = 1941 O.A. (Supp.) 430.**

——S. 39—*Proceedings under—Questions of title—If can be gone into—Practice in Oudh.*

Though ordinarily such miscellaneous proceedings as a correction of paper cases under the United Provinces Land Revenue Act, are not proper for the adjudication of disputed questions of title, it is permitted in the province of Oudh by reason of a long course of practice. (*Sathe, J.M.*) PARAGI *v.* MST. PHULA.
1941 O W N. 693 = 1941 R.D 375 = 1941 O.A. (Supp.) 494 = 1941 A.W.R. (Rev.) 563.

——S. 40—*Expunction on the basis of surrender—Withdrawal of application—When permissible—Possession when can be basis for an application for change of names.*

An application for expunction of name from the khewat on the ground of surrender by him can be withdrawn by him though at a late stage, provided no effect had been given to the prayer in the application in the meanwhile. Before possession can be a basis for change in the patwari papers, it must be shown to be based on *prima facie* title. (*Shirreff, J.M. and Sathe, A.M.*) SRI NARAIN *v.* REOTI KUNWAR. **1941 R D 821 = 1941 O A. (Supp) 754 = 1941 A.W.R. (Rev.) 853.**

——S. 40—*Mutation — Second application—When and when does not lie.*

A second application for mutation on the same cause of action cannot lie. But where a mutation application is rejected on the ground of absence of possession in a later application after the obtaining of possession would be maintainable. (*Sathe, A.M.*) SHEORATAN MISIR *v.* GIRJA DAYAL. **1941 O.A (Supp.) 866 = 1941 A.W.R. (Rev.) 1067.**

——S. 40—*Record officer's decision in correction case—If bars subsequent declaratory suit.*

The order of a record officer in a correction case does not operate as *res judicata* and is no bar to a subsequent declaratory suit. (*Harper, S.M.*) DAMBAR *v.* NATHI LAL. **1941 A.W R. (Rev.) 483 = 1941 O.A. (Supp.) 442 = 1941 R.D. 430.**

——Ss. 40 and 42—*Relative applicability—Decision of Land Record Officer as to creation of tenancy—Effect.*

Where the factum of tenancy is itself in dispute S. 42 of the Land Revenue Act does not apply and an order of the Land Record Officer as to declaration of an occupancy tenancy should be taken to be under S. 40 of the Act. But whether S. 40 or S. 42 applies, the order is not final between the parties and it is open to challenge in subsequent proceedings in the Revenue Courts and it has not the legal effect of creating a tenancy changing the nature of the alleged tenant's possession and preventing the prescription of a hostile title to the property. (*Dar, J.*) BHAGWATI PRASAD *v.* CHANDRIKA PRASAD.
196 I.C. 817 = 1941 A W.R (Rev) 610 = 1941 R.D. 566 = 1941 A.L.W. 655 =

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1941 O.A. (Supp.) 595=1941 A L J. 410= A.I.R. 1941 All. 339.

——**Ss. 40 and 42**—Scope of. *See* U. P. LAND REVENUE ACT. SS. 54, 40 AND 42.

1941 A.L.J. 410=A.I.R. 1941 All. 339.

——**S. 40**—*S. D. O.'s duty in correction of papers case.*

In the correction of patwari papers case all enquiries can be made by the Tahsildar. But that does not relieve the S. D. O. who disposes of the case from the duty of writing a judgment and that judgment must set out all the facts, the points at issue and the findings of the S. D. O. thereon. He is not justified in merely referring to the Tahsildar's report and saying that he accepts his report in such and such respects and not in others. (*Sathe, J. M.*) NUR MOHAMMAD *v.* ABDUL QUDUS. **1941 R.D. 243= 1941 O.A. (Supp.) 204=1941 A.W.R. (Rev.) 255.**

——**S. 40 (3)**—*'Property'—Meaning.*

The word 'property' used in S. 40 (3) of the U. P. Land Revenue Act does not connote merely proprietary rights but includes tenancy rights as well. (*Harper, S. M. and Sathe, J.M.*) PARTAB SINGH *v* BALWANT SINGH. **1941 R.D. 171=1941 O.W N. 461= 1941 A.W.R. (Rev.) 228=1941 O.A. (Supp.) 163= 1941 A.L.J. (Supp.) 48.**

——**S. 41**—*Boundary dispute affecting two sub divisions—Procedure—Regularity—Nature of proceedings under S.* 41.

Where a boundary dispute affects two sub-divisions and is dealt with by the two Sub-Divisional Officers concerned and the Collector passes orders on the report of the Sub-Divisional Officers on evidence admitted and recorded by them, the procedure followed though unusual is not irregular either from the point of view of S. 41 of the U. P. Land Revenue Act or of the instructions at pages 173 and 174 of the Revenue Court Manual. Proceedings under S. 41 are summary proceedings and regular judicial procedure is not prescribed for them as it is for proceedings under S. 42 of the Land Revenue Act. (*Harper, S.M. and Shirreff, J.M.*) SARFRAJ *v.* DEEP NARAIN.

1941 A.W.R. (Rev.) 592=1941 R.D. 499= 1941 O.A. (Supp) 546.

——**S. 41**—*Boundary dispute—Kishtwar survey—Demarcation—Forum.*

Where in the case of a Kishtwar plot the boundary is shown in the Kishtwar survey, the boundary can and should be demarcated through the Revenue Court. (*Shirreff, J.M.*) SHEO TAHAL *v.* SURAJ BALI LAL. **1941 O.A. (Supp.) 740=1941 A.W.R. (Rev.) 835= 1941 R.D. 898.**

——**S. 41**—*Demarcation—Basis.*

A demarcation application cannot be converted into a partition suit. According to S. 41 of the Land Revenue Act demarcation can be made either on the basis of existing survey maps or on the basis of actual possession. If the requisite material is not available, demarcation has to be refused and cannot be carried out merely with the help of the Civil Court judgment and *dakhalnama.* (*Shirreff, S. M. and Sathe, J.M.*) SHEO MANGAL PATHAK *v.* DHARAMDEI.

1941 A.W.R. (Rev) 767 (2)= 1941 O.A (Supp.) 677=1941 R.D. 740.

——**S. 41 and Land Records Manual, R. 116**—*Liability to furnish particulars of collections—On whom cast—Ziladar refusing to give* patwari, *information about collections—If an offence under S.* 176, *I. P. Code.*

R. 116 of the Land Records Manual is no doubt an extension of the provisions of S. 46 of the Land Revenue Act; it extends the liability imposed by S. 46 to all persons who receive the rent, but the rule is not on this account inconsistent with S. 41 of the Act. Hence a liability is imposed by a statutory rule upon the person who actually receives the rent from the tenants, whether the Zamindar himself or his agent to furnish the *patwari* with particulars of the payment and if a Zildar who received the rent refuses to furnish this information to the *patwari* when asked for he is guilty of an offence under S. 176, I. P. Code. (*Bennett, J.*) RAM BARAN SINGH *v.* EMPEROR. **195 I.C. 163= 1941 O W.N. 944=1941 O.L.R. 550= 1941 R.D. 706= 4 R.O. 72=1941 A.L.W. 831= 42 Cr.L J. 708=1941 A.Cr.C. 196= 1941 A.W.R. (Rev.) 627=1941 O.A. 656= A.I.R. 1941 Oudh 525.**

——**S. 42**—*Applicability.*

An application for the removal of the name of another who had been added as a co-tenant in his occupancy holding, will not fall under S. 42 of the United Provinces Land Revenue Act as the dispute does not relate to the class of tenure of a tenant. (*Shirreff, J.M.*) JHILLAR AHIR *v.* BECHAI AHIR. **1941 A.W.R. (Rev.) 511=1941 O.A. (Supp.) 470= 1941 R D. 539 (2).**

——**Ss. 54, 40 and 42**—*Powers of Land Records Officer—Scope of Ss.* 40 *and* 42—*Denial of tenancy and assertion of adverse possession—Land Records Officer declaring one to be an occupancy tenant—Effect.*

Under S. 54 of the United Provinces Land Revenue Act, the powers of the Land Records Officer are limited to those matters which relate to maintenance and correction of records. which powers in ordinary times are exercised by the Collector. Under S. 40 questions of title are not determined at all and disputes under S. 40 are decided on the basis of possession. S. 42 only comes into play when the factum of tenancy is admitted on both sides and the dispute is only as to the class and nature of tenancy. Where the tenancy itself is in dispute any order passed either under S. 40 or S. 42 will not have the effect of *res judicata* and the decision will be liable to be reagitated in a Civil or Revenue Court. Where before the Land Records Officer, the tenancy is denied and the opposite party maintains that he is in adverse possession of the property and is not a tenant at all, and the Land Records Officer declares the latter to be an occupancy tenant, the order whether it be taken to have been passed either under S. 40 or S. 42, is not final between the parties and it is open to challenge at the instance of either party in subsequent proceedings in Revenue Court. (*Dar, J.*) BHAGWATI PRASAD *v.* CHANDRIKA PRASAD. **196 I.C. 817= 1941 A.W R. (Rev.) 610=1941 R D. 566= 1941 A.L.W. 655=1941 O.A. (Supp.) 595= 1941 A.L.J. 410=A.I.R. 1941 All. 339.**

——**S. 57**—*Decision under—When operates as* res judicata.

A decision of an Assistant Record Officer under S. 57 of the Land Revenue Act operates as *res judicata* in a subsequent suit provided the full procedure prescribed by S. 42 of the Act has been followed. Where no issues were framed and one party stated that he did not wish to contest the particular case the decision is obviously only a summary decision. (*Harper, S.M.*) NAR SINGH *v.* BADRI. **1941 O.A. (Supp.)894= 1941 A.W.R. (Rev.) 1101.**

——**Ss. 57 and Civil Procedure Code (1908), S. 11**—*Orders during record operations—If* res judicata.

Orders passed during the record operations by the record officer do not operate as *res judicata* and cannot stand in the way of an adjudication of rights in a regular

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suit. (*Harper, S. M. and Sathe, J. M.*) PARTAP SINGH *v.* BALWANT SINGH. **1941 O.W.N. 461 = 1941 R.D. 171 = 1941 O.A. (Supp.) 163 = 1941 A.W.R. (Rev.) 228 = 1941 A.L.J. (Supp.) 48.**

——**S. 63-D (b)**—*Valuation of* sir *and* khudkasht—*Standard rate—Meaning.*

Even at octennial settlements the valuation of *sir* and *khudkasht* area should be done at the standard rate. The term 'standard rate' has not been defined anywhere in the Land Revenue Act, but according to the interpretation put upon it in the Settlement Department it means the rates applicable to occupancy tenants. (*Shirreff, S. M. and Sathe, J.M.*) FAZLUR RAHMAN *v* EMPEROR. **1941 R D. 689 = 1941 O.A. (Supp.) 615 = 1941 A.W.R. (Rev.) 675.**

——**S. 76**—*Usufructuary mortgage and subsequent simple mortgage—Provision for appropriation of profits towards interest in the earlier mortgage—Redemption and possession by subsequent mortgagee—Liability to account—Mortgagee voluntarily setting off profits against interest—If can affect his rights.*

Where a usufructuary mortgage providing for appropriation of profits towards interest is redeemed by a subsequent simple mortgagee who also obtains possession of the property, the latter cannot be called to account by the mortgagor. The fact that the subsequent mortgagee in a suit on his mortgage voluntarily allows a set off for profits against the interest due on his mortgage cannot prevent him from later on standing on his rights. (*Ghulam Hasan and Agarwal, JJ.*) TAJAMMUL HUSAIN *v.* AMIRUDDIN. **1941 O.W.N. 1239 = 1941 O.A. 951 = 1941 A.W.R. (Rev.) 1078.**

——**S. 79**—*Determination of rent under—If barred by compromise at prior settlement.*

Where as a result of a compromise at the time of a prior settlement, an under-proprietary tenure was recognised, the rental being the same as the land revenue but which was to remain unaffected by the changes in the *Jamina* payable, it was held that the compromise only determined the rent for the time being and did not bar the determination of rent under S. 79 of the Land Revenue Act at future settlements and for all times. (*Harper, S.M.*) DUKHI SINGH *v.* BACHCHAN MAN. **1911 A.W.R. (Rev) 445 (1) = 1941 O.A. (Supp.) 377 (1) = 1941 R.D. 335.**

——**S. 79**—*Fixation of rent under—Inference.*

Fixation of rent under S. 79 of the United Provinces Land Revenue Act may corroborate evidence showing that the land in question is under-proprietary. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRI DHAR. **192 I.C. 259 = 13 R O. 338 = 1941 O.L R. 93 = 1940 O.A 1293 = 1940 O.W N. 1344 = 1941 A.W.R. (Rev) 19 = 1941 R.D 6 = A.I.R. 1941 Oudh 189.**

——**S. 79**—*Power to assess rent on rent free under-proprietor.*

It is not open to a Settlement Officer to assess rent on a rent free under-proprietor under S. 79 of Land Revenue Act. (*Harper, S.M. and Sathe, J.M*) RAM ANJORI *v.* BABUA SAHEB SINGH. **1941 O.W.N. 95 = 1941 A L J. (Supp.) 29 = 1941 A.W.R. (Rev.) 265 ( ) = 1941 O.A. (Supp) 214 (1) = 1941 R D. 63.**

——**S. 79**—*Scope and applicability of—Rent free under-proprietary holding—If subject to assessment of rent under S. 79.*

S. 79 of the U. P. Land Revenue Act does not make every parcel of land liable to assessment of rent, even though it may be land held rent free in perpetuity under a judicial order. In fact this section does not prescribe the rights and liabilities of under-proprietary tenants at

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all. It only imposes on the Settlement Officer the obligation to determine the rent payable by an under-proprietor which implies that the liability to pay rent, if any, is fixed by some other provision of law. An under-proprietary holding held rent free under a Court decree of 1869 and which is not liable to assessment of rent under S. 107 of the Oudh Rent Act, is not subject to assessment of rent under S. 79 of the Land Revenue Act. (*Harper, S.M. and Sathe, J.M.*) ALLAH TALA *v.* SURAJ BIKRAM SINGH. **1941 O W.N 89 = 1941 R D. 57 = 1941 A.W.R. (Rev.) 222 = 1941 O.A. (Supp.) 157.**

——**S. 79**—Settlement Officer's duty under—If can determine gross rent. *See* 1940 Dig., Col. 1220 LAL CHANDRA MOOL SINGH *v.* TEJ BAHADUR SINGH. **16 Luck. 36.**

——**S. 86**—*Procedure as to recording of cesses—Absence of* wajib-ul-arz *at a settlement—Government sanction for continuance of custom recorded in previous* wajib-ul-arz, *if can be inferred.*

It is clear from S. 86 of the U. P. Land Revenue Act that at the time of each settlement only those cesses will be recorded and will be enforceable as have received the sanction of the government and if a custom is not so recorded, no such sanction can be assumed. If no *wajib-ul-arz* is drawn up at any particular settlement, it cannot be inferred from that fact that the government has sanctioned the continuance of the custom recorded in the *wajib-ul-arz* of the previous settlement. (*Collister, J.*) CHAMELI *v.* STATE KISHAN GARH. **1941 O.A. (Supp.) 899 = 1941 A.L.W. 1085 = 1941 A.W.R. (Rev.) 1106.**

——**S. 87 (2)**—*Instructions to revising officers—Para.* 18—*Rent arrived at after adjudication after* 1931—*If can be modified.*

Where a rent was arrived at after being challenged by both parties and after being adjudicated upon afresh subsequent to 1931, the revision officer could not modify it under S. 87 of the United Provinces Land Revenue Act. (*Harper, S.M.*) PAT RAM *v.* KISHORI SARAN. **1941 R.D. 452 = 1941 O.A (Supp) 444 = 1941 A.W.R. (Rev.) 485.**

——**S. 106**—*'Partition'—Meaning.*

The word 'partition' in the Land Revenue Act is not used in the narrow sense of mere arrangement into units of area. It imports and includes that rights in these units are distributed among the sharers. (*Yorke and Ghulam Hasan, JJ.*) KHAGGA *v.* HUMMA. **195 I.C. 381 = 14 R.O. 76 = 1941 O A. 555 = 1941 R.D. 492 = 1941 A.W.R (Rev.) 537 = 1940 O W.N. 823 = 1941 A.L.W. 673 = 1941 O.L R. 579 = A.I.R. 1941 Oudh 449.**

——**S. 106**—*Partition—Proof of prior private partition—Inference.*

Where a prior private partition is pleaded in defence to a suit for partition and though there is no evidence of it at the time of 1860 settlement, there appears to be something of that sort indicated in 1876. *Khatauni* and the 1291 and 1324 settlement *Khattas* show two shares as separate *Khattas* with separate areas and land revenues, the entries point to the fact that a partition should have taken place, and it is unlikely that both the subsequent settlements would have shown separate *Khattas* unless there had been a partition. (*Shirreff, J.M.*) BHUKHEL CHAUDHARY *v.* BHAGIRATHI CHAUDHARY. **1941 O.A. (Supp) 827 = 1941 A.W.R. (Rev). 983.**

——**S. 106**—*Perfect partition—Effect of—Recognition of right to perfect partition—Liability for revenue—Condition varying such liability—Enforceability.*

U. P. LAND REV. ACT (1901), S. 107.

S. 106 of the U. P. Land Revenue Act provides that in 'perfect partition' the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon. Once the right to a perfect partition is either admitted or established, the responsibility for payment of Government revenue will fasten upon each separate mahal formed newly and it is not open to the parties to enter into an agreement whereby the statutory liability to pay Government revenue imposed by the Act is contravened. A condition about the payment of Government revenue through the talukdar is a condition which imposes a restraint upon partition and cannot be enforced. (*Thomas, C.J. and Ghulam Hasan, J.*) MAHOMED RAZA *v.* AHMAD ABBAS. **193 I.C. 689 = 13 R.O. 489 = 1941 O.W.N. 522 = 1941 O.A. 316 = 1941 A.W.R. (Rev.) 285 = 1941 R.D. 274 = 1941 A.L.W. 375 = 1941 O.L.R. 315 = A.I.R. 1941 Oudh 391.**

——**Ss. 107 and 131**—*Orders in partition cases—On whom binding.*

Orders passed in partition cases are only final as regards the parties to the partition cases and not against tenants. (*Sathe, A.M.*) SHEOBARAN SINGH *v.* ARJUN SINGH. **1941 O.A. (Supp.) 819 = 1941 A.W.R. (Rev.) 975 = 1941 R.D. 949.**

——**S. 110**—*Partition proceedings — Fundamental objections—Stage at which to be raised—Objections after completion of partition—If justified.*

An objection that some of the numbers of the *Shamilat patti* are *minjumla* numbers and that hence the complete *patti* should be partitioned before any internal partition could start, is such a fundamental one that it should be raised at an early stage of the proceedings by way of objections under S. 110 of the U. P. Land Revenue Act. The law does not justify a party in raising after the completion of partition such an objection of such a vital nature, which could and should have been raised very much earlier. (*Harper, S.M.*) FAZAL HUSAIN *v.* ALE HASAN. **1941 A.W.R. (Rev.) 926 = 1941 O.A. (Supp.) 800 = 1941 R.D. 790.**

——**S. 111**—*Extension of time prescribed by—Power of Revenue Court—Civil Court, if can question such decision.*

The Revenue Courts have discretion to extend the time fixed by S. 111 of the Land Revenue Act and their decision on this point should not be questioned in a Civil Court. (*Bennett and Ghulam Hasan, JJ.*) INDERJIT *v.* KANHAIYA LAL. **16 Luck. 435 = 194 I.C. 849 = 14 R.O. 40 = 1941 A.W.R. (Rev.) 164 = 1941 O.W.N. 258 = 1941 O.A. 221 = 1941 R.D. 93 = 1941 O.L.R. 527 = A.I.R. 1941 Oudh 301.**

——**S. 111**—*Order of Revenue Court under—Jurisdiction of Civil Court to question—Limits.*

The question whether an objection is barred as not having been made within the time prescribed by S. 111, is essentially a question for the Revenue Court to decide and it is not open to the Civil Court to question the decision of the Revenue Courts on this point. The only circumstance in which the Civil Court would be justified in questioning the order passed by the Revenue Court under S. 111 (1) (*b*) is where the Civil Court finds the question raised is not a question of proprietary title. (*Bennett and Ghulam Hasan, JJ.*) INDERJIT *v.* KANHAIYA LAL. **16 Luck 435 = 194 I.C. 849 = 14 R.O. 40 = 1941 A.W.R. (Rev.) 164 = 1941 O.W.N. 258 = 1941 O.A. 221 = 1941 R.D. 93 = 1941 O.L.R. 527 = A.I.R. 1941 Oudh 301.**

U. P. LAND REV. ACT (1901), S. 112.

——**S. 111**—*Partition—Inequalities—Utilisation of* shamilat pattis—*Objection, when to be raised—Result of failure to raise it at the proper time.*

The proposal to break up the *shamilat pattis* for removing the inequalities of a partition, raises a question of proprietary title and any objection thereto should be raised before the partition proceedings are framed and failure to do so at that stage would be held to mean acquiescence in the proposal and hence it cannot be resisted after it has been incorporated in the partition proceedings. (*Harper, S.M. and Sathe, J.M.*) RAM JAS PANDEY *v.* SHEO PUJAN PANDEY. **1941 R.D. 338 (2) = 1941 O.A. (Supp.) 422 = 1941 A.W.R. (Rev.) 463.**

——**S. 111**—*Question of proprietary title—Claim to separate ownership of* sir *lands.*

The claim to separate ownership of *sir* lands raises a question of proprietary title. (*Bennett and Ghulam Hasan, JJ.*) INDERJIT *v.* KANHAIYA LAL. **16 Luck. 435 = 194 I.C. 849 = 14 R.O. 40 = 1941 A.W.R. (Rev.) 164 = 1941 O.W.N. 258 = 1941 O.A. 221 = 1941 R.D. 93 = 1941 O.L.R. 527 = A.I.R. 1941 Oudh 301.**

——**S. 111**—*Question of proprietary title*—Sir, *if belongs exclusively to one or jointly to both co-sharers—Forum for decision of this dispute.*

A dispute between two co-sharers as to whether a *sir* belongs exclusively to one or jointly to both raises a question of proprietary title. Where there is such a dispute the Revenue Court has jurisdiction to adopt any of the methods prescribed by S. 111 of the U. P. Land Revenue Act and if the Court has proceeded under Cl. (*c*) of sub S. (1), then the appeal lies to the District Judge. (*Collister, Allsop and Bajpai, JJ.*) PUNJAB SUGAR MILLS CO. LTD. *v.* LACHMAN PRASAD TEWARI. **I.L.R. (1941) All. 302 = 192 I.C. 733 = 1941 R.D. 52 = 1941 O.W.N. 84 = 13 R.A. 360 = 1941 A.L.W. 59 = 1941 A.W.R. (H.C.) 8 = 1941 A.L.J. 1 = 1941 A.W.R. (Rev.) 32 = 1941 O.A. (Supp.) 21 = A.I.R. 1941 All. 73 (F.B.).**

—— **S. 112**—*Appeal—Competency—Order rejecting application for perfect partition on the ground of prior agreement.*

Where the Deputy Commissioner rejects an application for perfect partition on the ground that an agreement between the predecessors in interest of the parties negatived such a right and also on the ground of *res judicata*, an appeal lies under S. 112 of the Land Revenue Act against such an order, for the order is one made under S. 111 (*c*) and not under S. 109 (1) of the Act. (*Thomas, C.J. and Ghulam Hasan, J.*) MAHOMED RAZA *v.* AHMAD ABBAS. **1941 O.W.N. 522 = 193 I.C. 689 = 13 R.O. 489 = 1941 R.D. 274 = 1941 A.L.W. 375 = 1941 O.L.R. 315 = 1941 O.A. 316 = 1941 A.W.R. (Rev.) 285 = A.I.R. 1941 Oudh 391.**

——**Ss. 112 and 114**—*Partition proceedings — Partition order—Finality—Review.*

Where in its nature an order by a partition officer involved compensation being given but is silent as to such compensation, the matter with regard to which it is passed cannot be regarded as final or settled until compensation has been allotted and hence it is open to review by the partition officer, though he would not have such powers if the order had been a final order. (*Harper, S.M. and Shirreff, J.M.*) CHIKHURI SINGH *v.* SUNDAR UPADHYA. **1941 R.D. 603 = 1941 O.A. (Supp.) 581 = 1941 A.W.R. (Rev.) 624.**

U. P. LAND REV. ACT (1901), S. 113.

——**Ss 113 and 114**—*Draft partition proceedings—Value—Setting aside—Necessity—Prosecution of claim to proprietary rights in Civil Court.*

Partition proceedings are drafted only after it is decided to make a partition under S. 113 of the U. P. Land Revenue Act. If such a decision is put into the form of a written order, that order will require to be set aside. Where the partition proceedings are still in a draft form and have not been confirmed, they do not assume any binding value. They do not require to be set aside, when a claim to proprietary rights is being prosecuted in a Civil Court. (*Harper, S.M. and Sathe, J.M.*) BABU LAL *v.* SHIAM PIARI.

1941 A.W.R. (Rev.) 178 = 1941 O.A. (Supp.) 122 = 1941 R.D. 20.

——**Ss 117 and 123**—*Joint* sir—*Mortgage and subsequent sale of portion by all co-sharers except one—Mortgage in possession—Partition proceeding—Proper allotment.*

Where four out of the five holders of a joint *sir* holding usufructuary mortgage of certain specified plots out of the *sir* holding subsequently sell them to another, the remaining co-sharer must be considered to be the sole *sir* holder of the whole *sir* holding and is therefore entitled to have his share made up first from it under S. 117, U. P. Land Revenue Act, even though the mortgagees are in possession over some of the plots. In such a case it cannot be said that under the proviso to S. 123, the sole co heir could only get so much area out of the joint holding as will make up his share in the total *sir* and *khudkasht* area of the patti. The intention of S. 123 is that no portion of a co-sharer's *sir* should be taken away from him in an imperfect partition unless it exceeds his total proprietary share in the patti or mahal under partition (*Sathe, J.M.*) MADAN GOPAL PANDE *v.* HARAI BAQAL **1941 R.D. 726 = 1941 O.A. (Supp.) 632 = 1941 A.W.R. (Rev.) 692 = 1941 A.L.J. (Supp.) 119.**

——**S. 118**—*Failure of co-sharer to claim rights under with reference to house—Effect.*

Where a co-sharer fails to obtain an order of the partition officer in his favour as required by S. 118 of the Land Revenue Act at the time of the partition, with reference to a house in his possession it is thereafter not open to him to reopen the question settled by the partition Court. (*Yorke and Ghulam Hasan, JJ.*) KHAGGA *v.* HUMMA. **195 I.C. 381 = 14 R.O. 76 = 1941 A.L.W. 673 = 1941 O.A. 555 = 1941 R.D. 492 = 1941 A.W.R. (Rev.) 537 = 1941 O.W.N. 823 = 1941 O.L.R. 579 = A.I.R. 1941 Oudh 449.**

——**S. 118**—*Scope and object of—Co-sharer acquiring rights of* riyayas, *if protected.*

The words 'the land occupied by a dwelling house or other building in the possession of a co-sharer' occurring in S. 118 of the U. P. Land Revenue Act clearly indicate that the intention of the section was to protect the rights of a co sharer in the dwelling house or other buildings which he possessed as a co sharer. They were not intended to extend the protection to the houses of *riyayas* which a co sharer might have acquired and in which his interest would be no better than those of the *riyayas* themselves. (*Yorke and Ghulam Hasan, JJ.*) KHAGGA *v.* HUMMA. **195 I.C. 381 = 14 R.O. 76 = 1941 A.L.W. 673 = 1941 O.A. 555 = 1941 R.D. 492 = 1941 A.W.R. (Rev.) 537 = 1941 O.W.N. 823 = 1941 O.L.R. 579 = A.I.R. 1941 Oudh 449.**

——**S. 123**—Interpretation—Intention of section. *See* **U. P. LAND REVENUE ACT, SS. 117 AND 123.**

1941 A.W.R. (Rev.) 692 = 1941 R.D. 726.

U. P. LAND REV. ACT (1901), S. 132.

——**Ss. 126 and 36**—*Partition—Carving out of ex-proprietary holding—Conditions necessary—Right of person ceasing to be co-sharer—Proper remedy.*

In a partition case the officer is empowered to carve out ex-proprietary holdings only when such rights arise on account of the allotment of severalty, land belonging to one co-sharer to the share of another co-sharer. Where a person is no longer a co-sharer in the khewat he has no *locus standi* in the partition case and no ex-proprietary holding can be carved out for him by the partition officer. If he has any claims for ex-proprietary rights he should apply for the carving out of the ex-proprietary holding under S. 36 of the Land Revenue Act before the Sub Divisional Officer in his capacity as Sub-Divisional Officer and not as Partition Officer. (*Shirreff, J.M. and Sathe, A.M.*) RAM LAL *v.* RAGHUBANS KUNWAR. **1941 A.W.R. (Rev.) 1048 = 1941 O.A. (Supp.) 857.**

——**Ss. 126 and 127**—*Partition—Failure to claim ex-proprietary rights—If bars a subsequent claim thereto.*

Where ex-proprietary rights were not claimed at the time of the partition, they could not be claimed subsequently. (*Harper, S. M. and Sathe, J. M.*) PIRTHI SINGH *v.* MADAN LAL.

1941 A.W.R. (Rev.) 340 = 1941 O.A. (Supp.) 254 = 1941 R.D. 170 = 1941 O.W.N. 508.

——**S. 126**—*Scope of—Partition—Ex-proprietary rights—When to be claimed.*

The phraseology used in S. 126 is ambiguous. It does say that the former *sir* holder shall be an ex-proprietary tenant if he continues to cultivate the land after the partition but it also says that the ex-proprietary rent shall be fixed before the partition is confirmed. A *khudksht* holder must know at the time of partition whether he wishes to cultivate after the partition and if he wishes to do so there is nothing to prevent him from claiming these ex-proprietary rights at once. Thus the rights should be claimed during the partition proceedings and a subsequent claim to them could not be admitted. (*Harper, S.M and Shirreff, J.M.*) WALI MAHOMED *v* NAZIR AHMAD.

1941 A.W.R. (Rev.) 643 = 1941 O.A. (Supp.) 474 = 1941 R.D. 684.

——**Ss. 131 and 114**—*Confirmation of partition by Collector—Proper stage.*

An order finally confirming partition can only be passed under S. 131, U. P. Land Revenue Act, only when the kuras approved by the partition officer are submitted to the Collector. Where no kuras were prepared and the partition file had only gone to the Collector for confirmation of partition proceedings only, he cannot at the stage pass an order finally confirming partition kuras, when they are not in existence. Such an order is entirely irregular and cannot be maintained. (*Shirreff, S. M. and Sathe, J. M.*) QUTUBULLAH *v.* NUR MAHOMED. **1941 R.D. 731 = 1941 O.A. (Supp.) 630 = 1941 A.W.R. (Rev.) 690.**

——**Ss. 131 and 133**—*Reopening confirmed partition.*

Even after a partition has been confirmed, there is nothing to prevent remedying the failure to carry out the orders. But it is a matter in which discretion should be exercised very sparingly. (*Shirreff, J.M.*) BABBAN SINGH *v.* GULAB SINGH. **1941 A.W.R. (Rev.) 507 = 1941 O.A. (Supp.) 466 = 1941 R.D. 545.**

——**Ss. 132 (3) and 214**—*Appeal against orders under S. 132 (3)—Limitation.*

An appeal against an order passed under S. 132 (3) of the United Provinces Land Revenue Act is appealable under S. 133 (*d*) and is subject to the limitation prescri-

U. P. LAND REV. ACT (1901), S. 142.

bed by S. 214 of the Act. (*Harper, S.M.*) GENDAN LAL *v.* KUNWAR BAHADUR.

1941 A.W.R. (Rev.) 505 (1) = 1941 O.A. (Supp.) 464 (1) = 1941 R.D. 529 (2)

——**S. 142**—*Applicability—Liability of* thekadar *to be sued for arrears of land revenue.*

S. 142 of the U. P. Land Revenue Act relates to the liability of every proprietor of land to pay land revenue to Government. Under this section Government will probably be entitled to realise arrears of land revenue from a *thekadar* on his joint and several responsibility. But this will not entitle a lambardar to sue a *thekadar* for arrears of land revenue as such a suit will have to lie under S. 221 of the Agra Tenancy Act and not under S. 142 of the Land Revenue Act. (*Shirreff, S.M. and Sathe, J.M.*) RAO HUSAN BUX *v.* LACHMICHAND

1941 O.A. (Supp.) 578 = 1941 A.W.R. (Rev.) 621 = 1941 A.L.J. (Supp.) 114 = 1941 R.D. 589.

——**Ss. 150 and 151**—*Attachment of mahal—Right of Zamindar to intervene and sue for ejectment.*

After a mahal is attached under S. 150 of the U. P. Land Revenue Act, the Zamindar does not retain any right to sue for ejectments or to settle vacant lands under S. 151 of the Act. Though a Collector is bound to support a suit previously instituted by the Zamindars, during attachment the Zamindars have no right to intervene directly. (*Harper, S.M. and Sathe, A.M.*) MANZOOR AQA *v.* MANZOOR HUSAIN.

1941 A.W.R. (Rev.) 1045 = 1941 O.A. (Supp.) 854.

——**S. 201**—*'Officer making the order', meaning of—Restoration application—If entertainable by a successor in office.*

The phrase 'officer making the order' occurring in S. 201 of the U. P. Land Revenue Act should be interpreted in a general sense as is equivalent to 'Court.' Hence a restoration application can be entertained by a successor in office. (*Sathe, A.M.*) MAHOMED ZAMAN KHAN *v.* BHAWANJI. **1941 O.A. (Supp.) 867 (2) = 1941 A.W.R. (Rev.) 1069.**

——**Ss. 210 and 211**—*Order refusing to dismiss lambardar—Appealability.*

A Sub D. O. order refusing to dismiss a lambardar is appealable according to Ss. 210 and 211 of the U. P. Land Revenue Act. (*Sathe, J.M.*) FAKHRUDDIN *v.* MAHABALI PRASAD. **1941 R.D. 320 = 1941 O.A. (Supp.) 271 = 1941 A.W.R. (Rev.) 357.**

——**Ss. 210 (c) and 99**—*Appeal—Remission under B.C. 8-1 framed under S. 99—Appealability.*

Where remissions are given under B C. 8-1 which has been framed under S. 99 read with S. 234 of the Land Revenue Act, inasmuch as S. 99 occurs in Ch. VI relating to remission of assessment and other proceedings during the currency of a settlement, the order of remission relates to a settlement matter and consequently appealable under S 210 (*c*) of the Act. (*Harper, S.M. and Sathe, J.M.*) RAM KISHORE *v.* EMPEROR.

1941 A.W.R. (Rev.) 403 = 1941 O.A. (Supp.) 352 = 1941 R.D. 302.

——**S. 212**—*Reasonable exercise of discretion—Questioning old transaction to remedy a party's negligence.*

Questioning a partition confirmed 28 years before in order to enable a plaintiff to make good his own negligence in not applying at that time to the Collector or the Commissioner would not be a reasonable exercise of the Court's discretion under S. 212 of the U. P. Land Revenue Act. (*Harper, S.M.*) HARAKH NARAIN SINGH *v.* BHAN SINGH. **1941 A.W.R. (Rev.) 449 = 1941 O.A. (Supp.) 381 = 1941 R.D. 348**

——**S. 213**—*Interference by Board—Refusal to postpone partition by three Courts.*

U. P. LAND REV. ACT (1901), S. 233.

Where three Courts have held that it is not desirable to postpone partition proceedings, there is nothing contrary to any specified law or usage having the force of law and the case does not fall within the provisions of S. 213 of the Land Revenue Act. (*Harper, S.M.*) UTTAM SINGH *v.* TALUQDAR SINGH.

1941 O.W.N. 598 = 1941 A.W.R. (Rev.) 388 = 1941 O.A. (Supp.) 345 = 1941 R.D. 301.

——**S. 213**—*Scope of—Decision as to right of single co-sharer to convert grain rents into cash rents—Interference in third appeal.*

Third appeals in miscellaneous proceedings will be governed by S. 213 of the U. P. Land Revenue Act. An order cannot be interfered with in third appeal unless it can be shown that it is against some special law or usage having the force of law. As it is very doubtful if a single co-sharer in Oudh can convert grain rents into cash rents, a decision by the commissioner that he cannot, cannot be said to be one wherein he can be held to have acted against any specified law or usage having the force of law. Hence such an order cannot be interfered with under S. 213. (*Sathe, A.M.*) JAGESHWAR PRASAD *v.* DWARIKA SINGH.

1941 A.W.R. (Rev.) 1044 = 1941 O.A. (Supp.) 853 = 1941 A.L.J. (Supp.) 141.

——**S. 218**—Patwaris—Punishment—Procedure to be followed—Enhancement by appellate authority—Proper procedure. *See* 1940 Dig., Col. 1222. SHYAM SUNDER LAL *v.* EMPEROR. **1941 A.L.J. (Supp.) 9.**

——**S. 218**—*Reference—Competency—Case decided in appeal by Commissioner himself—Proper procedure.*

S. 218 of the U. P. Land Revenue Act empowers a Commissioner to refer a case decided or proceedings held by any officer subordinate to him but not a case decided by himself in appeal. In such a case it is for the party concerned to move the higher Court either by way of second appeal or revision. (*Shirreff, S. M. and Sathe, J. M.*) FAZLUR RAHMAN *v.* EMPEROR.

1941 R.D. 689 = 1941 O.A. (Supp.) 615 = 1941 A.W.R. (Rev.) 675.

——**S. 219**—*Right of third appeal—Irregular order setting aside a valid order on appeal.*

Where a valid order passed on appeal is set aside by an irregular order in second appeal, a third appeal lies under S. 219 of the U. P. Land Revenue Act and the irregular order can be set aside. (*Shirreff, J.M. and Sathe, A.M.*) PUTTO LAL *v.* RAM CHANDRA.

1941 O.A. (Supp.) 794 = 1941 A.W.R. (Rev.) 920 = 1941 R.D. 937.

——**S. 220 (2)**—*Review—Powers—Grounds.*

Though the Board have unrestricted powers under S. 220 (2) of the United Provinces Land Revenue Act to review their own orders this must not be taken to mean that an application for review is nothing but an appeal. There must be some mistake obvious on the record. Some important point must have escaped consideration or some fresh evidence must be available. (*Harper, S.M.*) RAM ABHILAKH *v.* DEBI PRASAD.

1941 A.W.R. (Rev.) 668 (1) = 1941 O.A. (Supp.) 608 (1) = 1941 R.D. 675 (2).

——**S. 233 (k)**—*Bar under—Question as to quantum of share—If can be agitated in suit.*

The question whether certain persons were the under-proprietors of one half or three-fourths could not be raised in the partition proceedings and hence it could be raised later on and S. 233 (*k*) is no bar. (*Agarwal, J.*) BISHESHWAR SINGH *v.* ACHHAIBAR DIN.

195 I.C. 242 = 14 R.O. 63 = 1941 O.L.R. 558 = 1941 R.D. 489 = 1941 O.A. 560 = 1941 A.W.R. (Rev.) 581 = 1941 O.W.N. 820 = 1941 A.L.W. 670 = A.I.R. 1941 Oudh 507

U. P LAND REV. ACT (1901), S. 233.

——**S. 233 (m)**—*Applicability—Suit for contribution by an under proprietor who has paid rent due from all.*

A claim by an under-proprietor who has been made to pay the entire rent due from all the under-proprietors for contribution against the other under-proprietors falls within S. 233 (*m*) of the U. P. Land Revenue Act and a civil suit is barred by the section. (*Agarwal, J.*) NAGESHAR PRASAD *v.* CHANDRAPAL SINGH.

195 I.C. 823 = 1941 O.L.R. 625 = 14 R.O. 126 = 1941 R.D. 750 = 1941 A.W.R. (Rev.) 697 = 1941 O.A. 717 = 1941 O.W.N. 992.

——**S. 233 (m)**—Bar of civil suit—Attachment under decree found to be invalid. *See* 1940 Dig., Col. 1223. ARYA CO-OPERATIVE BANK SOCIETY *v.* SHIV CHARAN. **192 I.C. 337 = 13 R.A. 309.**

——**Ss. 233 (m), 163 and 164**—Sale in disregard of Ss. 163 and 164—Suit to declare sale void—If barred by S. 233 (*m*). *See* 1940 Dig., Col. 1223. SAT NARAIN *v.* CO-OPERATIVE SOCIETY. **15 Luck. 650.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), S. 7 (1) (q)—*Applicability—Erection of shrine to house idol found in municipal property—'Maintaining or developing the value of property vested in the Board'—Meaning and idea contemplated by.*

Erecting a house for the accommodation of an idol found in a Municipal property cannot be regarded as 'maintaining or developing the value of the property vested in the Board' within the meaning of S. 7 (1) (*q*) of U. P. Municipalities Act. The idea involved in maintenance and developing the value of the property relates to some increase in value or utility and it cannot apply to a case where the property has been burdened with some obligation which might lead to a deterioration of the property in value or in its general utility. (*Baipai and Dar, JJ.*) MAHOMED ISMAIL *v.* MUNICIPAL BOARD, BENARES. **1941 A.L.J. 563 = 1941 O.A. (Supp.) 770 (1) = 1941 A.L.W. 916 = 1941 A.W.R. (H.C.) 289 = A.I.R. 1941 All. 392.**

——**S. 8 (1) (b) (m)**—*'Work of public utility'—Nature of work contemplated by—Limitations on the powers of the Board—Maintaining place of worship for one community—When justified.*

A 'work of public utility' within the meaning of S. 8 (1), cl. (*b*) of the U. P. Municipalities Act has to be for the benefit of the public in the wider sense of the word namely as including all classes of His Majesty's subjects. The Municipal Board acting under S. 8 (1) (*b*) has no power to apply municipal funds for founding or maintaining places of worship for the use of one community to the exclusion of others. But it does not thereby follow that in the interests of public safety or public convenience the Municipal Board cannot erect a building which may incidentally or indirectly be used as a place of worship exclusively by one community, provided the dominant intention of the Municipal Board in erecting the building is to make a provision for public safety and public convenience, and the idea for the place of worship comes in the scheme incidentally and indirectly and in absolute subordination to the dominant intention of public safety or convenience. And the above is a question of fact in each case. (*Baipai and Dar, JJ.*) MAHOMED ISMAIL *v.* MUNICIPAL BOARD, BENARES. **1941 A.L.J. 563 = 1941 O.A. (Supp.) 770 (1) = 1941 A.L.W. 916 = 1941 A.W.R. (H.C.) 289 = A.I.R. 1941 All. 392.**

——**Ss. 120 and 189**—Scope and extent of powers of a Municipality. *See* U. P. MUNICIPALITIES ACT, SS. 189 AND 120. **1940 A.L.J. 896 = A.I.R. 1941 All. 78.**

U. P. MUNICIPALITIES ACT (1916), S. 189.

——**Ss. 162 and 164**—Reference to High Court—When competent—If can be made during pendency of review application after disposal of appeal. *See* 1940 Dig., Col. 1224. MUNICIPAL BOARD, UNAO *v.* YAGDUTT. **16 Luck. 58.**

——**Ss. 166 and 177**—*Liability to pay tax—When arises—Presentation of bill, if necessary—Withholding of tax—Insufficiency of Municipal service, if a valid ground for.*

According to S. 166 (2) of the Municipalities Act, the liability of the tax-payer to pay the tax is not made to depend upon the Board presenting a bill to the tax-payer. The liability arises the moment the tax-payer has been assessed and the money becomes due upon the date on which the Municipality have declared by their rules that the tax is payable. S. 177 of the Act creates a charge in favour of the Municipal Board in respect of all arrears of sums due on account of tax. Failure to present a bill does not disentitle the Municipality from enforcing the charge. The insufficiency of Municipal service is no ground for the tax-payer withholding the payment of tax. (*Thom, C.J. and Ganga Nath, J.*) BADRUNNISSA *v.* MUNICIPAL BOARD, AGRA.

I.L.R. (1941) All. 172 = 193 I.C. 822 = 13 R.A. 455 = 1941 A.W.R. (H.C.) 3 = 1941 O.W.N. 199 = 1941 O.A. (Supp.) 278 = 1941 A.L.W. 102 = 1941 A.L.J. 21 = 1941 A.W.R. (H.C.) 3 = A.I.R. 1941 All. 153.

——**S. 177 and T. P. Act, S. 100**—Arrears of Municipal tax—Liability for—Purchaser in execution sale. *See* 1940 Dig., Col. 1225. MUNICIPAL BOARD, CAWNPORE *v.* ROOPCHAND JAIN.

I.L.R. (1940) All. 669 = 191 I.C. 148 = 13 R.A. 217.

——**S. 177 and Transfer of Property Act, S. 3**—*Constructive notice—Applicability—Arrears of taxes—Auction-purchaser's liability for—Limits.*

The principle of constructive notice is applicable to the case of arrears of taxes forming a charge under the Municipalities Act upon lands and buildings in the Municipality. Hence an auction-purchaser of a house in the Municipality must be presumed to know about such a charge and he is liable to pay the arrears of taxes in respect of that house, even for a period prior to his purchase. (*Bennett and Ghulam Hasan, JJ.*) MUNICIPAL BOARD OF LUCKNOW *v.* RAMJI LAL.

16 Luck. 607 = 193 I.C. 290 = 13 R.O. 440 = 1941 O.L.R. 263 = 1941 O.W.N. 122 = 1941 O.A. 146 = 1941 A.W.R. (C.C.) 74 = A.I.R. 1941 Oudh 305.

——**S. 180 (3)**—*Right to proceed with construction by reason of — Warnings from Municipality interfering with—Right to damages.*

A person who knew full well his right to proceed with a construction by reason of S. 180 (3) of the United Provinces Municipalities Act stopped his construction by reason of certain warnings and threats from the Municipality and sued the Municipality for damages for interfering with his construction. It was *held* that, if at all there was any interference, it was not such as to make him refrain from starting his construction and that therefore as a cause of the damage alleged to have been sustained, if at all a cause, it was much too remote and he was not entitled to any relief. (*Yorke and Agarwal, JJ.*) BANWARI LAL *v.* MUNICIPAL BOARD, LUCKNOW.

195 I.C. 112 = 1941 O.W.N. 864 = 1941 O.L.R. 542 = 14 R.O. 52 = 1941 A.L.W. 764 = 1941 A.W.R. (C.C.) 235 = 1941 O.A. 542 = A.I.R. 1941 Oudh 572.

——**Ss. 189 and 120**—*Scope and extent of the powers of a Municipality—Draining sewage water into private* Jheel *If authorised by Act.*

U. P. MUNICIPALITIES ACT (1916), S. 278.

The provisions of Ss. 189 and 120 of the U. P. Municipalities Act read with S. 8 (1) (*j*) do not confer upon the Municipality the power to take land outside the Municipality for the purposes of a drain or a sewage works without notice to the owner or occupier of that land and without his consent and without compensation. Nor do these provisions entitle the Municipality to drain the sewage from the city on to private property outside the boundaries of the city without the owner's consent. The provisions of the Act seem to contemplate that a Municipality, if it desires for any purpose to use land outside its boundaries, it should acquire the land, for example, under the Land Acquisition Act, or by private agreement, with the sanction of the Local Government. There is nothing in S. 189 to entitle a Municipality to take its sewage outside its boundaries and to dispose of it where it likes upon a private *Jheel* regardless of the rights of the property owner. (*Thom, C.J. and Ganga Nath, J.*) MUNICIPAL BOARD, GORAKPUR *v.* KAMLAPAT RAI.

I.L.R. (1941) All. 141 = 193 I.C. 121 = 13 R A. 391 = 1940 A.L.J. 896 = 1940 A.W R (H.C.) 620 = A.I.R. 1941 All. 78.

——**S. 273**—Scope of authority given to Municipality under. *See* 1940 Dig., Col. 1225. MUNICIPAL BOARD, LUCKNOW *v.* RAM DEI. **16 Luck. 173 = A.I.R. 1941 Oudh 52.**

——**S. 314**—*Construction*—*'Some person authorised by the board'—Meaning of.*

The words 'some person authorised by the board' occurring in S. 314 of the United Provinces Municipalities Act does not necessarily mean that the person authorised must be mentioned by name; and they are comprehensive enough to include within its purview the power to delegate authority to an officer of the Municipal Board by virtue of his office as well and not necessarily by name only, (*Ghulam Hasan, J.*) EMPEROR *v.* ABDUL RAZZAQ. **16 Luck. 693 = 1941 A.W.R. (C C.) 185 = 1941 A.Cr.C. 143 = 1941 A.L.W. 562 = 1941 O.W.N. 720 = 1941 O A. 480 = A.I.R. 1941 Oudh 472.**

——**S. 337**—Declaration that certain locality is notified area—Effect on proprietary rights. *See* 194 0Dig., Col. 1226. KANHAI LAL *v.* HAMID ALI. **15 Luck. 619**

UNITED PROVINCES PARTITION MANUAL, R. 21 (5)—*Decision as to pendency of question of proprietary title—If mandatory.*

Sub-Cl. (5) of R. 21 of the Partition Manual is not mandatory. It is discretionary, for the partition officer to decide whether a question of proprietary title is pending or not. (*Harper, S.M.*) UTTAM SINGH *v.* TALUQDAR SINGH. **1941 O W.N. 598 = 1941 O.A. (Supp.) 345 = 1941 A.W.R. (Rev.) 388 = 1941 R D. 301.**

——**R. 66**—*Procedure under — Irregularity in following — Absence of prejudice — Interference in appeal.*

Where the procedure prescribed by R. 66 of the Partition Manual in the matter of local inspection prior to disposal of objections to draft partition proceedings and giving of time to objector to produce evidence in support of his objections, is not followed though the procedure is irregular, it will not be interfered with in appeal when the appellant has not been prejudiced at all by the procedure adopted. (*Shirreff, S.M.*) MOHAMMAD IQTADAR *v.* AFZAL UDDIN HAIDER. **1941 O.A. (Supp) 717 = 1941 A.W.R. (Rev.) 806 = 1941 R.D. 695.**

UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), S. 6—Scope of—Person not a 'vendor', if can plead ignorance of adulteration—His conviction, when justified. *See* 1940 Dig., Col 1227. MUNICIPAL BOARD, BERELLY *v.* RAM GOPAL. **I.L.R. (1940) All. 643 = 192 I.C. 83 = 13 R.A. 300 = 42 Cr.L J 243.**

U. P. REG. OF REM. ACT (1938), S. 2.

UNITED PROVINCES REGULARISATION OF REMISSIONS ACT (XIV OF 1938)—*Applicability—Pending actions.*

Per *Sulaiman, J.*—The U. P. Regularisation of Remissions Act is not applicable to pending cases. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM. **I.L.R. (1941) Kar. (F.C.) 72 = 72 C L J. 550 = 1941 A.L.J. 170 = 53 L W. 397 = 1941 R.D 121 = 13 R.F.C. 15 = 192 I.C. 138 = 1941 A.L.W. 201 = 1941 O.L.R. 121 = 3 F.L.J. 97 = 1941 M.W.N. 581 = 7 B.R. 433 = 22 Pat.L.T. 578 = 45 C.W.N. (F.R.) 27 = 1941 A.W R. (Rev.) 109 = 1941 O.A. 159 = 1941 O.W.N. 297 = 1941 A.W.R. (F.C.) 3 = A.I.R. 1941 F.C. 16 = (1941) 1 M.L.J. (Supp.) 65.**

——*If* ultra vires *of the United Provinces Legislature—Nature of the Act—If included in Item* 21, *List II of Schedule VII to Government of India Act.*

Per *Gwyer, C. J.*—Remission of rent is a matter covered by Item 21, List II of seventh schedule. The U. P. Regularisation of Remissions Act is an act with respect to the remission of rent and hence it is within the competence of the U. P. legislature to enact it.

Per *Sulaiman, J.*—In pith and substance it is an Act not only with respect to 'the relation of landlord and tenant' or the 'collection of rents', but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands. But the category of 'land' in entry No. 21 of List II includes 'rights in and over land' and is also within the exclusive authority of the Provincial Legislature.

Per *Varadachariar, J.*—The Act intended to deal and does deal with the subject of remission of rent made under the orders of the Provincial Government. It is within the sphere allotted to the Provincial Legislature by the Constitution Act and is not opposed to S. 292 of that Act and is *intra vires* the United Provinces Legislature. (*Gwyer, C. J., Sulaiman and Varadachariar, JJ.*) UNITED PROVINCES *v.* ATIQA BEGAM. **I.L.R, (1941) Kar. (F C) 72 = 72 C.L J 550 = 1941 A.L.J. 170 = 53 L W. 397 = 1941 R D. 121 = 13 R.F C. 15 = 192 I.C 138 = 1941 A L.W 201 = 1941 O L.R. 121 = 3 F L.J 97 = 1941 M.W.N. 581 = 7 B R. 433 = 22 Pat.L.T. 578 = 45 C.W.N. (F.R.) 27 = 1941 A.W R. (Rev.) 109 = 1941 O A. 159 = 1941 O.W.N. 297 = 1941 A.W.R. (F.C.) 3 = A I.R. 1941 F.C. 16 = (1941) 1 M.L.J. (Supp.) 65.**

——**S. 2**—*Change in status of holding—If can affect benefit of remission enjoyed prior thereto.*

If by any subsequent action or operation of law the status of a holding is changed later, the slump remission in rent which was enjoyed by the tenant till then could not be taken away without either an express agreement between the parties or an order of the Collector. (*Horper, S. M. and Sathe, J. M.*) GANGA PRASAD *v.* NANHE. **1941 R.D. 266 = 1941 A.W.R. (Rev.) 277 = 1941 O.A (Supp) 226 = 1941 A.L.J. (Supp.) 85.**

——**S. 2**—*Failure to get slump remissions due—Procedure to obtain—Judicial order for—If could be made.*

If a person to whom a slump remission is due fails to get it he has to apply to the Collector in his executive capacity for it and a Court sitting judicially cannot give

U. P. REG. OF REM. ACT (1938), S. 2.

him the necessary relief. (*Shirreff, S.M. and Sathe, J.M.*) MURLI *v.* SHYAM BIHARI.
1941 A.W.R (Rev.) 785 = 1941 O.A. (Supp.) 696 = 1941 A.L.J. (Supp.) 134 = 1941 R.D. 808.

——**S. 2**—*Provision for remission on rent before particular year—Subsequent Rent contracts—Remission, if available.*

Where slump remissions were given on rents which prevailed before 1339 F., no slump remission can be claimed in respect of rent contracts entered into in 1343 F. (*Shirreff, S.M. and Sathe, J.M.*) LAL UDEY PRATAP NARAIN *v.* RAM AWADH KURMI.
1941 A.W.R. (Rev.) 832 = 1941 O.A (Supp.) 750 = 1941 R.D 933.

——**S. 2**—*Right to slump remission—Revenue Courts—Limits of jurisdiction.*

In view of the United Provinces Regularization of Remissions Act (1938) even the question whether a particular tenant is entitled to slump remissions under the Government scheme or not, is a matter which can be adjudicated upon judicially in a Revenue Court. Revenue Courts must accept the fact that slump remission was given to a holding or not given, as the case may be, as a settled fact and should not take upon themselves the duty of deciding judicially whether under the executive orders of Government the particular holding was entitled to any remission and if so what. (*Harper, S.M. and Sathe, J.M.*) CHHOTEY LAL *v.* SUNDAR LAL.
1941 A.W.R (Rev.) 466 = 1941 O.A. (Supp.) 425 = 1941 R.D. 410.

——**S. 2**—*Right to slump remission—Revenue Courts—Limits of jurisdiction.*

The question whether a tenant is entitled to slump remission or not under the Government scheme for slump remissions is not one which can be adjudicated upon judicially by Revenue Courts. If slump remission was actually given under theCollector's order to a tenant on his holding, Revenue Courts should not go behind that order and must leave it to the party who is dissatisfied by that order to get it amended by the Collector in his executive capacity. (*Harper, S. M. and Sathe, J. M.*) SRI GANESHJI *v.* PUTIU SINGH.
1941 A.W.R. (Rev.) 482 = 1941 O.A. (Supp.) 441 = 1941 R.D. 421.

UNITED PROVINCES REGULATION OF SALES ACT (XXVI OF 1934), S. 4 (b)—*Exercise of option by decree-holder, under—Valuation made under S. 3, if applies or fresh valuation if to be made.*

Where after the value had been determined, the decree-holder exercises his option under S. 4 (*b*) of the U. P. Regulation of Sales Act, in order to have the sale postponed till November 1, 1936, the valuation made under S. 3 cannot hold good for the reason that the Regulation of Sales Act has now no force whatsoever and all the proceedings of the sale must be conducted under Ch. XL of the Revenue Department Manual. (*Harper, S.M. and Sathe, J.M.*) BADARI PRASAD *v.* MAKHAN LAL.
1941 R D. 28 = 1941 A.W.R. (Rev.) 28 = 1941 O.A. (Supp.) 17.

UNITED PROVINCES REVENUE COURT MANUAL—*Instructions relating to summons R. 13—Posting of Process—Procedure—Utmost care, necessity.*

Under R. 13 of the instructions relating to summonses published in the United Provinces Revenue Court Manual, an acknowledgment of the posting of the summons in a village must be taken from the patwari or chowkidar. It is no sufficient excuse to say that both of them live in another village. Process must be served with the utmost care, and it is imperative that the rules concerned must be strictly observed. (*Harper, S.M. and Sathe, J.M.*) KHUB RAM *v.* RAM CHAND.
1941 O.A. (Supp.) 384 (2) = 1941 R.D. 401 = 1941 A.W.R. (Rev.) 452 (2).

U. P. ST. AR. OF RENT REM. ACT (1939), S. 3.

——**R. 17**—*Proper service—Onus.*

It is for the plaintiff to prove service in accordance with R. 17 of the instructions published in page 11 of the Revenue Court Manual and not for the opposite party to prove inadequacy of service. (*Harper, S.M. and Shirreff, J.M.*) CHANGA SINGH *v.* DALMIR SINGH.
1941 A.W.R (Rev.) 595 (2) = 1941 O.A. (Supp.) 549 (2) = 1941 R.D. 516 (1).

——**Ch. X, Para. 22 (2)**—Instruction, if mandatory—Commissioner for local investigation of past possession—Legality. *See* 1940 Dig., Col. 1228. MANGAL CHAND *v.* RASOOL BUX **1941 A L J. (Supp.) 3.**

UNITED PROVINCES REVENUE MANUAL, Rr. 223 and 225—*Lambardar—Choice of—Exercise of Collector's discretion—When called forth—Passing of simple money decree, if disqualifies debtor for appointment.*

The discretion to make the appointment of a lambardar rests with the Collector under the second portion of R. 225, when both the candidates are competent under R. 223. A co-sharer against whom a simple money decree under the Encumbered Estates Act has been passed is not for that reason alone to be considered unfit for the office, in spite of his having superior claims in other respects for appointment as lambardar. (*Harper, S. M.*) SUNDER SWARUP *v.* GHULAM SAFDAR KHAN.
1941 A.W.R. (Rev.) 191 = 1941 O.A. (Supp.) 134 = 1941 R.D. 114.

UNITED PROVINCES REVENUE DEPARTMENT MANUAL Para. 911 (j)—*U. P. Land Records Manual, Para. 2—Removal of assistant patwari—If judicial matter—Right to appeal.*

An assistant patwari who is removed whether in consequence of some fault in his work or on the requisition of the chief patwari has a right to file a judicial appeal under the Land Revenue Act the matter being a judicial matter under para. 911 (*j*) of Revenue Department Manual. (*Shirreff, J.M. and Sathe, A.M.*) PUTTO LAL *v.* RAM CHANDRA. **1941 R D. 937 = 1941 O.A. (Supp.) 794 = 1941 A.W.R. (Rev.) 92.**

UNITED PROVINCES STAYED ARREARS OF RENT (REMISSIONS) ACT (XVIII OF 1939)—*If* ultra vires.

The U. P. Stayed Arrears of Rent (Remissions) Act is not *ultra vires* of the Provincial legislature. (*Yorke, Bennett and Ghulam Hasan, JJ.*) HARI SARAN DAS *v.* DHANI RAM. **1941 O.A. 419 = 1941 A.L.W. 496 = 16 Luck. 443 = 194 I.C 387 = 1941 O L.R. 455 = 1941 R.D. 354 = 1941 A.W.R. (Rev.) 392 = 13 R O 590 = 1941 O W.N. 656 = A.I.R. 1941 Oudh 273 (F.B.)**

——**S 3 and United Provinces Stay of Proceedings (Revenue Courts) Act (1937), S. 2**—*Applicability of S. 3 of Act XVIII of 1939—Appeal in rent cases which ought to have been but not in fact stayed under Act IV of 1932, S. 2.*

The words 'which have been stayed' occurring in S. 3 of U. P. Act XVIII of 1939 do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been stayed under S. 2 of Act IV of 1937. Had the legislature meant it the words would have been 'which have been stayed or ought to have been stayed.' Hence S. 3 of Act XVIII could not apply to an appeal in an arrears of rent suit pending when Act IV of 1932 came

U. P. STAY OF ARREARS (REMISSION) ACT (1939), S. 2.

into force, but in which appeal no order of stay was in fact passed. (*Agarwal, J.*) DAYA SHANKAR *v.* BADRI PRASAD. **193 I C. 150= 1941 A W R. (Rev.) 162=1941 R.D. 97= 1941 O.L.R. 256=13 R.O. 431=1941 O.W N. 262= 1941 O.A. 218=A.I.R. 1941 Oudh 257.**

UNITED PROVINCES STAY OF ARREARS (REMISSION) ACT (1939), S. 2—*Applicability —Payments by a* thekadar—*Absence of transfer of proprietary rights*—Thekadar *not entered in register according to S.* 32, *Cl. (b) or (c) of Land Revenue Act.*

Where there is no transfer of proprietary rights under a *theka*, and the *thekadar* is not entered in a register maintained under the provisions of Cl. (*b*) or Cl. (*c*) of S. 32 of the United Provinces Land Revenue Act, the payments made by the *thekadar* constitute rent and is not included in the exception referred to in S. 2 of the United Provinces Stay of Arrears (Remission) Act, 1939. (*Harper, S.M. and Sathe, J.M.*) MUKANDI LAL *v.* SHAFIULLAH. **1941 A.W.R. (Rev) 175= 1941 O.A. (Supp.) 119=1941 R.D. 23.**

——S. 3—*Effect of.*

S. 3 of the U. P. Stayed Arrears of Rent (Remissions) Act operates to dismiss all suits for arrears of rent stayed under Act IV of 1937 or which if instituted would have been stayed (*i e.*) all suits for arrears of rent prior to Rabi 1344 F. It also operates to dismiss all applications for the recovery of arrears of rent, *i.e.*, so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalment for Rabi 1344 F. Hence an appeal pending at the time when the Act came into force, relating to arrears of rent prior to Rabi 1344 F. is liable to be dismissed. (*Yorke, Bennett and Ghulam Hasan, JJ.*) HARI SARAN DAS *v.* DHANI RAM. **16 Luck. 443=194 I.C 387=13 R.O. 590= 1941 A.W.R. (Rev.) 392=1941 R D. 354= 1941 O.L.R 455=1941 O A. 419= 1941 A.L.W 496=1941 O.W N 656= A.I.R. 1941 Oudh 273 (F.B.).**

——S. 3—*What could be dismissed under.*

Under S. 3 of the United Provinces Stayed Arrears of Rent Act only suits and applications for the recovery of the arrears of rent which were stayed under the Act are to be dismissed. An application for assessment of compensation under S. 78 of the Agra Tenancy Act is not one for the recovery of rent; hence it cannot be dismissed. (*Harper, S.M. and Sathe, J. M.*) KISHEN PIARI *v.* HEERALAL. **1941 A.W.R. (Rev.) 453=1941 O.A. (Supp.) 385= 1941 R.D. 399.**

——and Contract Act, S. 23—*Object and intention of Act XVIII of* 1939—*Contract for payment of rent decree—Enforceability if barred.*

The intention of the Legislature in enacting Act XVIII of 1939 was to remit arrears of rent which had accrued prior to *rabi* 1344 by barring their recovery in the Revenue Courts. The provisions of the Act would therefore be inapplicable to a suit on a contract in a Civil Court unless they can be indirectly invoked by means of some other provision of the law. Where a suit is filed on a bond executed by defendant in pursuance of an agreement to pay the amount in respect of a prior decree for rent obtained by the plaintiff against the defendant there is nothing unlawful within the meaning of S. 23 of the Contract Act in the consideration or the object of the agreement and it cannot be affected by subsequent legislation barring a suit in the Revenue Court for recovery of arrears of rent. (*Collister, J.*) RAM PIARI *v.* DAYA SHANKER. **I L.R. (1941) All. 367= 194 I.C. 427=13 R.A. 501= 1941 A.W.R. (Rev.) 305=1941 A.L J. 232= 1941 A L.W. 321=1941 O.W.N. 452= 1941 O.A. (Supp.) 194=1941 R.D. 234= 1941 A W.R. (H.C.) 121=A.I.R 1941 All. 193.**

U. P. TEMP. POST. OF EX. OF DEC ACT (1937), S. 3.

UNITED PROVINCES STAY OF PROCEEDINGS (REVENUE COURTS) ACT (1937)—*Applicability and effect of—Ejectment during pendency of—Legality and effect.*

The U. P. Stay ot Proceedings (Revenue Courts) Act applies to applications for execution of decrees in suits under S. 92 of the Agra Tenancy Act and hence when the Act is in force, execution cannot take place. Where the heir of a statutory tenant whose term had expired was ordered to be ejected and the decree was put into execution and possession obtained on 31st May, 1939, when the U.P. Stay of Proceedings (Revenue Courts) Act was in force, the ejectment though it did take place by order of Court in execution of a decree is illegal. The tenancy is not extinguished by the ejectment. (*Shirreff, J.M.*) BENI MADHO PRASAD SINGH *v.* DUKHI. **1941 A.W.R. (Rev.) 923 (1)= 1941 O.A. (Supp.) 797 (1)=1941 R.D. 788 (1).**

——S. 2—*Applicability—Application under S.* 151, *C. P. Code, regaraing decree confirmed before the Act.*

An application under S. 151, C. P. Code, to give effect to a decree which had been confirmed long before the Stay of Proceedings Act had come into force could not be held to be a proceeding affected by the Act, (*Sathe, J.M.*) AUSAN *v.* PRAG NARAIN. **1941 A.W.R. (Rev.) 856=1941 O.A. (Supp.) 757= 1941 R D. 670.**

——S. 3—*Computation of period of limitation—Filing of civil suit—If can be taken into account.*

According to S. 3 of the U. P. Stay of Proceedings (Revenue Courts) Act in computing the period of limitation for suits to which the Act applies, the period during which the Act remains in force shall be excluded. The fact that a suit is brought in the Civil Court during that period in respect of the particular claim cannot affect the question for it is not a consideration allowed for, in the Act. (*Harper, S.M. and Shirreff, J.M.*) SURJU *v.* LEKHRAJ **1941 A.W R (Rev.) 922= 1941 O.A. (Supp) 796=1941 R D. 791.**

——and Agra Tenancy Act, S. 44—*Stay of Proceedings Act, if applies to suits under S.* 44, *Agra Tenancy Act.*

The U. P. Stay of Proceedings Act does not apply to suits under S. 44 of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) ZAHID ALI SUBZPOSH *v.* RAM LAGAN. **1941 A.W.R. (Rev.) 434= 1940 R.D. 622.**

UNITED PROVINCES TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (X OF 1937). S. 3 (1)—*Date of passing of the Act—Act when 'passed'.*

Any local Act cannot be said to be passed "until it receives the assent of the Governor. Hence the date of passing of the U. P. Act X of 1937 with reference to a person being an agriculturist on that date is the 20th December, 1937, when it received the assent of the Governor. (*Collister, J.*) RAMA KANT *v.* BI CHANDRA KIN. **I.L.R. (1941) All. 596=195 I.C. 457= 14 R.A. 37=1941 O.A. (Supp.) 563= 4 F.L.J. (H C) 266=1941 A.L.W. 654= 1941 A.W.R. (Rev.) 752=1941 A.L.J. 351= 1941 R.D. 565=1941 A W.R. H.C. 236= A.I.R. 1941 All. 312.**

UNITED PROVINCES TENANCY ACT (XVII OF 1939)—If affects tenant's right to build in the abadi. *See* 1940 Dig., Col. 1230. BADRI LONIA *v.* DWARKA PRASAD. **193 I.C. 785 = 13 R.A. 454**

——**S. 3 (9)**—*Khudkasht — Meaning, if different from old Act—Landlord seizing land and cultivating it —It can acquire title.*

There is no definition of *Khudkasht* in the old Act but there is nothing to show that the new Act intended to place a new interpretation on the word. The definition refers to land cultivated by a landlord 'as such'. This does not mean that the landlord can seize the land of any tenant and by cultivating it acquire a legal title as *Khudkasht*. (*Harper, S.M.*) BIRJ MOHAN LAL *v.* SHIB NARAIN. **1941 A W.R (Rev.) 1083 (1) = 1941 O.A. (Supp.) 873 (1).**

——**S. 3 (18)**—*Rent—Claim for payment per grove entered in* wajib-ul-arz*—Nature of.*

Per *Sathe, J.M.*—Where a claim is made for payment of Re. 1 per grove as entered in the *wajib ul arz*, it is evidently on account of the use or occupation of the land by the defendant for the purposes of maintaining a grove thereon. Hence it is in the nature of rent. This is all the more so, for, if a share of timber or its value when the grove is cut down is rent a share of the recurring income of the grove from the fruit of the trees must certainly be held to be rent.

Per *Harper, S.M.*—A cess is a due (1) payable by a tenant; (2) on account of occupation of land; (3) of the nature of rent payable in addition to the rent of tenants. The claim for payment of Re. 1 per grove complies with these conditions. As the holding is held 'bila lagan' but over and above that it is due to pay Re. 1 as a fixed sum calculated on a defined basis, it is clearly a cess. (*Harper, S. M. and Sathe, J M*) MOINUDDIN *v.* JAGMOHAN.
1941 R.D. 598 = 1941 A W.R. (Rev.) 575 (2) = 1941 O.A. (Supp) 533 (2).

——**S. 3 (18) and Agra Tenancy Act (1926), S. 3 (3)**—*Rent—Zaid mutalba—If legal rent.*

Zaid mutalba is not legal rent. (*Harper, S. M. and Sathe, J. M.*) THAMMAN *v.* RAM NARAIN.
1941 A.W.R. (Rev.) 345 = 1941 O.A. (Supp.) 259 = 1941 R.D 265.

——**S. 3 (18) and Agra Tenancy Act (1926) S. 3 (3)**—*Rent*—Zaid mutalba—*If legal rent.*

Zaid mutalba cannot be claimed as legal rent. (*Sathe J.M.*) ABDUL HAMID *v.* LAKHPAT RAI.
1941 A.W.R. (Rev.) 447 (1) = 1941 O.A. (Supp) 379 (1) = 1941 R.D. 321.

——**S. 3 (20)**—*Sayar—Test.*

Per *Sathe, J.M.*—The crux of the definition of Sayar in S. 3 (20) of the U. P. Tenancy Act is that the payment to be made should be on account of income from land which does not belong to the person who derives an income from it but to the zamindar. (*Harper, S.M. and Sathe, J.M.*) MOINUDDIN *v.* JAGMOHAN.
1941 R.D. 598 = 1941 A W.R. (Rev.) 575 (2) = 1941 O.A. (Supp.) 533 (2).

——**S. 3 (23) and U. P. Encumbered Estates Act, S. 35**—*Mortgagee in possession in lieu of interest—Absence of admission to tenancy—Mortgagee, if can claim to be a tenant and resist delivery.*

Where a mortgagee is in possession even if it be in lieu of interest on his loan, he cannot, in the absence of an admission to tenancy, claim to be a tenant and resist delivery of possession to the debtor. (*Shirreff, J. M.*) LAKHAN *v.* JAI KARAN.
1941 O.A. (Supp.) 553 = 1941 A.W.R. (Rev.) 599 = 1941 R.D. 538.

U. P. TENANCY ACT (1939), S. 36.

——**S. 11, proviso**—*Applicability — Loss of exproprietary rights by ejectment—Money decree in favour of mortgagee under Encumbered Estates Act—*Sir *right, if revives.*

Where a person loses his exproprietary rights owing to ejectment for arrears of rent and subsequently a money decree is passed in favour of his mortgagee, there can be no revival of *sir* rights. His position in the *khewat* is merely that of a co-sharer who has no particular claim for the plot in dispute. If the mortgagee happens to be the lambardar and in possession, his possession is that of *khudkasht* holder and hence he cannot be ejected. (*Sathe, A.M.*) RAM BHAROSEY *v.* SAVITRI. **1941 O.A. (Supp.) 839 = 1941 A.W.R. (Rev.) 995 = 1941 R.D. 864**

——**S. 29**—*Tenants of land wrongly entered as* sir *—Failure to claim exproprietary rights on transfer—Status of tenants.*

Where tenants of land wrongly entered as *sir*, fail to claim exproprietary rights on transfer of the proprietary rights their status would have been that of statutory tenants under the Agra Tenancy Act and it is now under S. 29 of the U. P. Tenancy Act, that of hereditary tenants. (*Shirreff, S.M.*) BANSI DHAR *v.* MITHU.
1941 R.D. 721 = 1941 O.A. (Supp.) 619 = 1941 A.W R. (Rev.) 679.

——**S. 33 (2), Proviso and Agra Tenancy Act Ss. 17, 23 (2), Proviso and 44**—*Admission as co-tenant of occupancy holding—Consent by landholder—Death of tenant—Landholder if estopped from denying co-tenant's title.*

Where a tenant of an occupancy holding admits another as a co-tenant with the consent of the landholder and the landholder treats him for a long time as the co-tenant of an occupancy holding, in a suit to eject the co-tenant as a trespasser on the death of the tenant, it was *held* that the landholder was estopped from denying the rights of the co-tenant of the occupancy holding and that the latter had become the occupancy tenant of the holding. (*Shirreff, S.M. and Sathe, J M*) PHUL KUMARI *v.* RAM DEI. **1941 A W.R. (Rev.) 600 = 1941 R.D. 550 (2) = 1941 O.A. (Supp.) 554.**

——**S. 33 (2) (c) Proviso and Agra Tenancy Act (1926), S. 23 (2) (b), Proviso**—*Recognition contemplated by proviso—Admission of consent to transfer by lambardar—If amounts to recognition.*

An admission of consent to transfer of an interest to a co-tenant embodied in an affidavit filed by a lambardar, amounts to the recognition in writing by the landholder required by the proviso to S. 23 (2) (*b*) of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) CHHOTEY LAL *v.* PARAS RAM.
1941 A.W.R. (Rev.) 391 = 1941 O.A. (Supp.) 348 = 1941 R D. 286.

——**S. 35 (k)**—*Applicability—Case as to succession by daughter's sons pending when new Act came into force —Co-sharing—Proof of—Necessity—Applicability of S. 24 of the Agra Tenancy Act.*

Where a case as to succession by daughter's sons is pending when the new Tenancy Act came into force, so far as the law of succession goes, the case is due to be decided under S. 24 of the Agra Tenancy Act and where there is no proof of co-sharing as required by the law prevailing at the time when the succession opened, the daughter's sons cannot succeed. (*Harper, S.M. and Sathe, A.M.*) ASGHAR ABBAS *v.* MAIKU.
1941 R.D. 812 = 1941 O A. (Supp.) 749 = 1941 A.W.R (Rev.) 831.

——**S. 36**—*Remarriage—Kurmis—Circumstances—Inference.*

U. P. TENANCY ACT (1939), S. 36.

Though it would not be justifiable to hold that there has not been a re-marriage between kurmis when the woman had lived with the man, as his wife, and when they had several children and had jointly cultivated, yet when both the man and woman swear that they had not been married a finding based on their oath is certainly one based on good evidence. (*Harper, S.M. and Shirreff, J.M.*) MUNESHAR KURMI *v.* BALAL. **1941 O.A. (Supp.) 760 = 1941 A.W.R. (Rev.) 859.**

——**Ss. 36 and 37**—Succession to Hindu daughter having life interest in occupancy holding. *See* AGRA TENANCY ACT, S. 25 AND U.P. TENANCY ACT, SS. 36 AND 37. **1941 R.D. 163.**

——**S. 40**—*Occupancy holding—Sub letting of portion to sole landholder—If prohibited.*

There is nothing to prevent an occupancy tenant from sub-letting a portion of his holding to his landholder though he happens to be the sole landholder. (*Sathe, A. M.*) PRATAP SINGH *v.* BANWARI LAL. **1941 A.W.R. (Rev.) 1077 = 1941 R.D. 952 = 1941 O.A. (Supp.) 884.**

——**S. 49 and Agra Tenancy Act, S 37**—*Private partition—Subsequent suit for division of holdings—All holdings, if should be included.*

Where as a result of a prior private partition, parties hold different parcels of land of a holding these parcels are holdings in the meaning of the definition in S. 3 (8) of the Agra Tenancy Act and any one of them is entitled to institute a suit for the division of one or more of these holdings but such a plaintiff cannot be compelled to include in his suit parcels of land which are other holdings. (*Harper, S.M. and Shirreff, J.M.*) PURAN MISRA *v.* GAVA MISRA. **1941 A W.R (Rev.) 567 = 1941 R.D. 501 (2) = 1941 O.A. (Supp) 498 = 1941 A.L.J. (Supp) 104.**

——**Ss. 49, 59 and 183**—*Suit under—Possession, relief for, barred—Decree under S. 49 or S. 59 if available.*

Where a suit is filed under Ss. 49, 59 and 183 by a tenant against his co-tenant, when it is found that the suit for possession was beyond limitation, he could not get a declaration of title under S 59; still less could he get a decree for division under S. 49. (*Harper, S.M. and Shirreff, J.M.*) RAQUMA *v* GHIRRAI. **1941 A.W.R. (Rev.) 497 = 1941 O A (Supp.) 456 = 1941 R.D. 548.**

——**Ss. 49 and 59**—*Suit under S. 49—Title question raised—Proper procedure.*

In a suit for division of holdings under S. 49 of the Tenancy Act, if any question of plaintiff's title to share in the holdings is raised, then, it can and should be disposed of in that very suit. A preliminary declaratory suit is not essential before a division suit. (*Shirreff, J. M. and Sathe, A.M.*) GANGA AHIR *v.* RAM HARAKH AHIR. **1941 A.W.R. (Rev.) 1082 = 1941 O.A. (Supp.) 872.**

——**S. 54 (2) proviso (a)**—*Interpretation In the village—Meaning—What is barred by the proviso (a).*

The words "in the village" occurring in proviso(a) to sub S. (2) of S. 54 of the U. P. Tenancy Act should be interpreted as having reference only to the village in which the land sought to be acquired is situated and not either to the whole estate of the zamindar or any other village belonging to him. That proviso bars the acquisition of land for purposes of planting a grove only if the zamindar possesses already an area of 5 acres under grove or garden in the same village in which the land sought to be acquired is situated. (*Sathe, A.M.*) SANTA *v.* CHANDER BHAN **1941 O.A. (Supp.) 892 = 1941 A.W.R. (Rev.) 1099.**

U, P. TENANCY ACT (1939), S. 87.

——**S. 59 and Agra Tenancy Act, S 121**—*Declaratory suit by plaintiff not in possession—Maintainability.*

When a plaintiff is not in possession, he cannot get that possession by a declaratory suit whether under the new Act or under the old Act. Such a suit would be barred. (*Harper, S.M. and Shirreff, J.M.*) MANGAL *v.* TONDA. **1941 A.W.R. (Rev.) 602 = 1941 O A. (Supp) 556 = 1941 R D 532 (2).**

——**S. 59 and Agra Tenancy Act (1926), S. 121**—*Pendency of suit under S 121, Agra Tenancy Act on 1st January, 1940—Further procedure.*

Under S. 59 of the United Provinces Tenancy Act any person claiming to be a tenant can sue and hence where a suit though originally filed under S. 121, Agra Tenancy Act is pending on the 1st January, 1940, it should be decided under S. 59 of United Provinces Tenancy Act. (*Sathe, J.M*) BASUDEO *v.* DATWA. **1941 O.W.N 691 = 1941 A W.R. (Rev) 480 (2) = 1941 O.A. (Supp) 439 (2) = 1941 R.D. 373.**

——**S. 59 and Agra Tenancy Act, S. 121**—*Suit to declare plaintiff co-occupancy tenant—Entries not disclosing any connection of plaintiff with suit lands—No evidence of payment of rent or cultivation—Right to relief asked for.*

Where a plaintiff seeks a declaration that he is a co-occupancy tenant with the defendant and none of the entries in the revenue papers produced for a number of years excepting one disclose any connection of the plaintiff with the suit land and further there is no evidence of his ever having paid any rent or cultivated the lands and the plaintiff has allowed more than 30 years to elapse without taking any action, he is barred from obtaining the declaration prayed for. (*Harper, S. M,*) BAIJU *v.* MANJI. **1941 A W R (Rev.) 593 (2) = 1941 O.A. (Supp) 547 (2) = 1941 R.D. 514.**

——**S. 61**—*Suit to declare Zamindar, sub-tenant regarding certain plots—Defence of* khudkasht *cultivation—Circumstances entitling declaration.*

Where in a suit to declare the Zamindar, a sub-tenant of the plaintiff in respect of certain plots, it was pleaded in defence that the cultivation was as *khudkast* but the sub tenancy was proved and the Zamindar was found to have admitted the status of the plaintiff in rent suits filed subsequent to the sub tenancy and he had not done anything thereafter to treat his possession as adverse to that of the plaintiff, it was held that the declaration sought for should be granted. (*Sathe, A. M.*) PRATAP SINGH *v.* BANWARI LAL. **1941 A.W.R. (Rev.) 1077 = 1941 R.D 952 = 1941 O A. (Supp) 884.**

——**Ss. 61 and 94**—*Suit under S. 61—Declaring rent, when found not fixed—Proper remedy.*

Rent cannot be declared to be payable in a suit under S. 61, U. P. Tenancy Act, if it has not been fixed. For determination of rent a suit under S. 94 will be necessary. (*Shirreff, J.M. and Sathe, A M.*) BEPIN CHANDRA CHATTERJEE *v.* JAGMOHAN TEWARI. **1941 O.A. (Supp) 781 (2) = 1941 A.W.R. (Rev.) 907 (2).**

——**S 87**—Abandonment—Making arrangements for cultivation during absence—If negatives abandonment. *See* AGRA TENANCY ACT, S. 107 AND U P. TENANCY ACT, S. 87. **1941 R.D. 501 (1).**

——**S. 87 and Agra Tenancy Act (1926), S. 107**—*Abandonment—Presumption—When arises—Possession subsequent to extinction of tenancy—Nature of—Liability to ejectment.*

Where the period for which the tenant could sublet expires without his making any arrangements for the holding, the presumption of abandonment arises. Any

U. P. TENANCY ACT (1939), S, 96.

subsequent possession of the tenant after the extinction of his rights, without the consent of the Zamindar, is that of a trespasser and hence he is legally liable to ejectment. (*Harper, S.M. and Sathe, J M.*) GAYA PRASAD *v.* ZALIM SINGH

1941 A.W.R. (Rev) 402 = 1941 O.A. (Supp.) 351 = 1941 R.D 285

——**S. 96**—*Applicability — Orders of settlement officer.*

S. 96 of the U. P. Tenancy Act does not apply to orders of the settlement officer and S. 87 of the Land Revenue Act is expressly excluded. (*Harper, S.M.*) HAR PYARI *v.* JIVA RAM.

1941 A.W.R. (Rev) 1037 = 1941 O.A. (Supp.) 846 = 1941 R.D. 876.

——**S. 98 and Agra Tenancy Act (1926), S. 50**—*Enhancement—Agreement not registered—Effect*

If an agreement enhancing legal rent is not registered, it is of no force. (*Harper, S. M. and Sathe, J. M.*) THAMMAN *v.* RAM NARAIN.

1941 A.W.R. (Rev.) 345 = 1941 O.A. (Supp) 259 = 1941 R.D. 265.

——**S. 117**—*Method of compensation for deficiency in* khudkhasht *and* sir *area.*

A provision in the partition proceedings allotting ex-proprietary land entirely to the vendee is not justified. It should either be utilised for giving compensation for khudkasht land or should be divided rateably. The fairest course in such cases is, that the exproprietary land should be utilised first to give compensation for deficiency in *sir* and *khudkasht* area. If any deficiency is still left over it should undoubtedly be made over from *khudkhasht* after 1333—34 F. If there is still any deficiency it should then be made good from land of other categories in the khatauni. (*Shirreff, S.M. and Sathe, J.M.*) KAMTA SINGH *v.* SUBEDAR SINGH.

1941 R.D. 728 = 1941 O.A. (Supp.) 629 = 1941 A.W.R. (Rev.) 689 = 1941 A.L.J. (Supp) 121.

——**S 134 and Agra Tenancy Act (1926), S. 141 (2)**—*Rent receipt—Failure to specify holding—Zamindar, if can take advantage of omission.*

Where the Zamindar fails to record in the rent receipt the holding for which the rent has been paid, he cannot take advantage of his own omission. (*Harper, S. M. and Sathe, J M.*) SHIV DAYAL *v.* SURAJ PAL SINGH.

1941 A.W R. (Rev) 352 = 1941 O.A. (Supp.) 266 = 1941 R.D. 251.

——**S. 148 and Agra Tenancy Act (III of 1926), S. 132**—*Suit for arrears of rent—Decree—Condition precedent.*

Until the correct rent is proved or if none exists until it is fixed, a suit for arrears of rent could not be decreed. (*Harper, S M. and Sathe, J.M*) BHAGWAN DIN *v.* BHOLA BUX SINGH. **1941 A.W.R. (Rev) 445 (2) = 1941 O.A (Supp) 377 = 1941 R D. 337.**

——**S. 158**—*Applicability—Decree for arrears of rent on which ejectment obtained under Agra Tenancy Act.*

Where ejectment has been obtained under the Agra Tenancy Act in respect of a decree for arrears of rent, execution proceedings in respect of further arrears are not barred by S. 158 of the U. P. Tenancy Act. (*Harper, S.M. and Shirreff, J M.*) RAM SHANKER JATI *v.* SOMARU BHAR. **1941 A W.R. (Rev.) 1071 (1) = 1941 O A. (Supp.) 869 (1) = 1941 R.D. 875 (1).**

——**S. 158**—*Applicability—Ejectment for arrears prior to Act—Decree for further arrears after the Act—Execution*

S. 158 of the U. P. Tenancy Act applies only to ejectment orders passed after 1st January, 1940, and not before. Where though there has been an ejectment

U. P. TENANCY ACT (1939), S. 168.

under a decree under S. 61 of the Oudh Rent Act prior to the U. P. Tenancy Act, a decree for further arrears passed after new Tenancy Act came into force can be executed, (*Harper, S. M. and Shirreff, J. M.*) RAM DULARI *v.* TEJU SINGH.

1941 A.W.R. (Rev 598 (2) = 1941 O A. (Supp) 552 (2) = 1941 R.D. 525.

——**S. 158**—*Applicability—Ejectments under Oudh Rent Act prior to 1st January, 1940.*

S. 158 of the United Provinces Tenancy Act cannot apply to ejectments under the Oudh Rent Act prior to 1st January, 1940. (*Harper, S.M and Sathe, J.M.*) AMIR AHMAD KHAN *v.* HAR CHARAN.

1941 R.D. 424 = 1941 O A. (Supp) 389 = 1941 A.W R. (Rev.) 460.

——**Ss. 158 and 296 and Agra Tenancy Act, S. 79**—*Scope and applicability of S. 158 of the United Provinces Tenancy Act—Execution for arrears subsequent to ejectment under S. 79 of the Agra Tenancy Act—If barred by S. 158.*

Under S. 296 of the U. P. Tenancy Act, it is only the corresponding provision of the Act and not all the provisions of the Act which have to be applied to execution pending on 1st January, 1940. S. 158 of the new Act, which is altogether a new provision and does not correspond to any section under the old Act, cannot be said to correspond with the provisions of old Act under which an execution may have been filed. All sections of the new Act do not become applicable to an execution case merely because it was pending on 1st January, 1940. Hence S. 158 cannot be brought forward against the continuation of execution proceedings pending on the 1st January, 1940, in respect of arrears of rent subsequent to ejectment under S. 79 of the Agra Tenancy Act. Moreover the wording of S. 158 shows that it applies to a tenant who is ejected, and not who has been ejected. It applies only to ejectments ordered after 1st January, 1940 and not before. (*Harper, S. M. and Sathe, J. M.*) RADHIKA PRASAD *v.* JIWAN. **1941 R.D 169 = 1941 A.W R (Rev.) 274 = 1941 O.A. (Supp.) 223 = 1941 O.W.N. 507.**

——**Ss. 163 and 168**—*Which corresponds to S. 81, Agra Tenancy Act.*

It is S. 163 of the United Provinces Tenancy Act that corresponds to S. 81 of the Agra Tenancy Act and not S. 168. (*Harper, S.M. and Sathe, J.M.*) HANUMAN PRASAD NARAIN SINGH *v.* GAVA PRASAD.

1941 A.W.R. (Rev.) 467 = 1941 O.A. (Supp) 426 = 1941 R.D. 379.

——**S. 168, Proviso**—*Calculation of rent of portion from which tenant is to be ejected—Rules as to.*

If the rent of each plot is separately recorded in the Khatauni, then that should be accepted as the rent of that area for the purposes of the proviso to S. 168 of the U. P. Tenancy Act. But if separate rent is not recorded against each plot, it will have to be worked out by the rule of proportion from the total rent recorded against the holding provided the class of soil is the same for all plots. If however the plots are of different classes of soil then the rent of each plot will have to be worked out by the process of valuation and proportion combined. (*Harper, S.M. and Sathe, J.M.*) KAMTA *v.* SAT NARAIN. **1941 O.A. 448 = 1941 A W.R. (Rev). 489 = 1941 R.D 552.**

——**S. 168, Proviso**—*Decretal amount—Calculation—What is included in.*

The decretal amount should be taken for the purposes of the proviso to S. 168, U. P. Tenancy Act, as the amount including all interest accruing up to the date of the application for execution. (*Harper, S.M. and*

U. P. TENANCY ACT (1939), S. 170.

Sathe, J.M.) KAMTA *v.* SAT NARAIN.
1941 O.A. 448=1941 A.W.R. (Rev.) 489=
1941 R D. 552.

——**S. 170 (5) and Agra Tenancy Act (III of 1926), S. 80 (3)**—*Extension of time beyond limit provided—Illness and other domestic difficulties—If justifying circumstances.*

The illness of a judgment-debtor and his other domestic difficulties cannot justify a fourth extension being given to the tenant to pay up the decretal amount against the express proviso to S. 80 (3) of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) BAJ BAHADUR SINGH *v.* MAHABIR SINGH.
194 A.W.R. (Rev.) 447=
1941 O A. (Supp.) 379 (2)=1941 R D. 336 (1).

——**S. 170 (5) and Agra Tenancy Act (III of 1926), S. 80 (3)**—*Extensions of time under—Inadequacy—Revision—Grounds.*

The granting of extension for the payment of decree amount in a suit for arrears of rent is entirely a matter of discretion. Where the Court in the circumstances of a case refuses to give extensions up to the maximum period of 6 months, it does not commit any irregularity. In cases of complaints of inadequacy of time, the Board can interfere in revision, but only when the circumstances warrant it.

Harper, S.M.—Courts should not only give reasons for an extension of time, but should give reasons for the particular amount of extensions sanctioned. (*Harper, S.M. and Sathe, J.M.*) JAGANNATH *v.* HARPRIYA SARAN. 1941 A.W.R (Rev.) 426=
1941 O.A. (Supp.) 363=1941 A.L.J. (Supp.) 78=
1941 R.D. 342.

——**S. 171**—*Applicability—Illegal subletting under old Act—Fresh cause of action, if necessary.*

Where the alleged illegal subletting arose under the old Act, the coming into force of the new Act does not necessitate a new cause of action for a suit under S. 171 of the U. P. Tenancy Act. As there is no period of limitation laid in both the Acts, the right to eject had not lapsed when the new Act came into force. (*Harper, S.M.*) RAGHUNANDAN SINGH *v.* BENI PRASAD.
1941 O.A. (Supp.) 583 (2)=
1941 A,W.R. (Rev) 614=1941 R.D. 595.

——**S. 171**—*Illegal subletting—New cause of action, if necessary for suit under.*

In the case of illegal subletting, if the cause of action was alive at the commencement of the new Act, it is not lost by the coming into force of the new Act. The holding over by the sub-tenants constitutes fresh subletting each successive year and as it is illegal subletting, a fresh cause of action accrued every year. (*Harper, S.M.*) DWARKA SINGH *v.* SHIB CHARAN LAL.
1941 A W.R. (Rev.) 505 (2)=
1941 O.A. (Supp.) 464 (2)=1941 R.D. 540.

——**S. 175**—Decree under on suit under S. 180 by appellate Court—Procedure. *See* U. P. TENANCY ACT, SS. 180 AND 175. 1940 A.W.R. (Rev) 890.

——**S. 180**—*Applicability—Ejectment of trespasser—Cause of action before the new Act—Suit by one of the co-sharers alone under the new Act—Maintainability—Scope of S.* 180.

In the case of ejectment of a trespasser the cause of action is a continuing one. Though such a cause of action may have arisen before the new Act came into force, a suit in respect of it can be filed after the new Act came into force by one only of the co-sharers inasmuch as S. 180 of the new Tenancy Act gives such a right to sue. S. 180 only prescribes that if the occupation of land took place when the old Act was in force then the occupation must be in accordance with the

U. P. TENANCY ACT (1939), S. 180.

provisions of that Act. But it does not apply the provisions of the old Act to the title of the plaintiff to institute a suit which must evidently be governed by the provisions of the Act in force when the suit is filed. (*Harper, S.M and Sathe, J M.*) SOHARAM *v.* DEO SINGH. 1941 A W.R. (Rev.) 841=
1941 O A. (Supp.) 746=1941 R.D. 827.

——**S. 180**—*Applicability—Suit under S. 44, Agra Tenancy Act, pending when new Act came into force—Effect.*

When a suit by some only of the co-sharers of a mahal under S. 44 of the Agra Tenancy Act is pending when the new Act came into force, it has to be disposed of under the corresponding provision of the new Act (*i.e.*) S. 180 and would be maintainable, if the plaintiffs could show that they were among the people entitled to settle the land. (*Sathe, A M.*) HARDAM SINGH *v.* GANGA RAM. 1941 R.D. 816=1941 O.A. (Supp) 742=
1941 A.W.R. (Rev.) 837.

——**S. 180 and Agra Tenancy Act, S. 44**—*Co-sharer taking possession without the consent of others—Liability to ejectment.*

Where a co-sharer brings a plot under his khudkasht cultivation without the consent of the whole body, a suit by one of the other co sharers who are jointly competent to settle the land could not be brought under S. 44 of the Agra Tenancy Act. But after the new Tenancy Act under S. 180, such a co-sharer is entitled to have a decree for ejectment, though on the evidence he may not be entitled to the plot. (*Sathe, A.M*) NARAIN *v.* LAKHMI NARAIN. 1941 O.A. (Supp) 785=
1941 A.W.R. (Rev.) 911=1941 R.D. 942.

——**S. 180**—Damages on ejectment—Necessity. *See* AGRA TENANCY ACT, S. 44 AND U.P. TENANCY ACT, S. 180. 1941 R.D. 170 and 177.

——**Ss. 180 and 175**—*Ejectment under—Difference between—Dismissal of suit under S. 180—Decreeing under S. 175 in appeal—Procedure to be followed.*

The considerations which would apply to ejectment under S. 175 of the U P. Tenancy Act are entirely different from those which govern a suit under S. 180 (*e g.*) under the latter section any one out of the whole body of co sharers entitled to settle the land in dispute can bring a suit for ejectment whereas under S. 175 the landholder must apply which means that all the partners who constitute the body of landholders must join in the suit. Hence, if a suit under S. 180 is to be decreed under S. 175, in appeal, it will have to go back to the trial Court for the framing of issues and fresh disposal. (*Sathe, A.M.*) HAR CHARAN SINGH *v.* KINNO.
1941 O.A. (Supp.) 810=1941 A.W.R (Rev.) 890=
1941 R.D. 940.

——**S. 180 and Agra Tenancy Act, S. 44**—*Liability to ejectment—Person in possession of land in excess of that leased.*

Where a person is in possession of land in excess of the area leased to him and it is only a small percentage, the difference might be due to leased area not having been properly delimited. But if even after its being pointed out, no attempt is made for a long time to pay rent for the excess area, the person is liable to ejectment (*Shir reff, J.M.*) RAM NARAIN *v.* KRISHNA DASS.
1941 A.W.R. (Rev.) 617=1941 O.A. (Supp.) 574=
1941 R D. 583.

——**S. 180**—*Liability to ejectment — Person let into possession in lieu of interest—Passing of a money decree in respect of loan—Creditor if becomes a trespasser.*

Where a creditor is put in possession of certain plot by the debtor in lieu of interest on a loan, he is entitled to retain possession until he is paid off. The creditor

U. P. TENANCY ACT (1939), S. 180.

does not become a trespasser simply because a money decree has been passed in his favour in respect of that very loan and he cannot be ejected on that ground. (*Sathe, J.M.*) RAMKISHUN RAI *v.* RAMLAHAL RAI.
1941 O.A. (Supp.) 695 = 1941 R.D. 683.

——**S. 180**—*Liability to ejectment—Vendee of sir plot from co sharer in possession as sole proprietor.*

Where a co-sharer sells a *sir* plot of which he claimed to be in possession as sole proprietor, and the vendee is admitted to the land with title, he cannot thereafter sue the vendee for ejectment as trespassers. (*Harper, S. M. and Shirreff, J. M.*) DAYACHAND *v.* JINDAIL SINGH.
1941 A.W.R. (Rev.) 623 = 1941 O.A. (Supp.) 580 = 1941 R.D. 591.

——**S. 180 and Oudh Rent Act, S. 127**—*Pendency of suit under S. 127, Rent Act, when new Tenancy Act came into force Law applicable.*

Where a suit filed under S. 127 of the Oudh Rent Act is pending when the new Tenancy Act came into force, it has to be decided under S 180 of the new Tenancy Act and no other provision of the new Act should be applied. Where the plot was a grove within the intention of the Oudh Rent Act when the suit was brought, it was held that no suit for ejectment of the defendant as a grove-holder could lie under S. 180 of the U. P Tenancy Act (*Harper, S. M. and Shirreff, J. M.*) MADAN GOPAL *v.* SANKATHA PRASAD.
1941 A W.R. (Rev.) 513 (2) = 1941 O.A. (Supp.) 472 (2) = 1941 R.D. 526.

——**S. 180**—Right to sue to eject trespasser—Person in possession of grove land though not as groveholder. *See* AGRA TENANCY ACT, S. 44 AND U. P. TENANCY ACT, S. 180.
1941 R.D. 172.

——**S. 180**—*Right to sue under—Rent collecting lambardar—Co-sharer cultivating unoccupied land, if can be sued under S. 180.*

Where a co sharer begins to cultivate certain unoccupied plots as *khudkasht*, a rent collecting lambardar can sue for his ejectment under S. 180 of the Tenancy Act. (*Harper, S. M.*) BIRJ MOHAN LAL *v.* SHIB NARAIN.
1941 A.W R (Rev.) 1083 (1) = 1941 O.A. (Supp.) 873 (1).

——**S. 180**—*Scope of— Burden of proof in suit under.*

S. 180 of the U. P. Tenancy Act is not confined only to ejectment proceedings against trespassers pure and simple. In a suit under that section the burden of proving his title lies on the defendant and if he fails to discharge it to the satisfaction of the Court a decree for ejectment is liable to be passed against him (*Sathe, A.M.*) COLLECTOR KHAN *v.* MAJEED KHAN.
1941 A.W.R. (Rev.) 1039 = 1941 O.A (Supp.) 848.

——**Ss. 180 and 296**—Suit filed under S. 127, Oudh Rent Act—Procedure, after new Tenancy Act came into force. *See* 1940 Dig., Col. 1231. KANHAIYA LAL *v.* BALDEO SINGH. **1941 R D. 237 = 1941 O.W.N. 491.**

——**S. 180 and Agra Tenancy Act (1926), S. 44**—*Suit to eject sub-tenants as trespassers—Starting point of limitation—Collector in possession of holding pending settlement of dispute as to succession to the fixed rate tenant.*

Where the Collector took possession of the holding on the death of a fixed rate tenant in 1913 pending the settlement of disputes as to succession and though in 1928 it was decided that there was no heir to the tenancy the Collector continued in possession and released the property in favour of the zamindar in 1937 only, on a question as to the starting point of limitation for a suit by the zamindar against the sub-tenants under S. 44, Agra Tenancy Act, as trespassers, it was *held*,

Per *Harper, S.M.*—The Collector held on behalf of the fixed rate tenant till 1928 and so could not know that the defendant's occupation was unauthorised until 1928 and from that date till 1937 he held on behalf of the zamindars and he was the landholder from 1928 and that date must be taken as the date from which the landholder had information as to unauthorized occupation.

Per *Sathe, J.M.*—The zamindars did not become the landholders of the sub-tenants till the holdings were made over to them by the Collector in 1937 and so could not sue earlier. (*Harper, S.M. and Sathe, J.M.*) KUMAR RAI *v.* THAKUR DAYAL RAI.
1941 A W.R. (Rev.) 347 = 1941 O.A. (Supp.) 261 = 1941 R.D. 240 = 1941 O W.N. 494.

——**S. 180**—*Suit under—Maintainability—Evidence as to defendant cultivating plaintiff's plots not satisfactory—Proper procedure.*

Where it is not clear from the evidence on record in a suit under S. 180 of the U. P. Tenancy Act that the defendant was cultivating any plots belonging to the plaintiff, the suit has to be dismissed as not maintainable. The plaintiff should first get the plots demarcated on the spot and then file a suit for ejectment if necessary. (*Sathe, A.M.*) GIRDAR SINGH *v.* CHHAJJU.
1941 O.A (Supp.) 893 = 1941 A.W.R. (Rev.) 1100.

——**S. 180**—*Suit under—Plea of adverse possession—Facts to be shown.*

In a suit by the heir of a tenant in chief to eject a former sub-tenant as trespasser under S. 180 of the U. P. Tenancy Act, the mere possession of the defendant for over 12 years is not enough to make the suit time barred. It must be shown that the defendant's possession was unauthorized to the knowledge of the plaintiff. (*Shirreff, J M. and Sathe, A. M.*) TRILOKI KURMI *v.* BHAGIRATH KURMI. **1941 A.W.R. (Rev.) 1043 = 1941 O.A. (Supp.) 852.**

——**S. 180**—*Suit under—Plea of tenancy, in defence—Proper procedure.*

Though in a suit under S. 180 of the U. P. Tenancy Act a plea of tenancy is raised in defence and it is thought that the real object is to get a declaration the suit cannot be dismissed as not maintainable. It must be decided on the merits. (*Shirreff J. M. and Sathe, A.M.*) GOPAL NARAIN *v.* ANGAD PERSHAD.
1941 A.W.R. (Rev.) 1081 (2) = 1941 O.A. (Supp.) 871 (2).

——**S. 180**—*Suit under—Plea of bar of limitation—Trespasser's possession during currency of usufructuary mortgage, if countable against mortgagor.*

In a suit for ejectment under S. 180, U. P. Tenancy Act, where the defendant pleads limitation, the period during which he as a trespasser was in possession during the subsistence of an usufructuary mortgage in respect of the property could not be taken into account as against the mortgagor-plaintiff. (*Shirreff, J. M. and Sathe, A.M.*) SAIMUL NISSA *v.* JOKHAN LAL.
1941 O.A. (Supp.) 863 = 1941 A.W.R. (Rev.) 1065.

——**Ss. 180 and 286**—*Suit under S. 180—Real dispute as to situation and not ownership—Reference under S. 286, if necessary.*

Where in a suit under S. 180 of U. P. Tenancy Act though the defendant pleads ownership, the real dispute is as to whether the plot in question is situated in one mahal or the other, the matter is not one which the Civil Court is competent to deal with and it need not be referred to it and can be decided by the Revenue

U. P. TENANCY ACT (1939), S. 180.

Courts. (*Sathe, A. M.*) JUMAN KHAN *v.* SURAJ BAHAL SINGH. **1941 O.A. (Supp.) 867 (1)= 1941 A.W.R. (Rev.) 1068.**

——**Ss. 180 and 296**—*Suit under S. 44 of Agra Tenancy Act, by one of the co sharers—Disposal under S. 180 of the new Act—Objection as to non-maintainability, if tenable.*

Where a suit under S. 44 of the Agra Tenancy Act is pending when the new Act came into force and has to be decided according to S. 180 of the new Act the corresponding provision in the new Act, an objection that the suit was only by one of several co-sharers cannot be upheld because S. 180 permits one of several co-sharers who are entitled to settle land in their patti, to sue alone. (*Shirreff, J.M. and Sathe, A.M.*) MATHURA PRASAD *v.* BACHAN SINGH. **1941 R.D. 823= 1941 O.A. (Supp.) 756=1941 A.W.R. (Rev.) 855.**

——**Ss 180, 206 (a), (b) and Oudh Rent Act, S. 127**—*Suit under S. 127, Rent Act, pending when Tenancy Act came into force—Law applicable—Land ceasing to be grove before suit—Liability to ejectment—Applicability of S. 206 (a) or (b) of Tenancy Act.*

S. 180 of the Tenancy Act corresponds to S. 127 of the Oudh Rent Act. Hence a suit filed under S. 127 of the Oudh Rent Act, if pending at the time of the new Tenancy Act coming into force, has to be disposed of under S. 180 of the new Tenancy Act, but the other sections of the new Act will not apply. S. 180 of the Tenancy Act lays down that the alleged trespass must be in accordance with the provisions of the law for the time being in force. Hence the pending case has to be decided according to S. 127 of the Rent Act. If the grove is proved to have ceased to be a grove at the time of the institution of the suit, the grove holder becomes a trespasser and is liable to be ejected. To such a case neither S. 206 (*a*) nor S. 206 (*b*) of the Tenancy Act applies. (*Sathe, J.M.*) TULUA *v.* RAM DAYAL. **1941 A W R (Rev.) 588= 1941 O.A. (Supp.) 542 (2)=1941 R D. 479.**

——**Ss. 181 and 182**—*Applicability—Compromise decree under S. 61, Oudh Rent Act.*

A compromise decree for rent passed under S. 61 of the Oudh Rent Act can be executed under Ss. 181, 182 of the new Tenancy Act though as a part of the compromise it is stated in the decree that there should be no ejectment for 4 months which period was due to expire on 29th Feb. 1940. (*Harper, S.M. and Shirreff, J. M.*) ANGAD SINGH *v.* DOODHNATH PANDEY. **1941 A.W.R. (Rev.) 498= 1941 O.A. (Supp.) 457 = 1941 R.D. 546 (2).**

——**Ss. 181 (1) and 182 (1)**—*Applicability—Decree under S. 61 of Oudh Rent Act.*

Where a decree has been passed under S. 61 of the Oudh Rent Act, and execution thereof is sought for after the U P. Tenancy Act came into force, execution may proceed under Ss. 181 (1) and 182 (1) of the Tenancy Act, the corresponding execution sections. (*Harper, S.M. and Sathe, J.M.*) RAJA SYED MOHAMMAD MEHDI *v.* BARHU BAQQAL. **1941 O.W.N. 504=1941 O A. (Supp.) 166= 1941 R.D. 166=1941 A.W R. (Rev.) 231= 1941 A.L J. (Supp.) 45.**

——**Ss. 183 and 243 (1) (a) and C.P. Code, S. 47**—*Ejectment in execution of decree under S. 61, Oudh Rent Act—Objection in execution—Remedy by suit under S. 183, Tenancy Act, available—Maintainability of objection—Scope and effect of S. 243 (1) (a).*

When in execution of a decree under S. 61 of the Oudh Rent Act the ejectment is complete, though a remedy by suit is open to the tenant under S. 183 of the Tenancy Act, it does not prevent him from raising objections under S. 47, C. P. Code, in the execution proceedings against the ejectment. As the Tenancy Act provides a remedy by way of suit the only effect of S. 243 (1) (*a*) of the Tenancy Act is that the bar of separate suits created by S. 47, C. P. Code, in matters relating to execution, cannot apply to suits under the Tenancy Act. (*Sathe, A.M.*) CHAHABIRAJ KUNWARI *v.* SUMERA. **1941 A.W R. (Rev.) 1089= 1941 O.A (Supp.) 879.**

U. P. TENANCY ACT (1939), S. 244.

——**S. 183**—*Suit under—Limitation—Limitation allowed by S. 129, Oudh Rent Act not expiring before new Act came into force—Effect.*

Where the limitation of one year allowed under S 129 of the Oudh Rent Act had not expired on the date when the new Tenancy Act came into force, the effect of the passing of the new Act is to extend the period of limitation from one year to 3 years according to the provisions of the new Act for a suit under S. 183 of that Act, (*Sathe, A. M.*) UDAI BHAN PRATAP SINGH *v.* RAM DASS. **1941 A.W.R. (Rev.) 1036=1941 O.A. (Supp.) 845.**

——**S. 183**—*Suit under—Maintainability—Failure to appeal against decree under S. 61 of Oudh Rent Act—If a bar.*

If a tenant is ejected under an irregular decree passed under S. 61 of the Oudh Rent Act he has a right of instituting a suit for restoration of possession under S. 183 of the U. P. Tenancy Act corresponding to S. 108 (10) of the Rent Act, though he might have not appealed against the decree under S. 61. If there are two remedies open to a party it is open to the party to resort to one or the other. (*Harper, S.M. and Sathe, J.M.*) CHHATRAPAL SINGH *v.* RAM ADHIN. **1941 A.W.R. (Rev.) 491=1941 O.A (Supp.) 450= 1941 R D. 483.**

——**S. 183**—Suit under S. 99 of the Agra Tenancy Act—Maintainability in Revenue Court—Land occupied by buildings at the time of suit. *See* AGRA TENANCY ACT, S. 99 AND U. P. TENANCY ACT, S. 183. **1941 R D. 498 (1).**

——**S. 206 (b)**—*Scope of.*

For the purposes of S. 206 (*b*) the question as to whether the plot is still a grove or not does not arise. All that is required is that on the 1st day of July, 1937, the plot must have been recorded as a grove and on the 1st January, 1940, it must have been still in the possession of the holder. (*Harper, S.M. and Shirreff, J.M.*) MADAN GOPAL *v.* SANKATHA PRASAD. **1941 A.W.R. (Rev.) 513 (2)= 1941 O.A. (Supp.) 472 (2) = 1941 R.D. 526.**

——**S. 231**—*Collection of rent by different co-sharers—Division—Mode.*

In the absence of a local custom whereby each co-sharer collects rents only to the extent of his share, all the collections made by all the parties should be posted together and each party would be entitled to retain only his share of the amount. (*Harper, S.M. and Sathe, J. M.*) MITTHAN LAL *v.* BUDH SEN. **1941 A.W.R. (Rev.) 671=1941 O.A. (Supp.) 611 = 1941 R.D. 664.**

——**S. 243**—Applicability—Execution of partially satisfied decree after new Act coming into force. *See* OUDH RENT ACT, S. 151 AND U. P. TENANCY ACT, S. 243. **1941 O.A. 889=1941 O.W.N. 1177.**

——**S. 243 (1) (a)**—Scope and effect of. *See* U. P. TENANCY ACT, SS. 183 AND 243 (1) (*a*) AND C. P. CODE, S. 47. **1941 A.W.R. (Rev.) 1089.**

——**S. 244**—*Power to act under—Application—Necessity—Suit under S. 44 and relief under S. 86 of the Agra Tenancy Act.*

U. P. TENANCY ACT (1939), S. 245.

A suit under S. 44 of the Agra Tenancy Act against a transferee cannot be changed into a suit under S. 86 against a sub-tenant except under S. 244, U. P. Tenancy Act and for that an application by the plaintiff and the framing of issues is necessary. (*Harper, S. M. and Sathe, A. M.*) PIAREY LAL *v.* RAM SARUP.

1941 A.W.R. (Rev.) 1050.

——**Ss. 245 and 246**—*Right of some only of the co sharers to sue—One of them happening to be lambardar—If affects question.*

Where one of the co-sharers along with another of them sues for arrears of rent, it could not be decreed on the ground that one of them happened to be also a lambardar. (*Harper, S.M. and Sathe, J.M.*) SHIB DAYAL *v.* RAM SINGH. **1941 R.D. 324 (2)= 1941 A.W.R. (Rev.) 448 = 1941 O.A. (Supp.) 380.**

——**Ss. 245 and 246 and Agra Tenancy Act (III of 1926), Ss. 265 and 266**—*Suit by one co-sharer for arrears of rent—Proof of separate collection by co-sharers—Proper order to pass.*

Where in a suit by one of the co-sharers for arrears of rent, the defendant pleads separate payment to different co-sharers, the case falls under S. 266 of the Agra Tenancy Act and the plaintiff can only be given a decree for the amount due in proportion to his share. (*Harper, S.M. and Sathe, J.M.*) NAGESAR CHAMAR *v.* BINDESHARI PANDE. **1941 R.D. 326= 1941 A.W.R. (Rev.) 446 = 1941 O.A. (Supp.) 378.**

——**S. 245 (2)**—*More than one lambardar—Settlement of land—If should be jointly done.*

There is nothing in the U. P. Tenancy Act or in the Revenue Department Manual to show that the consent of all lambardars is required before a tenant can be admitted to land in pattis where there are more than one lambardar. (*Sathe, A.M.*) DIGAMBAR SINGH *v.* PERSHADI. **1941 R.D. 870= 1941 A.W.R. (Rev.) 1076 = 1941 O.A. (Supp.) 883.**

——**Ss. 246 and 294**—*Provisions of S. 246, if mandatory—Application under S. 294 by one of the several persons against whom the original suit for arrears of rent was brought—Maintainability.*

If a plaint contravenes the mandatory provisions of S. 246 (1) of the U. P. Tenancy Act, it would be a fatal defect in as much as it would cut at the very root of the plaintiff's right to sue. But where an application under S. 294 is made by one only of several persons against whom the original suit for arrears of rent was brought, it is not invalid if it could be shown that that one person was really acting on behalf of the others. (*Harper, S.M. and Sathe, A.M.*) SARDAR PRASAD *v.* SPECIAL MANAGER COURT OF WARDS.

1941 O.A. (Supp.) 896= 1941 A.W.R. (Rev.) 1103.

——**S. 247 and Agra Tenancy Act (III of 1926), S. 270**—*Plea of payment in 'good faith'—Sustainability—Circumstances.*

Where a defendant in a suit for arrears of rent pleads a payment to third person as having been made in good faith, and the plaintiff is not able to prove that he has ever before collected rent from defendant, but on the other hand it is shown that the third person has been collecting rent from the defendant and that it was the third person who in fact admitted the defendant to the tenancy, the circumstances are such as to justify the plea that the payment to such third person was in good faith under S. 270, Agra Tenancy Act, even though his name did not appear in the khewat or in the khatauni in any capacity. (*Harper, S.M. and Sathe, J.M.*) LAL BEHARI *v.* BRAHMDEO PANDEY.

1941 R.D. 296 (2) = 1941 A.W.R. (Rev.) 400= 1941 O.A. (Supp.) 349.

U. P. TENANCY ACT (1939), S. 269.

——**S. 257** — Jurisdiction—Suit filed in S. D. O.'s Court — Transfer to Assistant Collector second class for adjudication on portion of the claim—Decree by that Court, if without jurisdiction. *See* AGRA TENANCY ACT, S. 234 AND U. P. TENANCY ACT, S. 257—JURISDICTION. **1941 R.D. 88.**

——**S. 265 (1) (a) and Agra Tenancy Act, S. 252**—*New Act—Procedure relating to entertainment of appeals or revisions.*

The procedure relating to the entertainment of appeals is governed by the law as it stood when the original suit was filed and not by the law as it stands when the appeal is filed. Where in a suit for profits a revision was filed by the judgment-debtor under S. 252 of the Agra Tenancy Act before the Commissioner but it was returned on the ground that the new U. P. Tenancy Act applied to it, it was *held* that S. 265 (1) (*a*) of the U. P. Tenancy Act would not apply that the order is only liable to revision under S. 252, Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) BAL MUKAND *v.* KARAN SINGH. **1941 A.W.R. (Rev.) 189= 1941 O.A. (Supp.) 133 = 1941 A.L.J. (Supp.) 43= 1941 R.D. 306.**

——**S. 265 (3) and Agra Tenancy Act, S. 242 (3)**—*Question of jurisdiction raised in trial Court and before Commissioner—Commissioner finding Revenue Court not having jurisdiction—Proper procedure.*

Where a defendant pleaded that the land in suit was *abadi* and that the Revenue Court had no jurisdiction to entertain it, but the trial Court decreed it and in appeal the question of jurisdiction was again raised before the Commissioner, and he overruled the objection but dismissed the suit as the land was *abadi*, it was *held* that the Commissioner's action in holding that the land was *abadi* was tantamount to deciding a question of jurisdiction which he was not empowered to do and that he should have returned the memorandum of appeal for presentation to the District Judge. (*Harper, S.M. and Sathe, J.M.*) GULAB SINGH *v.* SURAJ NARAIN SINGH. **1941 R.D. 175 = 1941 O.W.N. 424= 1941 A.W.R. (Rev.) 344 (2)= 1941 O.A. (Supp.) 258 (2).**

——**S. 267**—*Error of fact affecting decision of case on merits—Interference in second appeal.*

Where owing to an error as to the point of time to which the evidence related, the decision of a case on the merits has been affected, it could be interfered with in second appeal. (*Shirreff, S.M. and Sathe, J.M.*) NAINA *v.* RAJENDRA KUMAR.

1941 A.W.R. (Rev.) 798= 1941 O.A. (Supp.) 709 = 1941 R.D. 759 (2).

——**S. 267**—*Finding of fact—Absence of evidence—Interference.*

A finding of fact arrived at by the commissioner without practically any evidence on the point is liable to be interfered with in second appeal. (*Harper, S.M. and Sathe, J.M.*) MANODUTTA DUBEY *v.* RAM SAMUJ.

1941 R.D. 323 = 1941 A.W.R. (Rev.) 442= 1941 O.A. (Supp.) 372.

——**S. 267**—*Second appeal—Concurrent findings of fact—Oral evidence preferred to patwari papers—Interference.*

Where there is a concurrent finding of fact by two lower Courts though it be one based upon believing the oral evidence of a party in preference to the recorded entry in the patwari papers, it cannot be upset in second appeal. (*Sathe, J.M.*) SONBARSA *v.* MOHD KHALIL.

1941 A.W.R. (Rev.) 791= 1941 O.A. (Supp.) 702 = 1941 R.D. 716.

——**S. 269**—*Second appeal—Interference—Finding of fact—Absence of judicial scrutiny by appellate Court.*

U. P. TENANCY ACT (1939), S. 271.

Where an appellate Court merely accepts the reasoning of the trial Court in a very short judgment without subjecting them to any judicial scrutiny, it is a fit case for interference in second appeal even on a question of fact. (*Harper, S.M. and Sathe, J.M.*) SHIV DAYAL *v.* SURAJ PAL SINGH. **1941 R.D. 251 = 1941 A.W.R. (Rev.) 352 = 1941 O.A. (Supp.) 266.**

——**S. 271**—*Appeal—Competency—Stay of execution proceedings.*

An order of the Assessment Collector staying execution proceedings till the disposal of a case under the U. P. Encumbered Estates Act is an order under S. 47, C. P. Code, and it will be appealable under S. 271 of the U. P. Tenancy Act whether it amounts to a decree or not. (*Agarwal, J.*) LAKSHMINATH SETH *v.* KANHAIYA LAL. **196 I.C. 172 = 14 R.O. 135 = 1941 R.D 798 = 1941 O L.R 652 = 1941 O A. 751 = 1941 A W R. (Rev.) 817 = 1941 O.W.N. 1049 = A.I.R 1941 Oudh 609.**

——**S. 271**—Applicability—Appeal against dismissal of application under S. 40, Agra Tenancy Act, after U. P. Tenancy Act came into force. *See* AGRA TENANCY ACT, S. 248 (4) AND UNITED PROVINCES TENANCY ACT, S. 271. **1941 O.W.N. 254.**

——**Ss. 271 (2) and 272**—*Order of remand by Commissioner in appeal—If appealable*

While S. 272 of the United Provinces Tenancy Act does not forbid an appeal, S. 271 (2) does not provide for an appeal from a remand order passed by a Commissioner in an appeal. O. 43, R. 1, C. P. Code, is inapplicable to appellate orders of Commissioners, and appeals against orders under the United Provinces Tenancy Act are governed by S. 271 (2) of that Act and not by the general provisions contained in the C. P. Code. Hence no appeal lies against an order of remand passed by the Commissioner in a pending appeal. (*Harper, S.M. and Sathe, J.M.*) LACHMAN NONIA *v.* LOCHAN NONIA. **1941 A.W.R. (Rev.) 24 = 1941 O A. (Supp.) 15 = 1941 R.D 49.**

——**S. 275**—*Agra Tenancy Act* (1926), *S.* 252—*Revision—Competency—Case not decided.*

In view of the precise wording of S. 252 of the Agra Tenancy Act and S 275 of the U. P. Tenancy Act, no revision application will lie before the Board unless the case has been decided. Where the Collector had not only held that a reference to arbitrators was invalid, but also directed the Assistant Collector to dispose of the case afresh, the rights of the parties have not been decided in any way at all and hence the Collector's order could not be questioned in revision. (*Sathe, J.M.*) RIKHAI CHAUBE *v.* JAMUNA CHAUBE. **1941 A.W.R. (Rev.) 183 = 1941 O.A. (Supp.) 127 = 1941 R D. 253.**

——**S. 275**—*Case 'decided'—Case stayed under S. 7, U. P. Encumbered Estates Act—Order if revisable.*

A case which has been stayed under S. 7, U. P. Encumbered Estates Act, cannot be held to have been decided. Before a case can be held to have been 'decided' there must be some pronouncement at least on merits. Hence no revision will lie against an order for stay passed under S. 7 of the U. P. Encumbered Estates Act. (*Harper, S M and Sathe, J.M*) NAVINCHANDRA *v.* RADHEY SHYAM. **1941 A.W.R. (Rev.) 376 = 1941 R.D. 340 = 1941 O.A. (Supp.) 336.**

——**S. 275**—*Material irregularity—Dismissal of claim on point not in issue—Revision.*

Where the defendant to a suit for arrears of *theka* money has admitted that he is the *thekadar* and has not denied that *theka* money is due from him to the plaintiff the question of registration of the *theka* is not relevant to the case. When such a point is not raised in the first Court and not even in the grounds of appeal to the Deputy Commissioner, a dismissal of the whole claim by the Deputy Commissioner on the ground of want of registration, is a material irregularity and is hence open to revision. (*Harper, S.M. and Shirreff, J.M.*) SURJU *v.* LEKHRAJ. **1941 A W.R. (Rev.) 922 = 1941 O.A. (Supp.) 796 = 1941 R.D. 791.**

U. P. TENANCY ACT (1939), S. 275.

——**Ss. 275 and 286**—*Order referring issue to civil Court—Revision.*

An order under S. 286 of the U. P. Tenancy Act referring an issue to the Civil Court cannot be construed as one giving a pronouncement on merits on any of points involved, and it does not even cut at the root of the question in issue between the parties and could not be taken as deciding the case. Hence it is not revisable under S. 275. (*Shirreff, J.M. and Sathe, A.M.*) GOVIND RAM *v.* MANOHAR LAL. **1941 O.A. (Supp.) 821 = 1941 A.W.R. (Rev.) 977 = 1941 R.D. 953.**

——**S. 275**—Reference in pending cases—If permissible under the Act. *See* 1940 Dig., Col. 1231. RAM LOCHAN SINGH *v.* RAM SABHAG. **1941 A.L.J. (Supp.) 6.**

——**S. 275**—*Revision—Competency—Case decided—Setting aside* ex parte *decree.*

No revision application will lie to the Board unless a case has been decided, *i.e.*, the order must be one which cuts at the very root of the question between the parties. An order setting aside an *ex parte* decree in a suit for arrears of under-proprietary rent is not revisable under S. 275 of the U. P. Tenancy Act. (*Shirreff, J.M.*) JAI SHANKAR *v.* RAGURAJ SINGH. **1941 R.D. 593 = 1941 O.W.N. 847 = 1941 O.A. (Supp.) 582 = 1941 A.W.R. (Rev.) 625.**

——**S. 275 and Agra Tenancy Act, S. 252**—*Revision—Competency—Order referring issue to Civil Court by Assistant Collector—Decision in case appealable to District Judge.*

Where any decision that might be given in a case before an Assistant Collector would be appealable only to the District Judge, a revision against an order referring an issue to the Civil Court by the Assistant Collector in that suit would not lie. (*Shirreff, J.M. and Sathe, A.M.*) GOVIND RAM *v* MANOHAR LAL. **1941 O.A. (Supp.) 821 = 1941 A.W.R. (Rev.) 977 = 1941 R.D. 953.**

——**Ss. 275 and 296**—*Revision—Competency—Order that decree under S. 61 of Oudh Rent Act is not executable after U. P. Tenancy Act.*

Where it is held by the lower Courts that there could be no execution by way of ejectment, of decrees passed under S. 61 of the old Oudh Rent Act as there was no section in the new Act corresponding to S. 61 of the old Act, it means that those Courts held that under S. 296 of the U. P. Tenancy Act, they had no jurisdiction to allow execution of the decree. This is clearly a matter which comes within S 275 of the U.P. Tenancy Act and a revision does lie. (*Harper, S.M. and Sathe, J.M.*) RAJA SYED MOHAMMAD MEHDI *v.* BARHU BAQQAL. **1941 R.D. 166 = 1941 O.A. (Supp) 166 = 1941 O.W.N. 504 = 1941 A.W.R. (Rev.) 231 = 1941 A L J. (Supp.) 45.**

——**Ss. 275 and 276**—*Revision—Forum—Determining factor.*

Where an appeal lies to the District Judge and not to the Commissioner under S. 265 (1) (*a*) of the U. P. Tenancy Act against a decision in a suit, a revision in respect of the case will therefore also lie to the High Court under S 276 and not to the Board under S. 275.

U. P. TENANCY ACT (1939), S. 275,

(*Harper, S. M. and Sathe, J.M.*) NAVINCHANDRA *v.* RADHEY SHYAM. **1941 A.W.R. (Rev.) 376 = 1941 R.D. 340 = 1941 O.A. (Supp.) 336.**

——**S. 275 and Agra Tenancy Act (III of 1926), S. 252**—*Revision—Interference—Finding of fact without considering objections of a party*

A Collector's finding about the amount of claim in an arrear of rent suit would be accepted in revision, if it is based on merits. But where the Collector refused to consider the objections of the defendants on merits and accepted the trial Court's finding merely because there was no written cross-objections filed by the defendant, the finding can be interfered with in revision. (*Harper, S.M. and Sathe, J.M.*) MAHADEO *v.* GHURPATTAR. **1941 R.D. 299 = 1941 A.W.R. (Rev.) 401 = 1941 O.A. (Supp.) 350.**

——**S. 275**—*Revision—Order preventing reopening of case—Case if decided.*

Where the effect of a Commissioner's order dismissing a revision is to prevent its being reopened so long as that order stands, such an order amounts to an order deciding a case and is revisable. (*Harper, S.M. and Shirreff, J.M.*) NARSINGH PADMA SARAN SINGH *v* MOTI LAL. **1941 O.A. (Supp.) 761 = 1941 A.W.R (Rev.) 860.**

——**S. 276**—*Applicability.*

S. 276 of the U. P. Tenancy Act is applicable only when an appeal from an order complained of lies to the District Judge. Where it is not appealable to the District Judge, a revision is not maintainable. (*Agarwal, J.*) JAGANNATH SINGH *v.* SITA RAM. **194 I.C. 543 = 14 R.O. 5 = 1941 R.D. 488 = 1941 O.W.N. 819 = 1941 A.W.R. (Rev.) 533 = 1941 A.L.W. 669 = 1941 O.A. 554 = A.I.R. 1941 Oudh 497.**

——**S. 276**—*Applicability— Execution application after Act, in respect of suit prior to Act—Revision—Competency.*

An application for execution is a fresh proceeding and not always a continuation of the suit and it will be governed as regards appeal and revision by the law prevailing at the date it is presented. Where the execution application is presented after New Tenancy Act came into force in respect of a suit filed under the old Rent Act, S. 276 of the New Act is applicable to orders passed on it. (*Agarwal, J.*) LAKSHMINATH SETH *v.* KANHAIYA LAL. **196 I C. 172 = 14 R.O. 135 = 1941 R.D. 798 = 1941 O.L.R. 652 = 1941 O.A. 751 = 1941 A.W.R. (Rev.) 817 = 1941 O.W.N. 1049 = A.I R. 1941 Oudh 609.**

——**S. 276**—*Applicability—Suit when Ouah Rent Act in force—Order complained against passed after new Act came into force—Law applicable.*

Where a suit is instituted prior to the U. P. Tenancy Act and the order complained of is passed after new Act came into force, a revision preferred against such an order is governed by the U. P. Tenancy Act. (*Agarwal, J.*) JAGANNATH SINGH *v.* SITA RAM. **194 I.C. 543 = 14 R.O. 5 = 1941 R.D. 488 = 1941 O.W.N. 819 = 1941 A.W.R. (Rev.) 533 = 1941 A.L.W. 669 = 1941 O.A. 554 = A.I.R. 1941 Oudh 497.**

——**S. 276**—Procedural law—Retrospective operation—Revision under new act, if lies, where no revision lay before. *See* 1940 Dig., Col. 1231. TULSI RAM *v.* MADHO RAM. **A.I.R. 1941 Oudh 65.**

——**S. 276**—*Revision competency—Decision of District Judge on appeal in Revenue cases.*

Under S. 276 of the U. P. Tenancy Act the High Court or the Chief Court can interfere with a decision of a Subordinate Revenue Court in which an appeal lies to District Judge, if a question of jurisdiction is involved. (*Agarwal, J.*) LAKSHMINATH SETH *v.* KANHAIYA LAL. **196 I.C. 172 = 14 R O. 135 = 1941 R.D. 798 = 1941 O.L.R. 652 = 1941 O.A. 751 = 1941 A.W.R. (Rev.) 817 = 1941 O.W.N. 1049 = A.I.R. 1941 Oudh 609.**

U. P. TENANCY ACT (1939), S. 294.

——**S. 286**—Order referring issue to Civil Court—Revision. *See* U. P. TENANCY ACT, SS. 275 AND 286. **1941 A.W.R. (Rev.) 977.**

——**S. 286**—Reference to Civil Court—Necessity—Dispute as to situation and not ownership of plot. *See* U. P. TENANCY ACT, SS. 180 AND 286. **1941 A.W.R. (Rev.) 1068.**

——**S. 286 (1), Expl. 1**—*Applicability—Untenable claim to proprietary right.*

S. 286, U. P. Tenancy Act, has no application where the claim to proprietary right is clearly untenable. (*Harper, S.M.*) RAM MANZOOR PANDEY *v.* SPECIAL MANAGER, COURT OF WARDS, SHAHPUR. **1941 R.D. 325 = 1941 O.W.N. 674 = 1941 A.W.R. (Rev.) 450 (2).**

——**S. 286 (4) and Agra Tenancy Act (1926), S. 271 (4)**—*Difference between—Suit under old Act—Appeal after new Act—Right of appeal.*

Under the Agra Tenancy Act, S. 271 (4) if the question of proprietary right was not in issue in appeal, the appeal lay in the Revenue Court. Under the U. P. Tenancy Act, S. 286 (4) once an issue has been decided by a Civil Court the subsequent appeal from the order of the Revenue Court lies to the Civil Court which has jurisdiction to hear appeals from the Court to which the issue of proprietary title had been referred. Where the suit was instituted while the Old Act was in force but the appeal was filed after the New Act came into force, it is the Old Act which applies, for the right of appeal is governed by the date of the institution of the suit and not by the date of the first Court's order or of filing of the appeal. (*Harper, S.M. and Shirreff, J. M.*) RUDDAR PRASAD *v.* CHHEDA LAL. **1941 O.A. (Supp) 718 = 1941 A.W.R. (Rev.) 807 = 1941 R.D. 693 (2).**

——**S. 289 and C. P. Code, S. 151**—Reference under S. 289 not competent—Resort to S. 151 for reference—If permissible. *See* 1940 Dig., Col. 1232. SAMPAT SINGH *v.* NAKCHHED SINGH. **191 I.C. 753 = 13 R.O. 281 = 1941 O.L.R. 31 = 16 Luck. 492 = A I.R. 1941 Oudh 83.**

——**S. 289 (2)**—*'Rejected'—If includes return for presentation to proper Court.*

The word 'rejected' in S. 289 (2) of the U. P. Tenancy Act includes return of a memorandum of appeal for presentation to the proper Court. A memorandum of appeal is not rejected on the ground of want of jurisdiction but is only returned for presentation to proper Court. (*Agarwal, J.*) BHAIRONDIN SINGH *v.* MOHAMMAD MEHDI. **196 I.C. 169 = 14 R.O. 137 = 1941 R.D. 774 = 1941 O.L.R. 648 = 1941 O.A. 745 = 1941 A.W.R. (Rev.) 777 = 1941 O.W.N. 1032 = A.I.R. 1941 Oudh 621.**

——**S. 294**—*Applicability—Actual ejectment after 1st April, 1937, though order earlier.*

Where an order for ejectment of a tenant was passed on 12th December, 1936, but the ejectment was actually carried out on the 15th April, 1937, it was held that S. 294 of the United Province Tenancy Act applied to the case. (*Harper, S.M. and Sathe, J.M;*) BHAGWANIA *v.* PEMAN. **1941 R D. 417 = 1941 A.W.R. (Rev.) 479 = 1941 O.A. (Supp.) 438.**

——**S. 294**—*Applicability—Crucial date—Order for ejectment prior to 1st April, 1937, but actual ejectment*

U. P. TENANCY ACT (1939), S. 294.

subsequent to that date—Benefit of S. 294, if would be available.

For the purposes of the applicability of S. 294 of the U. P. Tenancy Act it is the date of the actual ejectment which counts and not that of the ejectment order. Where an order for ejectment is passed prior to 1st April, 1937, but the actual ejectment is carried out after that date, that does not prevent the tenant from obtaining the benefit of S. 294. (*Shirreff, S.M. and Sathe, J.M.*) RAGHUNATH *v.* RAM NATH.
1941 A.W.R. (Rev.) 590 (1) = 1941 R.D. 498 (2) = 1941 O.A. (Supp.) 544 (1).

——**S. 294**—*Applicability—Sale by ex-proprietary tenant of all his rights, after ejectment for arrears—If a bar to claiming benefit of S. 294.*

Where a person after mortgaging his *sir* plot holds it as an ex-proprietary tenant and sells all his rights to the mortgagee after ejectment under a decree for arrears of rent the sale is no bar to his claiming the benefit of S. 294 of the U. P. Tenancy Act. (*Shirreff, S.M. and Sathe, J.M.*) SANT BUX SINGH *v.* MUNESHWAR SINGH. **1941 R.D. 604 = 1941 O.A. (Supp.) 579 = 1941 A.W.R. (Rev.) 622 = 1941 A.L.J. (Supp.) 115.**

——**S. 294**—Application under, by one of the several persons against whom the original suit for arrears of rent was brought—Maintainability. *See* U. P. TENANCY ACT, SS. 246 AND 294. **1941 A.W.R. (Rev.) 1103.**

——**S. 294**—*Ejectment—If refers to date of order or delivery of possession.*

The ejectment referred to in S. 294 of the U. P. Tenancy Act is the delivery of possession and not the order of ejectment. (*Harper, S. M.*) DWARKA SINGH *v.* SUMER KURMI. **1941 A.W.R. (Rev.) 503 = 1941 R.D. 521 (2) = 1941 O.A. (Supp.) 462.**

——**S. 294 and Oudh Rent Act, Ss. 61 and 127**—*Ejectment under S. 61, Oudh Rent Act—Continuance in possession—Ejectment under S. 127—Reinstatement, if available.*

If a tenant sticks to the land notwithstanding his formal ejectment under S. 61 of the Oudh Rent Act the subsequent proceedings under S. 127 should be deemed to be only a continuation of the proceedings for the effective ejectment of the tenant, instituted under S. 61 and reinstatement could take place even if there has been an intermediate order for ejectment as trespasser. (*Shirreff, J.M.*) HARI KISHUN DASS *v.* SUKHDEI. **1941 R.D. 607 = 1941 O.A. (Supp.) 575 (1) = 1941 A.W.R. (Rev.) 618.**

——**S. 294**—*Reinstatement — Intention behind—Default in period subsequent to* 1344 F—*Benefit if denied.*

The intention behind S. 294, U. P. Tenancy Act was to give the benefit of reinstatement to those tenants who were ejected for non-payment of arrears which were stayed under the Stay of Proceedings Act and subsequently remitted. There is nothing to show that such a benefit is to be withheld from tenants who made default in subsequent instalments of rent. (*Shirreff, J.M.*) ALI AKHTAR *v.* DINDAYAL. **1941 R.D. 738 = 1941 A.W.R. (Rev.) 802 (1) = 1941 O.A (Supp.) 713 = 1941 O.W.N. 1010 (1).**

——**S. 294**—*Reinstatement under—If barred by ejectment under S. 44, Agra Tenancy Act following infructuous ejectment under S. 79.*

A subsequent ejectment under S. 44, Agra Tenancy Act, as trespasser of a tenant already once ejected, does not operate as a bar to proceedings under S. 294, United Provinces Tenancy Act, provided the later ejectment was in consequence of the previous infructuous ejectment under S. 79 of the Agra Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) RAM SUNDER *v.* BAL GOVIND. **1941 R.D. 398 = 1941 A.W.R. (Rev.) 472 (1) = 1941 O.A. (Supp.) 431 (1).**

——**S. 294**—*Remedy under—Availability—Pendency of appeal against order granting review of order of ejectment under S. 80, Agra Tenancy Act.*

Where an appeal is preferred against an order of the Assistant Collector granting review of his own previous order for the tenant's ejectment under S. 80, Agra Tenancy Act, the tenant can during its pendency apply under S. 294, U. P. Tenancy Act, if the conditions laid by the section are satisfied. Whatever may happen to the appeal the tenant cannot be deprived of the remedy provided to him by S. 294. (*Sathe, A.M.*) CHANDRA BHAN *v.* MAM RAJ. **1941 O.A. (Supp.) 891 = 1941 A.W.R. (Rev.) 1098.**

——**Ss. 294 and 246**—*Restoration of possession of holding—Application by one of four co-tenants—Maintainability—Condonation under O. 1, R. 13, C. P. Code.*

It is not competent for one of four co-tenants to apply alone for restoration of possession of holding under S. 294 of the U. P. Tenancy Act, in view of the clear provisions in S. 246 of the Act. The irregularity cannot be condoned under O. 1, R. 13, C. P. Code, though the objection is raised at a late stage. (*Shirreff, S.M. and Sathe, J.M.*) DHANDI BIBI *v.* ZALIM SINGH. **1941 R.D. 733 = 1941 O.A. (Supp.) 627 = 1941 A.W.R. (Rev.) 687.**

——**S. 294**—*Scope of—If creates any new right.*

S. 294 of the U. P. Tenancy Act only gives a concession to tenants ejected on account of arrears of rent; it does not create any new right in favour of tenants ejected on other grounds. Hence where ejectment proceedings have been taken both under S. 61 and Ss. 52 and 55 of the Oudh Rent Act, the tenants are not entitled to any relief under S. 294 of the Tenancy Act. (*Shirreff, J. M.*) AMBIKA *v.* RANA UMA NATH BUX SINGH. **1941 O.W.N. 717 = 1941 R.D. 403 (1) = 1941 O.A. (Supp.) 485 (1) = 1941 A.W.R. (Rev.) 554.**

——**S. 294**—*'Tenant'—Meaning—Applicability of section.*

The use of the word 'tenant' in S. 294 of the U. P. Tenancy Act is only descriptive and the section applies equally whether it deals with a tenant or with a cultivator who before the order of ejectment was a tenant. (*Harper, S.M.*) DWARKA SINGH *v.* SUMER KURMI. **1941 A.W.R. (Rev.) 503 = 1941 R.D. 521 (2) = 1941 O.A. (Supp.) 462.**

——**S. 294 (1)**—*'Ejected', meaning of—Conditions necessary for section to apply—Reinstatement, if affected by an intermediate order under S. 44, Agra Tenancy Act.*

The word 'ejected' in S. 294 (1) of the U. P. Tenancy Act means actual transfer of possession on the spot and not merely the passing of a decree or order to the effect that the tenant be ejected. The three ingredients necessary which have to be satisfied before S. 294 can apply are:—(1) the tenant must have been ejected for non-payment of arrears of rent after 1st April, 1937; (2) the application for reinstatement must be filed within 6 months of the commencement of Act XVII of 1939; (3) the land must not have been let to another person in 1345 F. and been continuously so let since then. An intermediate, order under S. 44 of the Agra Tenancy Act, would be disregarded and a reinstatement may take place in spite of it. (*Harper, S.M. and Sathe, J.M.*) RAJ NARAIN *v.* DAMODAR SINGH. **1941 R.D. 303 = 1941 O.A. (Supp.) 240 = 1941 O.W.N. 595 (2) = 1941 A.W.R. (Rev.) 330.**

U. P. TENANCY ACT (1939), S. 294.

——**S. 294 (1), Proviso**—*Applicability—Conditions to be fulfilled.*

The conditions required to be fulfilled before the proviso to S. 294 (1) of the United Provinces Tenancy Act applies are (1) that the holding or part thereof must have been let to another person in the agricultural year 1345, F and (2) that it must have been continuously so let since then. (*Harper, S.M. and Sathe, J. M.*) KISHORI BALLABH DALJI *v.* RAMESHWAR PRASAD. **1941 R.D. 397 = 1941 A.W.R. (Rev.) 476 = 1941 O.A. (Supp.) 435.**

——**S 296**—*Agra Tenancy Act, S. 18—Application under S. 18, Agra Tenancy Act—If governed by S. 296, Tenancy Act.*

S. 296 of the U. P. Tenancy Act does not govern applications for the recording of occupancy rights under S. 18 of the Agra Tenancy Act. (*Shirreff, J.M. and Sathe, A.M.*) DEEP CHAND *v.* RAM NARAIN. **1941 R.D. 943 = 1941 O.A. (Supp.) 816 = 1941 A.W.R. 972.**

——**S. 296**—*Applicability—Conditions—Proceedings for re-delivery of possession under S. 151, C. P. Code—If affected by S. 296.*

S. 296 of the U P. Tenancy Act applies only to (1) suits and (2) execution proceedings in respect of unsatisfied decrees pending on 1st January 1940. Where certain proceedings are taken under S. 151, C. P. Code, to obtain re-delivery of possession of certain property, they are obviously not a pending suit or proceedings for the execution of a decree and hence S. 296 of the U. P. Tenancy Act cannot apply to them. (*Sathe, J.M.*) AASAN *v.* PRAG NARAIN. **1941 O.W.N. 710 = 1941 R.D. 386 = 1941 A.W.R. (Rev.) 472 (2) = 1941 O.A. (Supp.) 431 (2).**

——**S. 296 and Oudh Rent Act, S. 60**—*Applicability—Ejectment proceedings started prior to new Act.*

Where ejectment proceedings under the Oudh Rent Act had already started prior to the new Act coming into force then S. 296 of the new Act has no application to them, and they can be continued under the old Oudh Rent Act according to S. 6 (*e*) of the U. P. General Clauses Act. (*Shirreff, J. M and Sathe, A. M.*) MAHADEVI *v.* SURAJ BALI. **1941 A.W.R. (Rev.) 1086 = 1941 O.A. (Supp.) 876.**

——**S. 296**—*Applicability—Execution application pending when new Act came into force—Limitation governing.*

S. 296 of the U. P. Tenancy Act being a section having retrospective operation should be interpreted strictly and the section can be said to require only that the 'corresponding provision' of the new Act should be applied to the execution of a decree which has not been satisfied in full at the commencement of the Act. Other sections and provisions of the new Act can be applied only if they can be considered to be indissolubly linked with the corresponding provision. S. 254 which lays down limitation for execution applications cannot be said to be indissolubly linked with the procedure to be followed in giving effect to an execution application. Hence an application for the execution of a decree which is not fully satisfied on 1-1 1940 is governed by the Agra Tenancy Act and not by the new Act. (*Harper, S.M. and Sathe, J.M.*) TIRKHA *v.* NAZEER BEGAM. **1941 A.L.J. (Supp) 19 = 1941 A.W.R. (Rev.) 185 = 1941 O.A. (Supp.) 129 = 1941 R.D. 105.**

——**S. 296**—*Applicability — Pendency of appeal against order upholding objection under S. 151 of the Oudh Rent Act—New Act coming into force—Power of appellate Court.*

U. P. TENANCY ACT (1939), S. 296.

Where during the pendency of an appeal against an order passed upholding objection under S. 151 of the Oudh Rent Act, the new Tenancy Act came into force, it was held that the appellate Court could give effect to S. 296 of the new Act and allow execution against the immovable property of the judgment-debtor. It was further held that an appellate Court could take cognizance of change of circumstances or the law having retrospective effect made during the pendency of the appeal. (*Agarwal, J.*) PAHLAD UPADHYAY *v.* UDAI BHAN PRATAP SINGH. **195 I.C. 411 = 14 R.O 81 = 1941 O W.N. 969 = 1941 A W.R. (Rev.) 644 = 1941 R D 713 = 1941 O.L R. 590 = 1941 O A. 674 = A.I.R. 1941 Oudh 577.**

——**S. 296**—*Applicability—Proceedings under Ss. 18 and 19, Agra Tenancy Act—Not finished before new Act came into force—Procedure to be followed.*

S. 296 of the U. P. Tenancy Act applies only to suits pending on 1—1—1940 and to those decrees which were unsatisfied on that date. It is not applicable to applications under Ss. 18 and 19 of the Agra Tenancy Act which are only applications and not suits. Where proceedings under Ss. 18 and 19 of the Agra Tenancy Act are not completed before the new Act came into force, the proceedings can be continued even thereafter. (*Shirreff, J.M. and Sathe, A.M.*) RAJA RAM *v.* LAKSHMAN. **1941 R.D 899 = 1941 A W.R. (Rev.) 929 = 1941 O.A. (Supp.) 803.**

——**S. 296**—*Applicability—Uncontested application under S. 81 of the Agra Tenancy Act.*

Where a zamindar applies under S. 81 of the Agra Tenancy Act for the ejectment of the defendant and it is not contested by the defendant the application remains an application and the proceedings do not become a suit and hence S. 296 of the U. P. Tenancy Act has no application to such a case. (*Harper, S.M and Sathe, J M.*) HANUMAN PRASAD NARAIN SINGH *v.* GAYA PRASAD. **1941 R.D. 379 = 1941 A.W.R. (Rev.) 467 = 1941 O.A. (Supp.) 426.**

——**S. 296 and Agra Tenancy Act, S. 86 (2)**—*Bar to execution—Decree under S. 86 (2), Agra Tenancy Act.*

S. 296 of the U. P. Tenancy Act is no bar to the execution of a decree under S. 86 (2) of the Agra Tenancy Act. S. 296 only states that the decrees should be executed in accordance with the corresponding provision of the new Act and not that the decree itself should be modified or cancelled in accordance with the provisions of the new Act (*Shirreff, J. M. and Sathe, A. M.*) MOLHU SINGH *v.* AFLATOON. **1941 A.W.R. (Rev.) 1085 (1) = 1941 O.A. (Supp.) 875 (1).**

——**S. 296 and Oudh Rent Act, S. 61**—*Decree for rent—Execution— Law applicable— Decree based on compromise, effect of.*

After the coming into force of the U. P. Encumbered Estates Act, execution proceedings under S. 61 of the Oudh Rent Act could be continued under S. 181 (1) and S. 182 (1) of the new Tenancy Act. Where such a decree is based on a compromise for the payment by instalments, the terms constitute a direction to the execution Court in addition to the direction already contained in the section and in no way alter the legal effect of the decree. (*Harper, S.M. and Shirreff, J.M.*) SITLA BUX SINGH *v.* BAKHTAWAR. **1941 A.W.R. (Rev.) 597 = 1941 R.D 523 = 1941 O.A. (Supp.) 551.**

——**Ss. 296, 181 (1) and 182 (1) and Oudh Rent Act, S. 61**—*Decree under S. 61, Oudh Rent Act—Execution under new Tenancy Act—Proper provision of law.*

U. P. TENANCY ACT (1939), S. 296.

A decree under S. 61 of the Oudh Rent Act is to be executed under S. 181 (1) and S. 182 (1) of the U. P. Tenancy Act, after that has come into force. (*Harper, S.M. and Shirreff, J.M.*) KHURSHED HUSAIN KHAN *v.* GANGA PRASAD.

1941 R.D. 585 (1) = 1941 A W.R. (Rev.) 575 (1) = 1941 O.A. (Supp.) 533 (1) = 1941 O.W.N. 897.

——S. 296 and Oudh Rent Act, Ss 61 and 145—*Decree under S.* 61, *Oudh Rent Act prior to new Act—Application for execution within three years but after new Act came into force—It barred.*

Where a decree under S. 61 of the Oudh Rent Act is obtained against a tenant prior to the passing of the new Tenancy Act and an application for execution is presented within the three years allowed by S. 145 of the Rent Act, which happens to be after the passing of the new Tenancy Act, the execution application is not barred on the ground that limitation is to be governed by the new Act by virtue of S. 296 of the Tenancy Act. A decree under S. 61, Oudh Rent Act, can be executed after the new Act within the period allowed by the Rent Act. (*Shirreff, J.M. and Sathe, A.M.*) TEJ PRATAP BAHADUR SINGH *v.* CHARAN PASI.

1941 A.W.R. (Rev.) 1063 = 1941 O.A. (Supp) 862.

——Ss. 296 and 168—*Order under S.* 80 *of Agra Tenancy Act—New Act coming into force—Effect.*

Where an order has been passed under S. 80 of the Agra Tenancy Act and the proceedings are pending when the New U. P. Tenancy Act came into force, the order under S. 80 cannot be allowed to stand and it must be revised in accordance with the provisions of S. 168 of the new U. P. Tenancy Act. (*Harper, S.M. and Sathe, J.M.*) KAMTA *v.* SAT NARAIN.

1941 O.A. 448 = 1941 A.W.R. (Rev.) 489 = 1941 R.D. 552.

——Ss. 296 and 168 and Oudh Rent Act, S. 52—*Proceedings under S.*52, *Oudh Rent Act and proceedings under S.* 168, *Tenancy Act, if same—Suit under S.* 52 *pending when Tenancy Act came into force—Effect.*

Proceedings under S. 52 (2) of the Oudh Rent Act are not proceedings in execution of the decree for arrears of rent, whereas proceedings under S. 168 of the U. P. Tenancy Act are proceedings in execution of a decree for rent ; the procedure is different and the object is also different. Hence there is no provision in the Tenancy Act corresponding to S. 52 of the Rent Act and where such a suit is pending on the date of the Tenancy Act coming into force, the proceedings must be quashed under S. 296 of the Tenancy Act. (*Shirreff, J.M.*) UJAGAR SINGH *v.* KAPTAN SINGH.

1941 R D. 378 = 1941 O.W.N. 696 = 1941 O.A. (Supp.) 485 (2) = 1941 A.W.R. (Rev.) 554 (2)

——S. 296—*Scope and applicability.*

Per *Sathe, J.M.* (*Harper, S.M.* dissenting).—The use of the word decided in S. 296 of the U. P. Tenancy Act conclusively shows that all provisions of the Act apply to suits pending on 1st January, 1940 and not merely the section corresponding to the section under which the suit was instituted. The naming of the section under which a suit is instituted is only for the sake of convenience and does not limit the legal questions which may arise in the disposal of the suit,to that section only. Under S. 296 all such questions will have to be decided according to the provisions of the new Act and not the old Act. (*Harper, S.M. and Sathe, J.M.*) BHOLA SINGH *v.* JAGDISH NARAIN SINGH.

1941 A.W.R (Rev.) 269 = 1941 O.A. (Supp.) 218 = 1941 R.D. 290 = 1941 A.L.J. (Supp.) 65.

U. P. TOWN IMPROVEMENT ACT (1919), S. 49.

——S. 296—Scope of. *See* 1940 Dig., Col. 1232. BHAGWATI PRASAD *v.* RAM LAUTAN **16 Luck. 42,**

——S. 296 –'*Suit*'—*Applications, if included.*

The ordinary law is that the clear words of a statute must be followed. S. 296, U. P. Tenancy Act, refers only to suits and does not refer to applications. So 'suits' cannot include applications. (*Harper, S M. and Sathe, J.M.*) KANAK SINGH *v.* MAHBUB ALI KHAN.

1941 O.W.N. 254 = 1941 A.W.R. (Rev.) 184 = 1941 O.A. (Supp.) 128 = 1941 R.D. 81 = 1941 A L.J. (Supp.) 51

——S. 296—'Suit'—Meaning of—If includes appeal—Appeal against decision in suit under Oudh Rent Act, prior to U. P. Tenancy Act, 1939—Forum. *See* 1940 Dig., Col. 1232. SHEO RAKHAN LAL *v.* SUNDER LAL.

16 Luck 529 = 191 I.C. 762 = 13 R O. 282 = 1941 O.L.R 27 = A.I.R. 1941 Oudh 81.

——S. 296 and Agra Tenancy Act, S. 24—*Suit pending on 1st January,* 1940—*Law applicable.*

Even in suits pending on 1st January, 1940, the succession will be governed by the provisions of law as it stood when the succession opened and hence it will be governed by Agra Tenancy Act, 1926. (*Harper, S.M. and Sathe, J.M.*) BADRI PRASAD *v.* BALDEO SINGH.

1941 O.W.N. 694 = 1941 R D. 376 = 1941 A.W.R. (Rev.) 465 = 1941 O.A. (Supp.) 424.

——Sch. II, List II, Item 12 and Limitation Act (IX of 1908), S 5—*Appeal not complying with requirements of Tenancy Act—Office note inviting compliance within time fixed—Effect.*

Where requirements as to the filing of a copy of the original judgment is not complied with as required by the U. P Tenancy Act, Sch. II. List II. Item 12 within period of limitation and the office points out the omission and asks for the copy to be filed within a time fixed, it does not amount to extending the time under S. 5, Limitation Act. The question of limitation still remains to be considered. (*Harper, S.M. and Sathe, J.M.*) AMBIKA CHAUBE *v.* RAM BARAN PANDEY.

1941 A.W.R. (Rev.) 421 = 1941 O A. (Supp.) 358 = 1941 R D 346 = 1941 O W.N 641.

——Sch IV, Group B, Sl. 18, Cl. (2) (a)—*Starting point of limitation—Knowledge prior to dakhal dihani—If can affect.*

According to Sl. 18, Cl. (2) (*a*) of Group B of Sch. IV to the U. P. Tenancy Act, limitation begins to run from the date the landholder first knew of the unauthorised occupation. Hence until the person obtains dakhal dihani over the proprietary rights and becomes a landholder limitation cannot count against him. His previous knowledge of defendant's possession not being in the capacity of that of a landholder cannot count for the calculation of the period of limitation. (*Shirreff, J.M. and Sathe, A.M.*) RAM DEO SINGH *v.* RAMANAND SINGH. **1941 A.W.R. (Rev.) 1087 = 1941 O.A. (Supp.) 877.**

UNITED PROVINCES TOWN IMPROVEMENT ACT (VIII OF 1919, as applied to Province of Delhi), S. 49—*Application to trust for permission to erect or re-erect—Trust neither refusing nor granting permission within reasonable time—S.* 193 (4), *Punjab Municipal Act—If applies.*

Where a resident of Delhi applies to the trust for permission to erect or re-erect and the trust neither refuses nor grants permission within a reasonable time, the provisions of S. 193 (4), Punjab Municipal Act, apply to the case by virtue of S. 49, U. P. Town Improvement Act, there being nothing in S. 193 (4), Punjab Municipal Act, inconsistent with the tenor of the U. P. Act VIII of 1919. (*Bhide, J.*) MAHOMED ISHAQ *v.* EMPEROR.

197 I.C. 67 = A.I.R. 1941 Lah. 431.

UNITED PROVINCES VILLAGE PANCHAYAT ACT (VI OF 1920), S. 71 (2) and Limitation Act, S. 14—*Scope—S* 71 (2) *of Village Panchayat Act, if renders S.* 14, *Limitation Act, inapplicable.*

The special rule of limitation provided in S. 71 (2) of the United Provinces Village Panchayat Act being a special provision in a local Act must derogate from the provisions of the general rule embodied in S. 14, Limitation Act. (*Agarwal, J.*) RAM SAGAR *v.* RAM NATH.
16 Luck. 512 = 192 I.C. 840 = 1941 O.W.N. 111 = 1941 A.W.R (C.C.) 92 = 1941 O.L.R. 231 = 13 R.O. 407 = 1941 A.L.W. 95 = 1941 O.A. 63 = A.I.R. 1941 Oudh 276.

UPPER BURMA LAND AND REVENUE REGULATION (1889), S. 53 (2) (xii)—*Bar of jurisdiction of Civil Court—'Connected with or arising out of the collection of revenue'—Meaning—Resumption of land for arrears of fishery revenue—Civil suit, in respect of—Maintainability.*

The words 'connected with or arising out of the collection of revenue' in S. 53 of the Upper Burma Land Revenue Regulation must be construed reasonably. The words 'collection of revenue' means collection by payment in the ordinary course, or recovery of arrears in the ways allowed by S. 41. If the revenue authorities proceed to enforce any process for the recovery of arrears of revenue the jurisdiction of the Civil Court will be barred. But where in respect of certain fishery revenue arrears land is resumed which is not authorised by the regulation, it is an act without jurisdiction and a suit at the instance of the aggrieved party is maintainable in a Civil Court in respect of it. (*Mosely, J.*) MAUNG SHWE THIN *v.* MAUNG THA OK.
1940 Rang.L.R. 764 = 193 I.C. 417 = 13 R.R. 250 = A.I.R. 1941 Rang. 78.

USURIOUS LOANS ACT (X OF 1918)—*Applicability—Conditions—Absence of loan—Effect of—Interest fixed at high rate—If ground for interference.*

The Usurious Loans Act can have no application to case in which there is no loan; nor would the mere fact that the rate of interest is somewhat high be itself a ground for interference in the absence of anything to suggest that the transaction was unconscionable or unduly hard. (*Harries, C.J. and Manohar Lall, J.*) BHULAN PRASAD SINGH *v.* RUP NARAIN SINGH.
195 I.C 664 = 7 B R. 955 = 14 R.P. 142 = 22 Pat.L.T. 12 = A.I.R. 1941 Pat. 233.

——(C. P. Amendment Act of 1934)—Applicability—Transaction prior to, but suit subsequent to Amendment Act. *See* 1940 Dig., Col. 1233. SHEOSHANKER SAHAI *v.* SURAJMAL. **193 I.C. 623 = 13 R.N. 341.**

——as amended by C. P. Usurious Loans (Amendment) Act 1934, Ss. 2 (3) and 3—*Applicability of the Act—Powers under the Act, Small Cause Courts, if can exercise—Refund, if can be ordered.*

The C P. Usurious Loans (Amendment) Act operates is respect of all suits for the enforcement of agreements made after the commencement of the Act in respect of loans made either before or after its commencement. The Act makes no distinction between the types of Court to which it is to apply. It is applied to all suits which fulfil the conditions necessary irrespective of the kind of the Court in which they are instituted. Hence a Court of Small Causes is entitled to exercise the powers conferred by S. 3 (1) (b) of the Act. S. 3 is mandatory and the Court is bound to exercise the powers conferred the moment the facts bring the claim within the ambit of the Act. A refund can be ordered by the Court of Small Causes, if the calculations justify it. (*Bose, J.*) KHISTY *v.* SUBBARAO, **1941 N.L J 456 = A.I.R. 1941 Nag. 294.**

USURIOUS LOANS ACT (1918), S. 3.

——(as amended by U. P. Amendment Act 1934), S. 2 (3) (ii)—*Scope of.*

By reason of the provisions of S. 2 (3) (ii) of the Usurious Loans Act as amended in U. P. in proceedings under the U. P. Encumbered Estates Act, it is competent to a Court to reduce the interest even though the loan was incurred prior to the passing of the Usurious Loans Act. (*Iqbal Ahmad, Ag. C. J. and Verma, J.*) SAHI MAL MANOHAR DAS *v.* ILTIFATUNNISA BEGAM. **I.L.R. (1941) All. 567 = 196 I.C. 158 = 1941 A.W.R. (H.C.) 204 = 1941 A.L J. 366 = 1941 A.L.W. 547 = 14 R.A. 129 = 1941 O.W.N. 701 = 1941 O.A. (Supp.) 374 = 1941 R.D. 391 = 1941 A.W.R. (Rev.) 457 = A.I.R. 1941 All. 293.**

——S. 3—*Applicability—Jurisdiction of Court to give relief—Conditions.*

S. 3 of the Usurious Loans Act will apply, and the power of the Court under that section to give relief is expressly limited, to cases where there is a finding that the interest is excessive, and that the transaction was unfair. In the absence of such findings there is no jurisdiction to apply S. 3. (*Dhavle and Meredith, JJ.*) SAGARMAL MARWARI *v.* BHUTHU RAM.
19 Pat. 974 = 190 I.C. 704 = 13 R.P. 239 = 21 P.L.T. 740 = 7 B.R. 28 = 1940 P.W.N. 719 = A.I.R. 1941 Pat. 99.

——(as amended in United Provinces), S. 3—*Applicability— Power under—Decree-holder preferring claim under S.* 9, *U. P. Encumbered Estate Act—Rate of interest in respect of such claim, if can be reduced.*

A decree obtained by a creditor prior to the institution of proceedings under the Encumbered Estates Act ceases to be operative as a decree when the debt which merged in the decree becomes the subject of adjudication by the special Judge. Hence there is no decree in existence and S. 3 of the Usurious Loans Act can be applied to reduce the interest. (*Iqbal Ahmad, Ag.C.J. and Verma, J.*) SAHI MAL MANOHAR DAS *v.* ILTIFATUNNESSA BEGAM. **I L R. (1941) A. 567 = 196 I.C. 158 = 1941 A.W.R. (H.C.) 204 = 1941 A.L J. 366 = 1941 A.L.W. 547 = 14 R.A. 129 = 1941 O.W.N. 701 = 1941 O.A. (Supp.) 374 = 1941 R.D. 391 = 1941 A.W.R. (Rev.) 457 = A.I.R. 1941 All. 293.**

——S. 3—*Court, if can act* suo motu.

The language of S. 3 of the Usurious Loans Act clearly shows that the Court has power to act *suo motu* even though the plea is not raised by way of defence. (*Bose, J.*) SITARAM SHRAWAN *v.* BAJYA PARNYA BHOI. **195 I.C. 463 = 14 R.N. 49 = 1941 N.L.J. 194 = A.I.R. 1941 Nag. 177.**

——(C. P. Amendment Act of 1934), S. 3—Re opening of transaction—Ground—High rate of interest. *See* 1940 Dig., Col. 1234. SITARAM *v.* KRISHNARAO.
I.L.R. (1941) Nag. 607.

——S. 3—*Transaction "substantially unfair"—Interest fixed at Rs.* 2 *per cent. per mensem—In case of default it was payable from date of execution of bond and not from date of default.*

Where the interest on a bond was fixed as Rs. 2 per cent. per mensem and in case of default the same was payable from the date of the execution of the bond and not from the date of the default, the transaction, is substantially unfair within the meaning of S. 3. (*Tek Chand and Abdul Rashid, JJ.*) SIRAJ DIN *v.* UMAR DIN. **192 I.C. 118 = 13 R.L. 361 = A.I R. 1941 Lah. 23.**

——and C. P. Amendment Act (1934), S. 3 (1)(a)—*Provision for future interest—If bad—Rate well within* 12 *per cent. in case of instalment mortgage bond—If unfair*

USURIOUS LOANS ACT (1918), S. 3.

There is nothing unfair in the charging of future interest. When the primary interest is *savai* in the case of an instalment mortgage bond but the actual interest worked out would not exceed 12 per. cent. the rate is not excessive. (*Bose, J.*) PANDURANG *v.* RAMCHANDRA. **1941 N.L.J. 669.**

——**C. P. Amendment Act (1934), S. 3 (1)(a) and (b)**—*Construction—Interest.*

The word 'interest' used in S. 3 (1) (*a*) refers to the primary rate secured. Any other clause referring to interest payable on default etc., would have to be examined under 3 (1) (*b*). (*Bose, J.*) PANDURANG *v.* RAMCHANDRA. **1941 N.L.J. 669.**

VENDOR AND PURCHASER — *Assignment of rights of vendor under contract of sale—Vendor to incur expenses before production or delivery of goods under contract—Claim by assignee against purchaser for purchase price—Purchaser, if entitled to credit for payments made by him to obtain delivery.*

Where there has been an assignment of the rights of a vendor under a contract for the sale of a commodity, which can only be produced and delivered to the purchaser after expenses have been incurred by or on behalf of the vendor, in the shape of wages, stumpage payments, freight and so forth and the purchaser has been compelled to provide these essential payments in order to obtain delivery, credit must be given to the purchaser, against any claim to the purchase price by the assignee by way of security of the vendor's rights, for all payments which were essential to the production of the subject-matter of the sale, and without which there would have been no sale completed, no purchase price payable, and consequently no subject-matter of the security. (*Lord Russell of Killowen.*) PORT ROYAL PULP AND PAPER CO., LTD. *v.* ROYAL BANK OF CANADA. **A.I.R. 1941 P.C. 134.**

——Covenant to pay mortgage debt—Default by vendee—Damages—Measure of. *See* 1940 Dig., Col. 1234. KARTAR SINGH *v.* SANT SINGH.
I.L.R. (1941) Lah. 353 = 13 R.L. 418 = 192 I.C. 841 = 43 P.L.R. 548.

——Covenant to pay vendor's creditors—Default by vendee—Vendor's right of indemnity. *See* 1940 Dig., Col. 1234. KARTAR SINGH *v.* SANT SINGH.
I.L.R. (1941) Lah. 353 = 13 R.L. 418 = 192 I.C. 841 = 43 P.L.R. 548.

——Purchaser undertaking to pay portion of price to vendor's creditor—Nature of the obligation created. *See* 1940 Dig., Col. 1234. RAM CHANDRA *v.* RAM LAL.
I.L.R. (1940) All. 681 = 191 I.C. 745 = 13 R.A. 266.

WAIVER—Principle of—Applicability—Prohibition or exemption based on public policy or public interests—If can be waived. *See* C. P. CODE, O. 21, R. 48.
43 Bom.L.R. 758.

WAJIB-UL-ARZ—Construction. *See* 1940 Dig. Col. 1235. MAN SINGH *v.* BABU LAL. **16 Luck. 369 = 191 I.C. 448 = 13 R.O. 242 = A.I.R. 1941 Oudh 114.**

——Entries in—Binding nature of—Riyayas not parties to it. *See* 1940 Dig., Col. 1235. KANHAIY LAL *v.* HAMID ALI. **15 Luck. 619.**

——*Value to be attached—Uniformity on point in dispute—Discrepancies on other matters.*

Where the various wajib-ul-araiz are in agreement as to the point in issue, namely, custom of exclusion of daughters from inheritance, but differ on the question of adoption, that is no ground for rejecting them as a whole as unreliable. (*Bennett, J.*) HARUN RASHID *v.* KANIZ FATIMA. **1941 O.W.N. 623 = 1941 A.W.R. (Rev.) 362 = 1941 A.L.W. 467 = 16 Luck. 626 = 194 I.C. 394 = 13 R.O. 593 =**

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1941 O.L.R. 459 = 1941 R.D. 472 = 1941 O.A. 394 = A.I.R. 1941 Oudh 468.

WAKF. *See* (*i*) MAHOMEDAN LAW—WAKF.
(*ii*) WAKF ACTS.

WASTE LAND RULES (1865), Cl. 5—*Nomination of substitute by malik and patel—If revocable.*

Where a malik and patel who is the sole proprietor of a village originally leased under the Waste Land Rules of 1865 nominates a substitute to perform the duties of the patel he cannot thereafter claim to oust the substitute and perform the duties in person. On principle such an option should not be revocable as there would be no continuity in the administration. (*Greenfield.*) SHRINIWAS *v.* RAJESHWAR. **1941 N.L.J. 385.**

WATERS AND WATER-COURSES—Natural stream—What is—Essentials. *See* 1940 Dig., Col. 1236. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER.
191 I.C. 275 = 7 B.R. 153 = A.I.R. 1941 Pat. 118

——Public navigable river—What is. *See* 1940 Dig. Col. 1235. U. KYAN *v.* MUN SHEIN. **192 I.C. 401 = 13 R.R. 173.**

WHIPPING ACT (IV OF 1909), Ss. 3 and 5—Scope and effect—Whipping—Permissibility in the case of convict of over 16 years—Age limit, Cr.P. Code, S. 393. *See* 1940 Dig., Col. 1236 EMPEROR *v.* ACHAR HAMZO.
193 I.C. 341 = 13 R.S. 222 = 42 Cr.L.J. 403 = A.I.R. 1941 Sind 48.

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(2) MAHOMEDAN LAW—WILLS.
(3) BUDDHISTS.
(4) SUCCESSION ACT.
(5) HINDU TRANSFER AND BEQUESTS ACT.

——*Charge—Charge for allowances — Creation of—No provision for their payment out of specified property.*

A charge for allowances granted under a will may attach to the general estate although the testator in his will may not make provision for the charge or allowances to be paid out of specified properties. (*McNair, J.*) UPENDRA NATH DAS *v.* DURLAV CHANDRA.
194 I.C. 133 = 13 R.C. 491 = A.I.R. 1941 Cal. 117.

——Codicil—Admission to probate independent of will. *See* 1940 Dig., Col. 1236. CYRIL *v.* D'ATTAIDES.
192 I.C. 690 = 13 R.R. 189 = A.I.R. 1941 Rang. 33.

——*Construction — Absolute estate conferred in earlier part—Subsequent clause cutting it down—Effect of.*

Where in the earlier part of a will the legatee is made an absolute owner of the properties given to her and subsequently it is provided that in the event of her quarrelling with a certain person she would only have a right to maintenance, the subsequent clause cutting down the absolute gift made in the earlier part of the will is void and of no effect whatever. (*Tek Chand and Beckett, JJ.*) GAWRI PARSHAD SHARMA *v.* RAJ RANI. **196 I.C. 177 = 14 R.L. 138 = 43 P.L.R. 357 = A.I.R. 1941 Lah. 286.**

——Construction — Absolute interest to widow—Prohibition against selling immovables—Effect of. *See* 1940 Dig., Col. 1237. JAGAT SINGH *v.* SANGAT SINGH. **72 C.L.J. 287 = 22 P.L.T. 407 (P.C).**

——Construction — Bequest to education or help to poor or for any other purpose of public service (lokopyogi) in named place—Validity—If void for vagueness. *See* 1940 Dig., Col. 1238. PRABHAKUVERBAI AMRITLAL *v.* KASUMBABAI SAKERCHAND.
192 I.C. 431 = 13 R.B. 253.

——Construction—Construction of words used in another will—Value of. *See* 1940 Dig., Col. 1239. PRA-

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BRAKUVERBAI AMRITLAL *v.* KASUMBABAI SAKERCHAND. **192 I.C. 431 = 13 R.B. 253.**

——*Construction—Dedication to charity—Part of house directed to be let and rents to be utilised for charities specifically named—Surplus given to legatee—Prohibition against alienation—House—If dedicated to charity—Estate taken by legatee.*

A testatrix by her will provided that her sister's daughter whom she called as her "daughter by affection" shall take possession of and reside in a part of a specific house belonging to her and that the remaining portion of that house which was not to be occupied by the daughter should be let out on rent and that the rents should be utilised for certain specific purposes connected with a particular religious charity. After further dispositions, the testatrix provided that the remainder left after the deducting the charity expenses, *i.e.*, the surplus, shall be given to the "daughter" (the residuary legatee). There was a prohibition against alienation by gift, sale, etc. The amount of the surplus was far greater than what was required to comply with the directions of the testatrix with regard to the religious charities The testatrix had no children of her own and she had brought up the residuary legatee as her daughter.

Held, that there was no dedication of the property (*i.e.*, part of it which was directed to be let on rent) to charitable uses but only of the income, and that the property was taken by the residuary legatee subject to a charge in favour of the charity.

Held, further, that the prohibition against alienation must be ignored. (*Leach, C.J. and Horwill, J.*) THIRUVENGADAMUDAYANAIVA *v.* NARASIMHA SWAMIAIVA. **53 L.W. 366 = 1941 M.W.N. 273 = A.I.R. 1941 Mad. 591 = (1941) 1 M.L.J. 488.**

——*Construction — Duty of Court to refer to will as a whole.*

In construing the provisions of a will the Court must refer to the will as a whole in order to ascertain the intention of the testator ; and when considering the general residuary clause in a will, the Court must give a meaning to the earlier provisions. (*Gentle, J.*) MADHAVA RAO *v.* ADMINISTRATOR GENERAL OF MADRAS. **1941 M.W.N. 773 = (1941) 2 M.L.J. 677.**

——*Construction—Exclusion of widow in case of unchastity—Re-marriage of widow, if amounts to unchastity.*

Where a will by a Hindu testator stated that his wife was to be the *malik kannil* of his property and provided that "as long as she will remain chaste and stay in her house she will continue to be in possession as a owner; in the event, however, of unchastity being established in Court, the next reversioners of the testator shall be entitled to get back equal shares in his inheritance", it was held on a construction of the will that,in the absence of any words in the will implying a restriction on re-marriage it would be neither reasonable nor proper to extend the word 'unchastity' so as to include re marriage and that the re-marriage of the widow did not have the effect of destroying the right conferred upon her by the will. (*Ghulam Hasan, J.*) HAR BUX SINGH *v.* SHANTI DEVI. **16 Luck 414 = 192 I.C. 53 = 1941 O.A. 132 = 1941 O.L.R. 49 = 1941 A.W.R. (C C.) 60 = 13 R.O. 301 = 1941 O.W.N. 25 = A.I.R 1941 Oudh 353.**

——*Construction — Legacy to person "putra poutradi purush uttaradhikrana"—Death of legatee before testator—Effect if gift over to sons and grandsons of legatee.*

The words "putra poutradi purush uttaradhikrama" in a will in connection with a legacy are merely descriptive of the estate which the testator proposes to confer on the legatee. They do not import a gift over to the sons and grandsons of the legatee when the latter predeceases the testator. (*Agarwala, J.*) JAGADISH CHANDRA DEO DHABAL DEB *v.* RAI PADA DHUL. **196 I C. 66 = 7 B.R. 993 = 14 R.P. 175 = 22 Pat L T. 396 = A.I.R. 1941 Pat. 458.**

——Construction — Meaning of words— Duty of Court. *See* 1940 Dig., Col 1240. PRABRAKUVERBAI AMRITLAL *v.* KASUMBABAI SAKERCHAND. **192 I.C. 431 = 13 R.B. 253.**

——*Construction—Power given to trustees to co-opt others in cases of vacancy—Surviving trustee, if can act alone.*

Where a will charging the income from certain properties with the expenses of a trust, provided that 'if one or two of the trustees aforesaid die, the remaining trustees shall have power to co-opt their disciples as trustees in their places" it was *held* that the provision was not mandatory but only directory, that there was nothing in the will to indicate that the authority of the surviving trustee to act was to remain suspended till new trustees in place of old ones were appointed. It was further *held* that a surviving trustee can continue the trust in the absence of any term in the instrument of trust itself indicating an intention to show that the conjoint act of the whole body of trustees was necessary for the validity of all or any of the proceedings under the trust. (*Iqbal Ahmad, C.J. and Collister, J.*) SOM GIRI *v.* RAM RATAN GIRI. **1941 O.A (Supp.) 770 (2) = 1941 A. L.W. 921 = 1941 A.W.R. (H C.) 283 = 1941 A L J. 660 = A.I.R. 1941 All. 387.**

——*Construction—Principles — Drafting without legal aid.*

Where it is found that a will has been drafted without any professional aid, undue stress should not be laid on words or expressions which might have particular significance if they had been used by a lawyer. (*Bennett and Ghulam Hasan, JJ.*) THAKURJI MAHRAJ *v.* RAJI INDRA PRASAD. **192 I.C. 89 = 13 R O. 309 = 1941 O.L R. 56 = 1940 O.A, 1240 = 1940 O.W.N. 1303 = 1941 A.W.R (C C.) 15 = A.I R. 1941 Oudh 105.**

——Construction—Prohibition against adoption by Hindu widow—When to be inferred—Principles. *See* HINDU LAW—ADOPTION—WIDOW. **43 Bom L.R. 483.**

———*Construction—Property bequeathed to wife and his children by her—Wife and children, whether take as tenants in common—Wife representing children in prior litigation—Sale in execution of decree therein, it will bind children—Incidents of* tavazhi *inconsistent with provisions in will—Inference—Malabar law.*

A testator bequeathed certain properties by his will to his wife and children, one of whom had been born when the will was executed and the other was born later. The will recited *inter alia* that the bequest was to operate in favour of the daughter already born as well as of all progeny that might yet be born to him by his wife that the legatees should have joint possession and enjoyment holding the properties as his legal representatives and heirs, that in realising outstandings the wife was to act as the guardian of the children who had not come of age and that none but the wife and children shall have any right to the properties. The present suit was brought by the children for partition and recovery of possession of $\frac{2}{3}$ of the properties on the ground that they and their mother took as tenants in common under the will, and a sale of the properties in execution of a decree obtained on the basis of a mortgage executed by their father, in a suit to which their mother alone was

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a party, would not bind their shares, she having no right to represent them as *karnavathi*. On the question whether the bequest in favour of the wife and children constituted a tenancy in common or whether they became joint tenants forming a group of *tavazhi* with the incidents of a Marumakkathayam tarwad and continued to remain so even after the wife married again after her first husband's death and had children by the second marriage,

Held, that if a *tavazhi* was to be understood as consisting of a mother and her children and descendants in the female line, as observed in (1928) I.L.R. 51 Mad. 574 =55 M.L.J. 208, the provisions in the will in the present case being in conflict with the underlying idea of a *tavazhi* and the intention of the testator being to bequeath the property to his wife and his own offspring by her, the beneficiaries took only as tenants in common, that being so, the mother could not have represented her children (the present plaintiffs) in the previous litigation and therefore the sale in execution of the decree therein was not binding upon them. (*Abdur Rahman, J.*) KRISHNA MENON *v.* DEVU AMMA.
(1941) 2 M.L.J. 287.

———*Construction—Rules — Intention of testator—Duty of Court.*

The Court has no power to give effect to a hypothetical intention by supplying lacunae in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may be supposed to have intended to write. The only intentions of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity but so strong a possibility of intention, that a contrary intention cannot be supposed. (*Nasim Ali and B. N. Rau, JJ.*) LOKE NATH MUKHERJI *v.* ABANI NATH. **194 I C. 874 = 14 R.C. 19 = 72 C.L.J. 362 = A.I.R. 1941 Cal. 68.**

———*Construction—Use of words 'malik kamil'.*

Where in a will, in the earlier portions a person has been described as Manager '*muntazimkar*' and it is also clear in view of other provisions in the will that the testator had no intention of conferring on that person any absolute interest or even a life-interest, a declaration in another portion of the will that that person is to be '*malik kamil*' cannot confer on him any absolute right of ownership or even a life-estate. (*Bennett and Ghulam Hasan, JJ.*) THAKURJI MAHRAJ *v.* RAJ INDRA PRASAD. **1940 O.A. 1240 = 192 I.C. 86 = 1941 A W.R. (C.C.) 15 = 13 R.O. 309 = 1941 O.L.R. 59 = 1940 O.W.N. 1303 = A.I.R. 1941 Oudh 105.**

———Executor—Liabillty—Equitable mortgage—Executor giving security by deposit of testator's title deeds to one of his creditors—If assumes personal liability for debt. *See* 1940 Dig., Col. 1241. JAMSHEDJEE JEEJIBHOY *v.* SORABJI BYRAMJI. **1941 O.A. 610 = 1941 A.L.W 572 = 1941 A.W.R. (P.C.) 55 = 1941 P.W.N. 570 = 1941 O.W.N. 739 = (1940) 2 M.L.J. 126 (P.C.).**

———Executor— Liability — Mortgage — Executors giving security for testator's debt—Personal liability for interest. *See* 1940 Dig., Col. 1242. JAMSHEDJEE JEEJIBHOY *v.* SORABJI BYRAMJI.
1941 O W.N. 739 = 1941 O.A. 610 = 1941 A.L.W. 572 = 1941 A.W.R. (P.C.) 55 = 1941 P.W.N. 570 = (1940) 2 M.L.J. 126 (P.C.).

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———*Legacy—Estate made over to legatee—Decree previously obtained against administratrix—If can be executed against legatee—Proper remedy of decree-holder.*

The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit and cannot be exercised merely by levying execution against the assets in the hands of the legatee. A decree obtained against an administratrix cannot, therefore, be executed against a legatee to whom the estate has since been handed over, and the proper remedy of the decree holder is to institute a suit against the legatee for the recovery of the money due to him. (*Edgley, J.*) DEBI PROSANNA GHOSE *v.* INDRA NARAIN PAL. **192 I.C. 335 = 13 R.C. 310 = 45 C.W.N. 78 = A.I.R. 1941 Cal. 27.**

———*Probate—Application for—Will by old and sick lady—Creditors named as executors—Duty of Court to investigate before grant of probate.*

Where an application is made for the grant of probate in common form in respect of a will executed by a testatrix who was very old and ill at the time she made the will, naming two of her creditors, as executors, one of them being the largest creditor probate should not be granted until the Court after investigation is satisfied that the testatrix was of a sound disposing state of mind and that the will was duly executed according to law. It is in the interests of all parties that the Court should decide after investigation whether the will is valid or not. (*Harries, C.J. and Fazl Ali, J.*) R. S. SINHA *v.* MISS SALENA HECTOR. **20 Pat. 75 = 1941 P.W.N. 221.**

———*Probate—Application for grant of probate or letters of administration—Scope of inquiry—Power of Court to inquire into question of ownership of property dealt with.*

In an application for probate of a will or for the grant of letters of administration with the will annexed the sole question before the Court is whether or not the will is genuine. It is not open to the Probate Court to decide whether or not the property with which a testator has purported to deal in fact belonged to him. (*Meredith and Shearer, JJ.*) KASHI NATH SINGH *v.* GULZARI KUER. **193 I C. 856 = 7 B.R. 627 = 13 R.P. 631 = 1941 P.W N. 334 = A.I.R. 1941 Pat. 475.**

———Probate—No executor appointed under will—Duty of Court to grant letters of administration with will annexed. *See* PRACTICE—COSTS— BENEFICIARY PROPOUNDING WILL. **(1941) 1 M.L.J. 299.**

———*Revocation—Proof — Revocation by codicil—When may be implied.*

A Court, before holding that a codicil has by necessary implication revoked a clear devise in a will, must find definitely that the intention to revoke is clear. (*Tek Chand and Beckett, JJ.*) GAWRI PARSHAD SHARMA *v.* RAJ RANI. **196 I.C. 177 = 14 R.L. 138 = 43 P.L.R. 357 = A.I R. 1941 Lah. 286.**

———Validity—Burden of proof—Suit to declare will set up by the defendants as not genuine and not valid by reason of minority of testator and absence of sound disposing state of mind—Onus—Limitation Act, Arts. 92 and 120—Recital in will as to age of testator—Admissibility and value of—Statement not made by testator—Effect. *See* 1940 Dig., Col. 1243. GNANAPRAKASAM PILLAI *v.* PARASAKTHI AMMAL.
A.I R. 1941 Mad. 179.

———What amounts to—Form of—Use or absence of the word "will"—Materiality—Executor—Appointment by implication—Employee in company becoming member of provident fund—Declaration in writing signed and attested by two witnesses naming his nephew

as person entitled to receive payment of money on his death—Direction that money to be paid to father of nephew on his behalf. *See* 1940 Dig., Col. 1244. VENKATARAMA IYER *v.* SUNDARAMBAL.
192 I.C. 665=13 R.B. 273.

WORDS AND PHRASES—Ahar—Meaning. *See* 1940 Dig., Col. 1244. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.**

———*Birt rights.*

Birt rights means under-proprietary rights. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRI DHAR.
192 I.C. 259=13 R.O. 338=1941 O L.R. 93=1941 A.W.R (Rev.) 19=1941 R D. 6=1940 O.A. 1293=1940 O.W N. 1344=A.I R. 1941 Oudh 189.

———"Carrying on business"—If includes service. *See* ASSAM MUNICIPAL ACT, SS. 3 (15) AND 59 (1) (*b*).
I.L.R. (1941) 1 Cal. 127.

———"Civil Court" if includes High Court. *See* BENGAL COURT OF WARDS ACT, S. 10 (*c*).
45 C.W.N. 617=73 C.L J. 617.

———Cohabitation—Meaning. *See* 1940 Dig., Col. 1244. MAUNG MAUNG *v.* MA SEIN KYI.
192 I.C. 49=13 R.R. 163.

———"Commercial premises"— Meaning of—Coffee hotel. *See* ELECTRIC SUPPLY—RULES.
1941 M.W.N. 253=(1941) 1 M.L.J. 411.

———"Corruption"—Meaning. *See* RANGOON CITY MUNICIPAL ACT, S. 15 (1).
1941 Rang.L.R. 638.

———"Debt" meaning under Bengal Agricultural Debtors' Act. *See* BENGAL AGRICULTURAL DEBTORS' ACT, S. 2 (8).

———*Emanation—Meaning—Servant or agent to be used in preference to 'emanation.'*

The word 'emanation' is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is 'that which issues or proceeds from some source' and it is commonly used to describe the physical properties of substances (*e.g.*, radium) which gives out emanations of recognizable character. It would avoid obscurity if the words agent or servant are used in preference to the inappropriate and undefined word 'emanation.' (*Lord Luxmoore.*) INTERNATIONAL RY. CO. *v.* NIAGARA PARKS COMMISSION.
197 I.C. 186=1941 O.A. 901=1941 A.W.R.(P.C.) 76=A.I.R. 1941 P.C. 114(P.C.).

———'*Jote*'—*Meaning of.*

The word "jote" is a perfectly general expression meaning tenancy of any kind. (*Mukherjea, J.*) NARENDRA CHANDRA DE *v.* RAJENDRA CHANDRA CHANDA. **197 I.C. 45=45 C.W.N. 654=43 C.L.J. 159=A.I.R. 1941 Cal. 506.**

———'*Karbhari*'—'*Dastaki*'.

The term 'dastaki' is not a term used to denote or distinguish a malik patel, and the term 'karbhari' does not connote an agent of a malik but a working patel. (*Greenfield, R.A.*) KALYAN GOPALRAO *v.* RAMRAO SITARAM. **1941 N L J. 566.**

———Khairat—*Meaning.*

The basic idea of *khairat* is a relief of the poor and the sick. (*Bajpai and Das, JJ.*) MAHOMED YUSUF *v.* AZIMUDDIN. **I.L.R. (1941) All. 443=1941 A L W. 509=196 I.C. 324=14 R A. 145=1941 A.W.R (H.C.) 175=1941 O.A. (Supp.) 400=1941 A.L.J 269=A.I.R. 1941 All. 235.**

———"Kuhl"—Meaning of. *See* 1940 Dig. Col. 1244. DHANI RAM *v.* HAMIRA. **191 I.C 734=13 R.L. 330.**

———"Lands"—Meaning—If covers bed of river *See* BENGAL LAND REVENUE ASSSESSMENT (RESUMED LANDS) REGULATION. **A.I R. 1941 Cal. 520.**

———Malik—Malik kamil—*Meaning of.*

The word *Malik* is not a term of art implying full proprietary ownership free from any limitation. On the contrary it is a term which has to be interpreted according to the surrounding circumstances of each case. The addition of the word *kamil* does not have any sensible effect, although it is doubtless a slightly stronger form of expression to say that some one is *malik kamil* or absolute owner than that he is only *malik* which in proper cases would also mean absolute owner. (*Yorke, J.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. **196 I C. 787=1941 A.W.R. (C C.) 274=1941 O.L.R. 764=1941 O.W.N. 906=1941 O.A. 621=A.I R. 1941 Oudh 529.**

———*Matahtdar.*

Matahtdar cannot be said to mean only a subordinate proprietor and not an under-proprietor. (*Ghulam Hasan, J.*) BATUL BANDI *v.* SRI DHAR.
192 I C. 259=13 R O. 338=1941 R D. 6=1941 O.L R. 93=1941 A.W.R. (Rev) 19=1940 O.A. 1293=1940 O.W N. 1344=A.I.R. 1941 Oudh 189.

———"Money lender"—Who is. *See* C. P. MONEY-LENDERS ACT—APPLICABILITY.
1941 N.L.J. 194.

———Nadi—Meaning. *See* 1940 Dig., Col. 1244. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER.
191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.

———Nala—Meaning of. *See* 1940 Dig., Col. 1244. HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER.
191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.

———'*Nankar*'—*Meaning of.*

No doubt the word "nankar" literally means "rent free". But it can be used in a technical sense to mean a tenancy, where the tenant enjoys the rent as wages for the services he renders to the landlord. (*Mukherjea, J.*) NARENDRA CHANDRA DE *v.* RAJENDRA CHANDRA. CHANDA. **197 I.C. 45=45 C.W N. 654=73 C.L.J. 159=A.I.R. 1941 Cal. 506.**

———*National law of propositus—Meaning.*

In the English Courts phrases which refer to the national law of a propositus should *prima facie* be construed not as referring to the law which the Courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the Courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant). (*Lord Justice Clauson.*) KOTIA *v.* NAHAS. **A.I.R. 1941 P.C. 139 (P C.).**

———"Officers of Crown"—Meaning *See* BENGAL CESS ACT, SS. 100 AND 108 (*b*).
A I.R. 1941 Pat. 306 (S B.).

———"Permanent appointment"—Meaning of. *See* MASTER AND SERVANT—"PERMANENT APPOINTMENT OR EMPLOYMENT." **7 Cut.L.T. 67.**

———"*Phal phul*"—*Meaning—If covers resin of chil tree.*

The expression "phal phul" does not cover resin extracted from a chil tree. The widest meaning that could be given to that expression is the normal annual produce of the tree, such as the leaves, flowers and fruits which a tree produces every year. Resin is an exudation found in the sap-wood of the chil tree and as such it is not part

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of the normal annual produce of the tree. (*Mitchell, F. C.*) HARSARAN *v.* DEVI SARAN. **20 Lah.L.T. 61.**

———"Pergunah" and "Taraf"—Meaning of. *See* 1940 Dig., Col. 1245. MIDNAPORE ZEMINDARY CO., LTD *v.* BIJOY SINGH DUDHURIA. **193 I C. 578 = 13 R.C. 420 = A.I.R. 1941 Cal. 1.**

———"Private street"—Meaning. *See* CALCUTTA MUNICIPAL ACT, S. 3 (54). **45 C.W.N. 413.**

———"Purushanukramah" — Meaning. *See* HINDU LAW—WILL—CONSTRUCTION. **72 C.L.J. 348.**

WORKMEN'S COMPENSATION ACT (VIII OF 1923), Ss. 2 and 4—*Total disablement—Compensation—Injuries mentioned in Sch. I—If can result in total disablement.*

Where there is total disablement compensation as laid down in Sch. IV—Workmen's Compensation Act, has to be paid and in the case of partial disablement as laid down in Sch. I. Sch. I contains a list of injuries deemed to result in permanent partial disablement, but it does not mean that the injuries therein described cannot amount to total disablement. Where the Medical Board reported a turner 'to be completely and permanently incapacitated for further service of any kind in consequence of multiple fractures of tarsus and metatarsus bones of left foot', it was *held* that the injury must be taken to have resulted in total disablement and that compensation as provided for in Sch. IV should be awarded. (*Pollock, J.*) PROVINCIAL GOVERNMENT, C. P. AND BERAR *v.* JANARDAN GANESH. **1941 N.L.J. 532.**

———**S. 2 (n)**—*Workman—Licencee upon mine paid by piece work rates.*

A mere licensee upon the mine who is paid by piece work rates for the work which he did and over whom there is no control by the mine authorities is not a 'workman' within the meaning of the Act. (*Roberts, C.J., Dunkley and Blagden, JJ.*) MA HTWA YIN *v.* MAUNG THET HNIN. **192 I.C. 728 = 13 R.P. 192 = A.I.R. 1941 Rang. 61 (S.B.).**

———**S. 3**—Construction—Conditi ns for award of compensation—"Arising out of and in the course of employment"—Meaning of. *See* 1940 Dig., Col. 1246. BECHARAM MALLICK *v.* KHAS JOYRAMPUR COLLIERY. **22 Pat.L.T. 92.**

———**S. 3 (1)**—Accident arising out of and in course of employment as workman. *See* 1940 Dig., Col. 1247. KHAIROJ JAMA *v.* MATARDIN. **42 Cr.L.J. 56.**

———**S. 3 (1), Proviso (b) (ii)**—Conditions to be fulfilled before proviso can operate in employer's favour. *See* 1940 Dig., Col. 1248. KHAIROJ JAMA *v.* MATARDIN. **42 Cr.L.J. 56.**

———**S. 3 (5) (a)**—*Applicability—Claim for compensation—Dismissal in limine—Suit for damages—If barred.*

A claim for compensation which has been rejected *in limine* would be a claim instituted before the Commissioner so as to attract the operation of S. 3 (5) *a*) of the Workmen's Compensation Act and to bar a suit for damages in a Court of law. (*Horwill, J.*) ALAGAPPA MUDALIAR *v.* VEERAPPAN CHETTIAR. **1941 M.W.N. 910 = (1941) 2 M.L.J. 665.**

———**S. 8 (8)**—"Variation of circumstances"—Death of some of dependants after order of distribution—Variation of that order in favour of surviving dependant—Legality. *See* 1940 Dig., Col. 1248. DEPENDANTS OF RAHIM BUX *v.* JAMES FINLAY & CO., LTD. **193 I C. 57 = 13 R.C. 359.**

———**S. 10**—*Construction—Notice to employer—Necessity for—When to be given—Trivial accident developing serious consequences later on—Time for notice.*

WORKMEN'S COMPEN. ACT (1923), S. 12.

Under S. 10 of the Workmen's Compensation Act, it is not necessary for a workman to give notice of every trivial accident to which he may be subject. But a workman is bound to give notice of any accident which is not merely trivial and it is not open to him to decide whether it is likely to give rise to a claim for compensation. If an accident, too trivial in the first instance to require notice, subsequently develops servious consequences, the obligation to give notice as soon as practicable would be met by giving notice when the consequences ensue. Until then there has not really been an accident. (*Beaumont, C.J. and Macklin, J.*) AHMEDABAD VICTORIA IRON WORKS, LTD. *v.* MAGANLAL KESHAVLAL. **196 I C. 252 = 14 R.B. 118 = 43 Bom.L.R. 611 = A.I.R. 1941 Bom. 296.**

———**S. 10 (1)**—"*Claim for compensation*"—*Meaning of—Formal claim—If condition precedent to taking of proceedings.*

The expression "claim for compensation" in S. 10 (1) of the Workmen's Compensation Act means a claim made before the Commissioner. The claim for compensation is of the nature of a plaint without which no proceedings for recovery of compensation are maintainable; and unless there is a formal claim for compensation, the Commissioner cannot make any enquiries or conduct any proceedings. (*Horwill, J.*) ALAGAPPA MUDALIAR *v.* VEERAPPAN CHETTIAR. **1941 M.W.N. 910 = (1941) 2 M.L.J. 665.**

———**S. 10 (2)**—*Scope—Notice to fellow workman—Sufficiency.*

Notice of accident to a fellow workman or co-employee is not a sufficient compliance with S. 10 (2) of the Workmen's Compensation Act. (*Beaumont, C.J. and Macklin, J.*) AHMEDABAD VICTORIA IRON WORKS, LTD. *v.* MAGANLAL KESHAVLAL. **196 I C. 252 = 14 R.B. 118 = 43 Bom.L.R. 611 = A.I.R. 1941 Bom.296.**

———**S. 12**—*Applicability and construction—Selling agent agreeing to take delivery of goods from manufacturer's godowns—Employment of contractor for such work—Workmen employed by contractor in such work—Accident resulting in death—Liability of selling agent for compensation.*

The respondents who were the sole selling agents of a mill company manufacturing cloth. According to the terms of the agreement between them, the respondents had to take delivery at the mill's godowns where the mill stored them, and to sell them at a shop in Bombay, involving transport from the mill's godowns to the selling agent's shop. On 30—8—1939, the respondents engaged a firm of which one *N* was a partner, to transport the bales of cloth from the godowns to the shop and that firm hired a lorry from a lorry owner and the son of the appellant who was a cleaner on that lorry was engaged by *N* to help to remove the bales from the godowns and to stack them in the lorry. In the course of that work, the cleaner was accidentally killed. The appellant preferred a claim for compensation against the respondents under S. 12 of the Workmen's Compensation Act.

Held, that on the construction of the agreement, the work of the respondents must include removing goods from the mill company's godowns to the shop of the respondents (selling agents), and such work not only formed part of the business of the selling agents but was an essential part of it, and the respondents could not therefore escape liability by employing a contractor to do such work; (2) that the work, which was being done by the contractor at the time when the accident occurred, was work ordinarily done by the selling agents, and therefore the respondents were liable to pay compensation to the appellant for her son's death.

WORKMEN'S COMPEN. ACT (1923), S. 19.

(*Beaumont, C.J., Wassoodew and Sen, JJ.*) BAI KOKILABAI *v.* KESHAVLAL MANGALDAS & CO.

43 Bom L.R. 985 (F.B.).

——**Ss. 19 and 23**—*Commissioner for workmen's compensation—If Court or* persona designata—*C. P. Code S.* 115.

The scheme of the Workmen's Compensation Act clearly shows that the matters which are set out in S. 19 of the Act are to be decided by the commissioner judicially and while deciding them he is performing judicial functions. He derives his authority from a statute passed by a competent authority and in exercising his jurisdiction he has the sanction of the law behind him. The commissioner acts as a Court and is a Court, and not a *persona designata*. *Persona designata* means a person indicated in a statute or legal instrument not by name but either by official designation or as one of a class. If he is invested with powers as a Court, the necessary implication is that the jurisdiction of the Court is enlarged and its decision is subject to all the incidents of such jurisdiction. If the powers are conferred on him not as a Court he is a mere *persona designata* and his decision will not be subject to the incidents of such jurisdiction as the Court ordinarily exercises. There is no real antithesis between "Court" and *persona designata*; in other words even a *persona designata* may be a Court. Whether he is a Court or not depends upon his powers and the functions that he has to discharge. The expression *persona designata* cannot be appropriately used with reference to a commissioner appointed under the Workmen's Compensation Act, because the Act does not single out any person by his official designation to be appointed as commissioner, nor does it say that only an official can be appointed as commissioner.

Quaere.—Whether the commissioner is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) DIRJI *v.* GOALIN.

20 Pat. 373 = 92 I.C. 217 = 7 B.R. 353 = 1940 P.W.N. 1000 = 13 R.P. 438 = 21 Pat. L T. 1067 = A I.R. 1941 Pat. 65 (F.B.).

——**Ss. 19 (2) and 8 (8)**—Money allotted by Commissioner—Suit for its redistribution—Jurisdiction of Civil Court—Consent decree—Effect of. *See* 1940 Dig., Col. 1248. DEPENDANTS OF RAHIM BUX *v* JAMES FINLAY & CO., LTD. **193 I.C. 57 = 13 R.C. 359.**

——**S. 30**—*Claim made beyond time fixed by S.* 10 (1)—*Condonation of delay—Subsequent dismissal on ground of limitation without enquiry into merits—Legality—Remedy of applicant.*

Where the Commissioner rejects a claim for compensation on the ground of limitation under S. 10 (1) of the Workmen's Compensation Act after condoning the delay in making the claim, without giving any decision on the merits, the order is illegal. But the remedy of the applicant is to appeal to the High Court under S. 30 of the Act, and not to file a suit for damages and for compensation. (*Horwill, J.*) ALAGAPPA MUDALIAR *v.* VEERAPPAN CHETTIAR. **1941 M.W.N. 910 = (1941) 2 M.L J. 665.**

——**S. 30**—*Question of law—Finding of sufficient cause for non-service of notice under S.* 10—*Question whether there was evidence to support—Interference in appeal.*

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The question whether there was any evidence justifying a finding of sufficient cause for not giving the notice required by S. 10 of the Workmen's Compensation Act, is a question of law on which the High Court will interfere with the finding of the commissioner for workmen's compensation in appeal under S. 30 of the Act. (*Beaumont, C.J. and Macklin, J.*) AHMEDABAD VICTORIA IRON WORKS, LTD. *v.* MAGANLAL KESHAVLAL.

196 I.C. 252 = 14 R.B. 118 = 43 Bom L R. 611 = A.I.R. 1941 Bom. 296.

WORKS OF DEFENCE ACT (1903), S. 23—Compensation—Market value—Relevant date—Earlier and later declarations. *See* LAND ACQUISITION ACT, S. 23 (1) AND WORKS OF DEFENCE ACT, S. 23.

1941 Rang L.R. 40.

YOUNG OFFENDERS (BURMA) ACT (III OF 1930). *See* BURMA ACTS.

ZAILDAR—*Appointment—Confidential police records—If can be discussed.*

The introduction into a Zaildari case of matters contained in confidential police records, which can only be known to the candidates by illicit means is undesirable, and it is equally undesirable that the confidential reports of individual subordinate officers of the Police Force should be discussed in open Court. The Collector in his capacity as District Magistrate is head of the Police Force in his district, and this fact is by itself sufficient guarantee that an undesirable police record is not overlooked. (*Mitchell, F.C.*) NASRULLAH KHAN *v.* MOHAMMAD NAWAZ KHAN. **20 Lah.L.T. 41.**

——*Appointment of — Considerations — Representation of predominant tribe—Land Revenue R.* 5.

In Land Revenue R. 5, the extent to which a candidate is by race or otherwise fitted to represent the majority of the agriculturists in the zail is only one of the four items specified as matters which have, among others, to be considered. It is not an inflexible rule that the zaildar should belong to the predominant tribe in the zail. (*Alan Mitchell, F.C.*) MAQBUL AHMAD *v.* MIRZA KHAN. **20 Lah.L.T. 49.**

——*Appointment of—Promotion of sufedposh.*

It is the practice that a sufedposh who has rendered meritorious service in the minor office should receive promotion to the post of Zaildar. (*Alan Mitchell, F. C.*) MAQBUL AHMAD *v.* MIRZA KHAN. **20 Lah.L.T. 49.**

——*Appointment—Principles governing.*

The two main principles governing the appointment of zaildars are (1) that normally the choice of the Collector should not be upset on appeal, and (2) that other things being equal the first claim to the office of zaildar is that of a person already holding the office of sufedposh in the zail. (*Mitchell, F.C.*) DIDAR SINGH *v.* BALWANT SINGH. **20 Lah L.T. 148.**

——*Selection — Non-lambardar—Approval of his candidature—Duty of Commissioner.*

It is now settled law that in choosing a zaildar or sufedposh the field of selection should not be widened by the inclusion of non lambardars without good reason, and that the Commissioner should not accord approval as a matter of course but only after satisfying himself that none of the lambardar candidates are really suitable. (*Mitchell, F.C.*) NASRULLAH KHAN *v.* MOHAMMAD NAWAZ KHAN. **20 Lah.L.T. 41.**

II—SELECT ENGLISH CASES.

BANKRUPTCY—*Power to reopen transactions.*

The Court has no jurisdiction to make an order which would in effect be an order reopening the accounts which were already dealt with in the master's certificate and reopening the question of remuneration which the master allowed to a receiver in an earlier partnership suit between the bankrupts. *Re* KAY AND LOVELL, TRUSTEE *v.* MOORE AND QUAIFE.

(1941) 2 All.E.R. 67 (Ch.D.).

COMPANIES—*Company in insolvent circumstances—Issue of debentures creating floating charges—Arrangement not* bona fide *for benefit of company—Validity—Test.*

Where debentures are issued by a company in insolvent circumstance within six months of its winding up the test for deciding the validity of such issue is whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company or whether it is intended merely to provide certain moneys, not for the benefit of the company, but for the benefit of certain creditors of the company. Where the effect of the issue of the debenture is to procure the payment to certain of the directors in preference to other creditors of the company of the sums due to them the floating charge created by the debenture is wholly invalid. *Re* DESTONE FABRICS, LTD. **(1941) 1 All. E R. 545 (Ch D.).**

——*Voluntary winding up—Debts incurred before and after—Priorities.*

A liquidator in a voluntary winding up may without any sanction carry on the business of the company so far as may be necessary for the beneficial winding up thereof. If, in the proper exercise of this statutory power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up. There can be no question of the two classes of creditors ranking *pari passu*. If the condition is fulfilled the post liquidation creditors come first. If it is not they do not come in at all, or at any rate not until the preliquidation creditors have been satisfied. *Re* GREAT EASTERN ELECTRIC CO.

(1941) 1 All. E.R 409 (Ch D.).

COMPANIES ACT (1929). S. 294—*Application for avoidance of dissolution—Limitation.*

The period of two years, for making an order declaring a dissolution void, is to be decided by taking the period between the date of the dissolution of the company and the date when the application under S. 294 of the Companies Act, 1929, is made. The order itself on such application need not be made within two years. (S. 294 provides *inter alia* that the Court can declare the dissolution of a company void at any time within two years of the date of the dissolution.) *Re* SEAD, LTD. **(1941) 2 All E.R 466 (Ch.D.).**

COMPANY IN LIQUIDATION—*Unsuccessful proceedings by and order for costs against—Bank account in liquidator's name—If can be attached.*

Where there was an order for costs against a company in liquidation which took out unsuccessful proceedings, the persons entitled to costs sought to attach moneys in a bank account standing to the credit of the liquidator. *Held*, that there was no relationship of banker and customer or debtor and creditor between the bank and the company and the amount cannot be attached. (1936) 2 All. E.R. 905, Not Foll.; (1938) 2 K.B. 801, Rel. on. LANCASTER MOTOR CO. (LONDON), LTD. *v.* BREMITH, LTD.

(1941) 2 All. E.R. 11 (C.A.).

CONTRACT—*Agreement to pay on breach, a certain amount as liquidated damages—"Damages or penalty"—Test for enforceability.*

Agreed liquidated damages if to be enforced must be the result of a "genuine pre-estimate of damages". They do not include a sum fixed *in terrorem* covering breach of contracts of many varying degrees of importance the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. When the sum agreed is a penalty whatever it may be called in the agreement then the penal stipulation will not be enforced. MICHEL HABIB *v* SHEIKH SULEIMAN.

(1941) 1 All. E R. 507 (P.C.).

——*Charterparty—Frustration caused by accident to ship—Burden of proof as to absence of negligence.*

The appellants chartered their vessel the *Kingswood* to the respondents to carry a cargo from Port Pirie in South Australia to a British Port. A few days after her arrival off Port Pirie but before she became an "arrived ship," a violent and unexplained explosion took place on board. The damage caused to the steamer by the explosion was such as to frustrate the commercial object of the adventure. In an action by the charterers for damages, the shipowners claimed that they were absolved from all further liability.

Held, that the burden was on the party denying frustration to prove negligence or default of the party setting up the plea. Frustration will excuse non-performance unless it is proved to be self induced. Decision of Court of Appeal, (1940) 3 All.E.R. 211, reversed and that of Atkinson, J., (1940) 2 All.E.R. 46, restored. CONSTANTINE S.S. LINE *v.* IMPERIAL SMELTING CORPORATION. **(1941) 2 All E.R. 165 (H.L.).**

——*Damages—Failure to deliver goods—Loss of co-operation of editors who had written advertisement puffs in their periodicals—Damages—Right to.*

The plaintiffs who were suppliers of cosmetics to the public contemplated putting on the market a new summer cream in small attractive containers suitable for ladies to carry about in their hand-bags. The plaintiff's managing director secured the co-operation of certain beauty editresses to write "puffs" of the product and also include in their columns particulars of a half price offer which said in substance "post me your name and address together with 7½*d.* in stamps, it will be sent to you by return." In response some 3 000 orders were received. The plaintiffs had entered into a contract with defendants for the supply of 10,000 of these containers which had to be specially made, and were not available in the market. In an action for damages for

CONTRACT,

breach of the contract to supply the containers, claiming *inter alia* damages for the loss of the future co-operation of the editresses,

Held, that the plaintiffs were not entitled to damages for loss of co-operation of the editresses in the absence of proof of essential facts to support such claim as one for loss of reputation. The mere fact that pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiff from recovering in respect of that pecuniary loss. To recover damages under this head the plaintiff must prove with sufficient certainty (1) the occurrence of the pecuniary loss, and (2) that such loss was within the contemplation of the defaulting party at the time when the contract was made. FOAMINAL, LTD *v.* BRITISH PLASTICS, LTD. **(1941) 2 All.E.R. 393 (K.B.D.).**

——*Formation—Order for goods on the understanding that the balance of purchase price can be had on hire purchase terms—How far a completed contract.*

The plaintiffs wished to acquire a new motor van, giving in part exchange an old van. On 23—11—1937 an interview took place between the partner of the plaintiff firm and a representative of the defendants. On the following day the defendants wrote to the plaintiffs a letter giving a quotation for the van proposed to be acquired by plaintiffs and the allowance to be made for the old van on 6—12—1937 in an interview the offer contained in the letter of 24—11—1937 was accepted by the plaintiffs. On 7—12—1937 defendants wrote to plaintiffs thanking them for the order and asking them to send the official order to complete their records. This request was complied with by letter dated 8—12—1937 in the following terms: "We beg to acknowledge receipt of your acceptance of our order for vehicles as per specifications sent on Nov. 25." This order is given on the understanding that the balance of purchase price can be had on hire purchase terms over a period of 2 years Throughout the negotiation the plaintiff wanted to purchase on hire purchase terms and there was never any question of an out and out purchase by the plaintiffs. The defendants repudiated the transaction and in an action for damages for breach of contract,

Held, reversing the decision of the C. A. in (1940) 1 All. E. R. 59 that the crucial sentence. "This order is given on the understanding that the balance price can be had on hire purchase terms" was so vaguely expressed that it cannot standing by itself be given a definite meaning. As there was no *consensus ad idem* there was no contract and therefore no breach. SCAMMELL *v.* OUSTON. **(1941) 1 All.E.R. 14 (H.L.).**

——*Railway ticket—Conditions printed on back—Notice drawing attention to it blotted out by date stamp—Effect.*

Conditions were printed on the back of the railway ticket referring passengers to conditions contained in the railway time tables and bills protecting the railway company against claims for damages for negligence. On the ticket issued to the plaintiff the words "For conditions see back" were blotted out by the date stamp which was put on the face of the ticket. In a claim for damages for injuries sustained by the plaintiff by falling into a hole while she was leaving the station, by reason of the defendant's alleged negligence in leaving the hole in a passage,

Held, that the railway company did not do that which was reasonably sufficient to give the plaintiff notice of the conditions and therefore the plaintiff was entitled to recover damages. SUGAR *v.* LONDON, MIDLAND & SCOTTISH RAILWAY CO.
(1941) 1 All. E.R. 172 (K.B.D.).

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——*Restriction on dealing with goods except under licence under war emergency legislation — Whether excuse for non-performance.*

Under a contract dated Aug. 3, 1939, sellers agreed to sell to buyers a quantity of butter beans to be shipped from ports in Madagascar to London as per bills of lading dated or to be dated October/November 1939. One of the conditions on the back of the contract provided that sellers were to give notice of appropriation and tender documents. Before the due date war broke out and by food control legislation buying and selling cereals outside the United Kingdom without a licence was forbidden. The sellers did not apply for the necessary licence by the due date for appropriation and tender. On Feb. 14, 1940, the sellers made enquiries from the Cereal Control Board who replied that on the outbreak of the war private trading ceased. It was argued on behalf of the sellers that licence would have been refused even if they had applied before the due date and that they were excused from performing the contract.

Held, the sellers having failed to take the steps necessary to enable them to perform their contract by applying for a licence they are not excused from performance of the contract. TAYLOR & CO. *v.* LANDANER & CO. **(1940) 4 All E.R. 335 (K B.D.).**

CONTRACT OF SERVICE FOR A TERM—*Sale of business before expiry of term and vendee not requiring the services—Claim for damages.*

Plaintiff entered into a contract of service with the defendants by which he was appointed as sub-editor of a specific paper for a period of two years from 1—9—1938 to 31—8—1940. On 11—6—1939 the paper was sold to another company which did not retain the services of the plaintiff. In a claim for damages for breach of contract,

Held, that the sale of the newspaper operated as an improper dismissal of the plaintiff and that the plaintiff was entitled to damages up to the date when the broken contract would have expired. Normally a servant, so long as he continued to be paid the stipulated salary, can have no legal complaint notwithstanding that owing to the action of the employer he was left with nothing to do. Only in certain exceptional cases there is an obligation to provide work. COLLIER *v.* SUNDAY REFEREE PUBLISHING CO., LTD. **(1940) 4 All E R 234 = (1940) 2 K.B. 647.**

COPYRIGHT ACT (1911), S. 22—*Scope.*

In construing S. 22 (1) of the Copyright Act, 1911, it is convenient to disregard the double negative and treat the section as though it read "The Copyright Act shall not apply to the designs of works used or intended to be used as models or patterns to be multiplied by any industrial process where the designs of such works are capable of being registered under the Designs Act." "Design" may be embodied in a sketch illustrative of the model itself, *e.g.*, in a sketch of a brooch or doll or in a brooch or doll itself. Unregistered designs are not subject of design copyright. But original sketches or cartoons not used or intended to be used as models or patterns to be multiplied by any industrial process, retain their copyright and their owner can prevent infringement of such right. KING FEATURES *v.* KLEEMAN, LTD. **(1941) 2 All.E R. 403.**

COSTS—*Appeal by non-party—Dismissal—Order for costs against solicitor personally who launched the appeal—Jurisdiction.*

Where an appeal by a non-party is dismissed as wholly incompetent the proper order and indeed the only order as to costs which the Court can make must be an order, against the solicitors personally who launched the appeal. The Court has jurisdiction over

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them and can order them to pay costs. MURFIN *v.* ASHBRIDGE. **(1941) 1 All. E.R. 231 (C A.).**

——*Solicitor's lien on costs ordered to be paid to his client—If "property recovered or preserved" within the meaning of Solicitors Act* (1932), *S.* 69—*Solicitor's common law right.*

By decree *nisi* in a divorce petition the husband the petitioner was ordered to pay his wife's taxed costs. The intervener in the wife's cross petition had previously been dismissed from the suit with costs against the wife. The wife's costs were taxed at the sum of £826-15 10 to meet which there was a sum of £550 in Court. The sum was paid out to the appellant who was the wife's solicitor leaving a balance of £276-15-10 unprovided for. On July 31, 1940, an order was made for payment of this balance to the appellant by the respondent. The costs of the intervener were taxed at £302-1-11 and by a document dated July 3, 1940, the intervener assigned this sum to the respondent in consideration of his paying her a like sum in cash. The appellant took out a summons on August 23, 1940, for an order that he should have a charge to the extent of £276-15-10 upon the costs ordered to be paid by the respondent to his wife.

Held, that without deciding whether costs were not "property recovered or preserved" within the meaning of Solicitors Act (1932), S. 69 the solicitor's claim could be made at common law for a charging order on a sum ordered to be paid as costs. CAMPBELL *v.* CAMPBELL. **(1941) 1 All E R. 274 (C.A.).**

DAMAGES—Defamation—Award of damages by trial Judge—Appellate Court's power to review. *See* TORT —DEFAMATION—DAMAGES.

(1941) 1 All. E R. 297 (C.A.).

DEED—*Rectification—Evidence of mistake—Burden.*

A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case mutual and concurrent intention of parties must be established. FREDENSEN *v.* ROTHSCHILD.

(1941) 1 All. E.R. 430 (Ch.D.).

DIVORCE—*Adultery—Mere statement by wife that co-respondent and not the husband was father of her expected child—Admissibility to prove adultery.*

Except admissions made by the wife in the form of statements that the co-respondent and not the husband was the father of her expected child, there was no evidence of adultery at all in a husband's petition for divorce against the wife. On the question of the admissibility of such admissions in view of *Russell* v. *Russell*,

Held, that so long as the admissions are not used to prove non-access or non-intercourse, the statements standing alone are admissible and quite sufficient to support a finding of adultery. FRAMPTON *v.* FRAMPTON AND BUSHELL. **(1941) 1 All. E.R. 305(P.D A.).**

——*Deed of separation after desertion—Misapprehension of petitioner—Cannot prevent its barring a dissolution.*

After the wife had deserted her husband without just cause, the parties entered into a deed of separation reciting the desertion and agreeing to live apart. The husband alleged that the deed was intended to regulate

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merely the financial position and provided for the child and that he was under a misapprehension that the deed will not bar his petition for divorce based on the desertion.

Held, that the deed prevented the desertion from continuing and was a bar to a decree for dissolution. LONG *v.* LONG. **(1940) 4 All E R. 230 (C.A.)**

——*Desertion—Marriage contract providing that matrimonial home was to be at wife's place of business—Effect on husband's right to dictate where the matrimonial home is to be—Refusal by wife to move to house selected by husband—If desertion—Agreement—If opposed to public policy.*

Where before marriage the husband had agreed that the wife shall continue her own business and to make the business premises the matrimonial home the husband cannot subsequently insist on his right to select the matrimonial home and if the wife refuses to move to the home selected by him charge her with desertion. There is nothing opposed to public policy in such an agreement and the husband by making it an excuse to stay away from the wife is guilty of desertion. KING *v.* KING. **(1941) 2 All E.R. 103 (P D.A.)**

——*Matrimonial Causes Act*, 1937 (*C.* 57), *S.* 5 (1) —*Judicial separation—Grounds for—"Might have been presented"—Meaning.*

S. 5 (1) of the 1937 Act provided that a petition for judicial separation may be presented "on any grounds on which a petition for divorce "*might have been presented.*" It was suggested that the words mean "might have been presented before the passing of the Act."

Held, that three years desertion immediatey preceding the presentation of the petition was a ground for judicial separation. CHADBURN *v.* CHADBURN.

(1941) 1 All. E.R. 407 (P.D.A.).

——*Wife's petition for divorce based on presumption of husband's death—Decree* nisi—*Husband found to be alive—Decree to be rescinded.*

On a wife's petition for divorce a decree *nisi* was passed on the presumption that the husband was dead. On an intervention by the King's Proctor for rescinding the decree on the ground that the husband was alive, it was contended for the petitioner that the presumption of death was a ground for divorce and the fact of death was not material.

Held, that there was good cause for rescinding the decree *nisi* and not to make it absolute. The proceedings cannot continue on the footing of the presumption of death of an individual who is admittedly alive. MANSER *v.* MANSER. **(1940) P. 224= (1940) 4 All. E.R. 238 (P.D.A.)**

EASEMENTS—*Collateral support—Right by custom to let down the surface of adjoining mine without compensation for damages — Validity — Reservation by Judge of right to reconsider decision—Effect.*

In a claim for an injunction to restrain the defendants from so working their mines as to let down the surface and thus damage the plaintiff's property the defence was that there was both a custom and a right by prescription to work their mine so as to let down the surface without paying compensation.

Held, that the custom was unreasonable and therefore unenforceable. *Hilton* v. *Granville*, (1844) 5 Q B. 701, applied. Prescription in common law resembled custom and was based on presumption of a lost grant and it is not necessary for those who allege a custom to show how it arose or might have arisen.

Viscount Maugham.—Reservation by a Judge or Lord of Appeal of the right to reconsider a decision cannot be taken as a statement that he thinks the deci-

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sion was erroneous. WELSTANTON, LTD. AND ATTORNEY-GENERAL OF DUCHY OF LANCASTER *v.* NEWCASTLE UNDER LYME CORPORATION.
1940 A.C. 860.

EXTRADITION—*Application for—Expert's evidence as to Indian Law—How far conclusive—Practice—Counsel giving evidence—Propriety—Fugitive Offenders Act*, 1881.

In an application for the issue of a writ of *habeas corpus* against committal to prison of a fugitive offenders from India before being sent to India without order of the Magistrate for extradition under the Fugitive Offenders Act,

Held, (*i*) All that is necessary while asking for extradition is to show that the person against whom the order is sought is one accused of having committed an offence in India and that he has left India, when he becomes, in the words of the Act, "a fugitive from India." (*ii*) All that is required in this case is a warrant issued in India by a person having lawful authority to issue it duly endorsed and authenticated in the United Kingdom for an offence to which the Fugitive Offenders Act applies. (*iii*) No objection to a warrant on the ground of duplication can be effective although the prosecution may be called upon to elect because the committal for one of those offences is not rendered void by the inclusion in the warrant of another charge upon which no committal was asked for or has been ordered. (*iv*) Depositions taken in India in the trial of the conspirators, but in the absence of the fugitive are not rendered inadmissible by reason of the fact that they were not taken "for the purposes of the Fugitive Offenders Act." (*v*) The fact that only part of the depositions was used in the Magistrate's Court did not make them inadmissible either. (*vi*) Where an affidavit of an expert on Indian Law was nothing more in truth than a forensic argument, the Court would be justified in interpreting for itself the relevant Indian statutes. (*vii*) A barrister should not act as both counsel and witness in the same case. (*viii*) The apprehended risks of war to which the fugitive will be exposed while travelling to India is no ground for interfering with the course of law. R. *v.* SECRETARY OF STATE FOR INDIA. (1941) 2 All E.R. 546 (K.B.D.).

FACTORIES ACT—*Technical institute carried on by local authority—If factory under the Act.*

A technical institute run by local authorities is not a factory within the meaning of Factories Act and the local authority is not liable for an accident to a pupil of the institute while working a wood-cutting machine Where the pupil disobeyed the instructions given to him and brought about the accident there is no common law liability on the part of the local authorities carrying on the technical institute. WESTON *v.* LONDON COUNTY COUNCIL. (1941) 1 All. E.R. 555 (K.B.D.).

——(1937), S. 151, Sub-Ss. (1) (a) (b), (9)—*Kitchen in a hospital run by public authority—If factory—Injury to kitchen maid while mincing meat—Failure to make dangerous machinery safe—Liability.*

Plaintiff a kitchen maid in a hospital kitchen was injured while mincing meant by reason of her hand being caught in the machine which was not safely fenced. In an action for damages,

Held, that the kitchen was a "factory" within the meaning of S. 151, sub-S. (1) of the Factories Act and the defendant ought to have safely fenced any dangerous machinery therein. Where premises belong to or are in the occupation of a public authority it is not necessary that the work carried on thereat should be carried on by

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way of trade or for purposes of gain. WOOD *v.* LONDON COUNTY COUNCIL. (1940) 2 K.B. 642 = (1940) 4 All E.R. 149.

FATAL ACCIDENTS ACT—*Law Reform Act* (1934), *S* 1 (5)—*Award of damages under Law Reform Act* (1934)—*Effect on right to damages under Fatal Accidents Act.*

In assessing damages under the Fatal Accidents Act, it is right to take into consideration any beneficial interest derived by a dependant from the estate of the deceased by reason of its increase by the award of damages to the legal personal representative of the deceased under the Law Reform Act (1934), S. 1 (2).

The taking into consideration of any interest of a dependant derived from the estate of the deceased does not involve setting off any right under the Law Reform Act against the rights of the dependant under the Fatal Accidents Act; for the defendant as such has no right whatever conferred on him or her by the Law Reform Act. YELLAND *v.* POWELL DUFFRYN COLLIERIES. (1941) 1 All. E.R. 278 (C.A.).

HIGHWAY—*Local authority operating a tramway—Tramway ceasing to be worked—Liability for non-repair of the road.*

A local authority which was operating a tramway ceased to work the tramway but instead of pulling out the lines filled it with betumen. An accident occurred to some cyclists owing to the unsatisfactory condition of the road. In an action for damages,

Held, (reversing (1940) 4 All.E.R. 330) upon a proper construction of the Tramways Act 1870 S. 28 the tramway had not been abandoned and the corporation were liable as a tramway authority for non-feasance. BROWNE AND OTHERS *v.* DE LUXE CAR SERVICES. (1941) 1 All. E R. 383 (C.A).

HUSBAND AND WIFE—*Restitution of conjugal rights — Jurisdiction—"Matrimonial home when co-habitation ceased"—Whether physical home necessary.*

The phrase "matrimonial home" extends in relation to jurisdiction to the husband's residence within jurisdiction in such circumstances that any husband similarly circumstanced and not estranged from his wife would set up his house within such jurisdiction at the time when co-habitation ceased. A wife's action in that place for restitution of conjugal rights is within jurisdiction. MILLIGAN *v.* MILLIGAN.
(1941) 2 All.E.R. 62 (P.D.A.).

——*Separation deed providing for weekly payments to wife for joint life of husband and wife—Subsequent annulment of marriage on the ground of wife's incapacity—Effect.*

A deed of separation provided for the weekly payment of £1 to the wife during the joint lives of husband and wife. Subsequently the marriage was annulled on the ground of the wife's incapacity and the decree was made absolute.

Held, that the annulment had no effect on the separation deed and the covenant for weekly payment was still enforceable. ADAMS *v.* ADAMS.
(1941) 1 All. E R. 334 (C.A.).

INCOME-TAX—*Assessee company incurring litigation expenses for maintaining title to property of the company—Entitled to deduction against profits.*

Where legal expenses were incurred in defending an action against a company questioning the validity of its title to certain real properties purchased by the company,

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Held, that such expenses can be deducted as business expenses in computing the profits of the company for purposes of income-tax and it is not a capital expense. SOUTHERN *v.* BORAX CONSOLIDATED.
(1940) 4 All.E.R. 412 (K.B.D.).

———*Insurance company agreeing to pay annuity to assured in return for a single premium paid by him—Guarantee that aggregate amount will not be less than premium—Continuation of payments on assured's death to his brother—Liability of payments to income-tax.*

In return for a single premium of $ 65, 243·22 a life assurance company paid the assured an annuity of $. 6,510. The aggregate amount to be paid was guaranteed not to be less than the premium paid. On the death of the assured the annuity was continued to be paid to assured's brother.

Held, that the payments received by the assured's brother was income liable to income-tax. (1940) 3 All. E.R. 416, reversed. SOTHERN SMITH *v.* CLANCY.
(1941) 1 All E.R. 111 (C.A.).

———*Professional football player—Receipt of proceeds of benefit match—Taxability.*

If a payment to the assessee though voluntary is remuneration for the office or employment, it is taxable, but, if it is personal in the sense that it is given to the person not as a holder of an office or employment, but as a personal testimonial, it is not. The line is often difficult to draw. Where in the case of a professional football player taking part in a benefit match, payments though not obligatory, are expected, are generally asked for, and are usually accorded, the payment must be treated as remuneration for employment as football players. CORBETT *v.* DUFF.
(1941) 1 All.E.R. 512 (K.B.D.)

INCOME-TAX FINANCE ACT (1938), S. 38—*"Wife" if includes "widow"—Liability of income under settlement to tax.*

The word "wife" should extend to the case of "widow" and the income under a settlement where the "widow" of the settlor might benefit after the settlor's death is liable to income tax and sur-tax under S. 38 of Finance Act, 1938. (1941) 2 All.E.R. 82, reversed on this point. GAUNT *v.* INLAND REVENUE COMMISSIONERS.
(1941) 2 All.E.R. 662 (C.A.).

INSURANCE—*Fire insurance—Articles concealed in a grate—Fire carelessly lit—Damage—Right to under insurance.*

The plaintiff took a Lloyd's comprehensive policy insuring her against loss by fire, burglary and housebreaking and other cause, at her flat. There was an attempted burglary at her flat during the summer which made her nervous about the safety of her jewellery while she was out and the flat was empty. While going out one day in addition to her jewellery worth £500 she had £100 in bank notes and she felt more uneasy than usual about the safety in the empty flat and hid them rolled in a newspaper in the fire place mixed up with other paper already there. The plaintiff returned home late in the afternoon and feeling cold lighted the fire, forgetting all about the jewels and bank notes. In an action against the underwriters for the loss, it was contended that waste where damage is done to insured property, by a fire in a place where fire is intended to be—where the fire has not broken its bounds—the loss is not covered because such a "fire" is not a "fire" within the meaning of the policy. It was said that there must be ignition where no ignition ought to be in order to create liability.

Held, that the plaintiff was entitled to succeed and if the underwriters wished to avoid liability, they must

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have put words to that effect in their policy. HARRIS *v.* POLAND.
(1941) 1 All. E.R. 204 (K.B.D.).

———*Life insurance—Parent effecting policies in name of his children—Death of parent leaving will—Person entitled to the policies.*

During his lifetime the testator took out two insurance policies on the respective lives of his two children. All the premiums on the policies were paid by the testator down to the time of his death and on the death of the testator the question arose as to whether the money payable under the policies was the property of the testator's estate or whether the child named in each of the policies was entitled to the money assured. In the proposal form the father was described as the grantee who was stated to be desirous of effecting an assurance on the life on behalf and for the benefit of the person therein named as "the life assured"—namely, the child.

Held, that the life assured was the person entitled to the money payable under the policy and if there were any further payments to be made the person whose life was assured was the person to make those payments. On the wording of the policy there was sufficient to establish a trust in favour of the children as against the father who no doubt effected the policy. (1924) 2 Ch. 348 and (1938) Ch. 799 distinguished. *Re* WEBB, BARCLAYS BANK, LTD. *v.* WEBB AND OTHERS.
(1941) 1 All. E.R. 321 (Ch.D.).

———*Marine insurance—Insurance against war risks—Ship struck by another ship requisitioned for war service and proceeding to port under the orders of Government—If damage due to war risk.*

A ship was insured against marine perils and the underwriters by another policy insured it against war risks. The ship collided with a second ship which was requisitioned for war service and was proceeding to a port. In a claim,

Held, that the damage was not due to war risks as the second ship was not engaged in warlike operations and the loss must be borne by the underwriters as due to ordinary marine perils. WHARTON (SHIPPING), LTD. *v.* MORTLEMAN AND ANOTHER.
(1941) 1 All.E.R. 175 (K.B.D.).

———*Marine insurance—"Insurance of cargo including risks of non delivery until discharge at port of destination"—Termination of risk.*

An all risk policy of marine insurance provided *inter alia* for risks of theft, pilferage and non delivery, while on board the vessel until discharged at port of destination and whilst in transit by land and/or water to final destination there or in the interior. According to the practice of the port of discharge the goods (timber) were put on to the quay alongside, close up to the ship in a stack or bulk and was subsequently sorted by the port authorities. The consignees were not allowed to put their hands on the timber until it had been so sorted. In a claim by consignees against underwriters under the policy,

Held, that the final destination was the place at which the goods arrived when they were bulked or stacked. The removal of the goods to another part of the shed does not extend the destination. RENTON *v.* BLACK SEA INSURANCE CO. **(1941) 1 All.E R. 149 (Ch. D.).**

———*Marine insurance—Perils of the sea—Ventilators closed in rough weather—Goods damaged through lack of ventilation—Damage whether due to "perils of the sea."*

Where under a policy of marine insurance a cargo of rice was insured against the perils of the sea and during rough weather in the voyage the ventilators were closed and the goods damaged through lack of ventilation,

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Held, that the damage having been caused by action necessitated to prevent the peril of the sea (*viz.*,to prevent incursion of sea water through the ventilator) was itself a loss due to the perils of the sea and can be recovered under the policy. CANADA RICE MILLS, LTD. *v.* UNION MARINE AND GENERAL INSURANCE CO., LTD. **(1940) 4 All.E R. 169 (H.L.).**

——*Marine insurance policy—Clause exempting liability for frustration of voyage—Effect on right to recover for constructive total loss of the goods on account of scuttling of the German steamers carrying the goods.*

A marine insurance policy covered war risks as well as marine risks and the policy contained a "frustration clause". The policy was warranted free of any claim based upon loss of, or frustration of the insured voyage or venture caused by arrests, restraints or detriment of kings, princes peoples, usurpers or persons attempting to usurp power. The goods were being carried on German ships which were directed by the German government on the outbreak of the war to take refuge in a neutral port, or if possible return to Germany with the cargo or as a last resort to scuttle. The master of the vessels ultimately scuttled the ship In a claim by cargo owners against the underwriters,

Held, the insured having suffered a constructive total loss of the goods was entitled to recover under the policy. The frustration clause afforded no defence to the under writers as it applied only to the loss of the voyage which cannot exclude the right of recovery for the loss of the goods. (1940) 4 All. E. R 96, reversed. FORESTALL LAND, TIMBER AND RAILWAYS CO., LTD. *v.* RICKARDS, ETC.

(1940) 4 All.E.R. 395 (C.A.).

——*Motor insurance including third party risks—False statements in proposal form—Insurance company's suit for declaration that policy was obtained by material misrepresentation—Right of third parties to strict proof of the misrepresentations.*

An insurance company asked for a declaration that at the material date they were apart from any provision contained in the policy, entitled to avoid the policy on the ground that it had been obtained by non-disclosure of material facts or by representations of facts which were false in material particulars. At the time of the action a third party who had been injured was entitled to damages for which the insurance company would have been liable if the policy was valid. The injured third party got himself impleaded as a party.

Held, that the third party was entitled to have strict proof of the misrepresentation by the assured and the evidence (1) of an admission by the assured's father to the managing clerk of the solicitor for the insurance company, and (2) of an admission by the assured to the claim's manager of the insurance company that the information given by his father to the solicitor's clerk was true, was inadmissible and the declaration asked for cannot be made on such evidence. (1940) 4 All. E.R. 205, Affirm. MERCHANTS INSURANCE CO. *v.* HUNT. **(1941) 1 All E.R. 123 (C.A.).**

——*Motor insurance—Non-disclosure of facts in proposal—Unqualified negative answer—Not to be construed as to the best of proposer's knowledge.*

In a motor insurance proposal form in answer to the question "Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle or is any prosecution pending?" The answer given was "No".

Held, that the answer was an assertion first of all that he has the knowledge which he purports to impart and secondly that that knowledge is what he is imparting. The answer to the question was a material matter and

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will affect the question of liability under the policy. But the insurance company expressly contracted in the policy that noting in the policy will affect the right of any person indemnified by the policy or of any other person to recover an amount under or by virtue of the provisions...." The company therefore cannot avoid the policy when strangers are claiming under it. MERCHANTS INSURANCE CO. *v.* HUNT.

(1940) 4 All.E.R. 205 (K.B.D.).

LAND ACQUISITION—*Compensation—Disturbance of business—Compensation for—Right to.*

(*Goddard*, *L.J.*, dissenting). Under the Acquisition of Land (Assessment of Compensation) Act the person whose land is compulsorily acquired is entitled to compensation but since the value of the land as building land could only be realised by the removal of the business, compensation for disturbance of business could not be awarded because the value of the land as building land exceeded its value as agricultural land plus the value of the minerals plus the loss by disturbance. If the sum of these exceeded the value as building land then the owner would be entitled to the difference. (1941) 1 All. E.R. 166 reversed in part. HORN *v.* SUNDERLAND CORPORATION.

(1941) 1 All. E.R. 480 (C.A.).

LANDLORD—*Defective condition of lift—Liability to visitor of tenants—Liability of repairer to users of the lift.*

The plaintiff, the managing clerk to a firm of solicitors, in the course of his professional affairs went to a block of flats, owned by *X* and managed by *Y* and Co. in order to call upon a tenant living there. Owing to the defective condition of the hydraulic lift plaintiff sustained severe injuries and brought an action for damages against *X* the owner, *Y* and Co, the managers and *Z* the lift engineers who were responsible for "inspecting the lift every calendar month during working hours to adjust, clean and lubricate the mechanism, to provide the cleaning materials and necessary lubricants and to attend also at all reasonable working hours to adjust the mechanism in case of stoppage or irregular running between the periodical visits. The day before the accident the lift engineers attended and adjusted the mechanism.

Held, (1) that plaintiff was not an invitee for the purposes of the occupier. He was only permitted to use the lift for his own purposes to call on a tenant and so was a licensee and the only duty of *X* was to warn him of any danger of which he actually knew. (2) In undertaking the carriage of the plaintiff in the lift *X* was under a duty to use reasonable care to provide a vehicle reasonably safe for the conveyance of the plaintiff, as well as to exercise reasonable care in the conduct of that vehicle throughout the course of the journey. (3) The complete maintenance of the lift was not entrusted to the independent contractors and therefore *X* had not discharged his duty to see that the lift was reasonably safe and *X* was accordingly liable. (4) As regards the lift engineers they were also liable to the users of the lift because the accident was due to their failure through their workmen to do their contractual work with reasonable skill and care and no intermediate examination could be anticipated. HASELDINE *v.* DAW & SON, LTD.

(1941) 1 All. E.R. 525 (K.B.D.).

LEASE—*Provision for six months' notice to determine tenancy—Notice terminating lease "at the end of the last quarter"—Sufficiency.*

A lease commencing from January 1, 1937, provided that the tenant had the option of determining the tenancy at the end of the third or fifth year by giving the landlord or his agent at least six months' previous

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notice in writing of his intention to do so. The lessee assigned his rights to a major who was called for military service. By a letter dated June 30, 1939 sent to the agents of the landlord who received it the same day, the assignee of the lessee wrote as follows: "I hereby give you formal notice of termination at the end of the last quarter of this year."

Held, that there was no ambiguity in the notice and termination at the end of the current year was meant. WINCHESTER COURT, LTD. *v.* HOLMES.

(1941) 2 All.E.R. 542 (K.B.D.).

LIMITATION—*Period of limitation extended by later Act after expiration of the period under earlier Act—Amendment of statement to claim making out a new cause of action—Not to be allowed.*

On December 11, 1939, the plaintiff was involved in an accident in which she was injured by a tramcar belonging to the defendants—a public authority. The period of 6 months within which an action had to be commenced expired on June 11, 1940 under the Public Authorities Protection Act then in force. The writ was issued on April 11, 1940, claiming damages for negligence without specifying the particular type of negligence of which the defendants were alleged to have been guilty. On May 28, 1940 a statement was put in making it clear that the complaint against defendant was one of negligent driving by the tramcar driver. On November 1, 1940 an application for leave to deliver an amended statement of claim was made. The amendment sought set up a new and different case that defendants were negligent in maintaining the roadway.

Held, that the amendment set up an entirely new cause of action and was barred under the Act as it stood. The introduction of a longer period of one year's limitation by amendment to the statute coming into operation 19 days after the limitation of 6 months under the provisions of the unamended Act cannot be of any avail as the cause of action was already completely barred. BATTING *v.* LONDON PASSENGER TRANSPORT BOARD. (1941) 1 All. E.R. 228 (C.A.).

MASTER AND SERVANT—*Apprentice—Dismissal of for turning "conscientious objector"—Liability of master for breach of covenant.*

A clause in an apprenticeship deed provided "should the apprentice be wilfully disobedient or be slothful or negligent or otherwise grossly misbehave himself the master may discharge the apprentice from service. The apprentice became a conscientious objector and as a result the master discharged him. An action was commenced to recover damages for breach of covenant. It was also found that the apprentice's conduct would irritate his fellow workmen and lead to loss of employer's time.

Held, that the employers were not entitled to terminate the contract of apprenticeship and were liable for breach of covenant. NEWELL *v.* GILLINGHAM CORPORATION. (1941) 1 All.E.R. 552 (K.B.D.).

———*Doctrine of common employment—Limitations.*

It is not sufficient to debar a plaintiff from recovering against the employers, of another man also in their employment, by whose negligence the plaintiff has suffered, merely to assert that they were both servants of the defendant company or firm in the sense that they were both paid their wages by that firm or company. The rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work, or are not fellow labourers in the same work, or are not engaged in different departments of duty. Where the plaintiff whose duty was to attend to mail orders was injured while driven in a car belonging to the employer for carrying servants of the company from one

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point to another in the course of his duties the doctrine of common employment is not applicable to debar the claim for damages. POLLOCK *v.* BUNT, LTD.

(1940) 4 All E.R. 264 (C.A.

———*Duty of employer to provide a safe system of working—Delegation to another employee—Negligence—Liability—Common employment—How far defence.*

The duty of an employer is to provide a safe system of working and he cannot delegate it to an employee. If the employer provides a safe system of working and if the employee fails to carry it out the fault is the fault of the employee and not that of the employer. But where the employer maintains that the system provided is safe and it is found to be otherwise, it is not open to them to say that there were means whereby the employee could have made it safe. Where an accident occurs due to the failure to supply a safe method of working the plea of common employment will not avail the defendants. A servant injured by the accident is entitled to damages. GRANTHAM *v.* NEW ZEALAND SHIPPING CO.

(1940) 4 All.E.R. 258 (K.B.D.).

———*Stoker in hospital—If domestic servant.*

A hospital is a domestic establishment and a person employed as a stoker in a hospital is a domestic servant though he may perform tasks which a domestic servant might not ordinarily be able to do. CAMERON *v.* ROYAL LONDON OPTHALMIC HOSPITAL.

(1940) 4 All.E.R. 439 (K.B.D.).

POWERS—*Settlement conferring power to appoint new trustee—Exercise of power by infant—Validity.*

A settlement provided *inter alia* that the power of appointing new trustees shall be vested in the settlor during his life and after his death in *P* his son. After the death of the settlor and the original trustee *P* while still an infant purported to appoint his mother to be sole trustee of the settlement in the place of the deceased original trustee. On the question of the validity of the appointment,

Held, that as there was conflict of interest and duty in the position in which the mother was placed, the appointment was invalid as being prejudicial to the minor's interest. PARSONS, *In re*: BARNSDALE AND SMALLMAN *v.* PARSONS. (1940) 1 Ch. 973 = (1940) 4 All E.R. 65 (Ch D.).

PRACTICE—*Agreed medical report—When to be allowed in trial—Desirability of having medical witnesses available for cross-examination.*

In a case where prognosis is an important matter it is most desirable that a doctor or doctors should be present in Court to answer any questions the Judge may wish to ask. The Master or Registrar should consider whether the case is suitable for hearing with a medical report agreed between the parties PROCTOR *v.* PEEBLES, LTD. (1941) 2 All.E.R 80 (C.A.).

———Amendment of claim setting up cause of action barred by limitation—Not to be allowed. *See* LIMITATION. (1941) 1 All E.R. 228 (C.A.).

———*Costs—Case involving construction of wills—Unsuccessful appeal—Costs — Numerous parties — Persons not likely to be heard served with notice—If entitled to costs—Proper procedure.*

In a case involving construction of wills only in exceptional cases will the Court allow the costs of an unsuccessful appeal out of the estate. Such exceptional cases are where large interests, interests of unborn persons and so on are at stake, when it is perfectly proper that a second opinion should be taken. But where the point is fairly brought before the Court by the trustees and there is an appeal which is without foundation the unsuccessful appellant must be ordered to pay the costs

regard to questions arising in bulk on an originating summons, where there are necessarily numerous persons many of them having exactly the same interest, it is always open to an appellant to give to the other parties a notice that he will object to more than one set of costs being allowed to the respondents who are all in the same interest. The matter is then considered by the Court, and, if the Court comes to the conclusion that it was not right for the parties to be separately represented it may decide appropriately as to costs. It would be contrary to modern practice to deprive the trustees on an originating summons of their costs in the Court of appeal. STUART, *In re*: JOHNSON *v.* WILLIAMS.

(1940) 4 All.E.R. 80 (C.A.).

———*County Court—Examination of witness on commission—Costs—County Court Rules, O. 47, R. 1.*

In an action in County Court no order was made as to the costs of taking evidence of the defence witness on commission. On the ultimate dismissal of the action,

Held, that the defendant was entitled to the costs incurred by him in making an interlocutory application to the County Court in respect of the examination of his witnesses before an examiner and the costs of examining the witnesses. FRIIS *v.* PARAMOUNT BAGWASH CO., LTD. (NO. 2). **(1940) 4 All.E.R. 72 (C.A.) = (1940) 2 K.B. 654.**

———*Discovery — Production contrary to public interest—Privilege.*

Where the head of a department of State claim privilege for production of documents, the Court must give effect to that claim. DUNCAN *v.* CAMMELL LAND & CO. **(1941) 1 All. E.R. 437 (C.A.)**

———Ex parte *judgment—Application to set aside —Conditional leave granted to defendant—Failure to fulfil condition within the time given—Jurisdiction to extend time—R. S. C., O. 67, R. 7.*

There was a judgment in default of appearance on September 26. The defendant applied on December 2 to set aside the judgment. The order made was that it should be set aside provided that certain costs were paid and that £50 was paid into Court within 7 days. On appeal the part of the order about paying costs and 7 days further time was given for paying the money into Court. The defendant failed to make the payment within the extended time and then on December 30 he applied to the Master for a further 7 days' time. On an objection raised it was held that the Master had no jurisdiction to order extension of time. On appeal the order was confirmed. On a further appeal,

Held, that the action was subsisting and therefore there was jurisdiction in the Master to enlarge the time. MANLEY ESTATES, LTD. *v.* BENEDEK.

(1941) 1 All.E.R. 248 (C.A.).

———Ex parte *order obtained without disclosing all facts—Setting aside for technical defects—Merits of the case—If to be considered.*

An applicant in an appeal filed an affidavit stating that no counter-notice had been filed or received in pursuance of the rules. He believed misconstruing the rules that the 8 days' time had expired on that day, whereas on a true construction the time expired only the next day. An *ex parte* order was passed and in an application to set it aside,

Held, that the *ex parte* order cannot stand in view of the fact that it had been made in ignorance of an essential fact, and ought not to have been, and never would have been made if that circumstance had been brought to the notice of the Court. The question in an application to set aside the *ex parte* order is not one concerned with the merits at all. FISHMONGER'S

COMPANY *v.* DONINGTON FINANCE CO., LTD.

(1941) 1 All.E.R. 137 (C.A.).

———*Insurance company given control of proceedings by or against insured—Insurers—No locus standi in actions to appeal in own name.*

Though insurers are given by the policy control of the proceedings and could take any step in those proceedings in the name of the defendant, they are not parties to the action and no application or appeal could be made in their own name. MURFIN *v.* ASHBRIDGE & MARTIN.

(1941) 1 All E.R. 231 (C.A.).

———*Jurisdiction—Contract evidenced by bill of lading—Provision that it shall be governed by the law of England—Later clause providing that any provision inconsistent with the Australian Act prevailing at the place of shipping shall be null and void—Effect—Service on defendant outside jurisdiction—Not to be ordered.*

The defendant shipped on plaintiff's vessel at Brisbane parcels of wheat under various bills of lading. On the voyage the wheat was alleged to have been infested with weevils which caused damage to bags of flour shipped by other shippers and the plaintiffs having been forced to pay damages and incur expenses claimed indemnity. The bill of lading provided that the contract shall be governed by the law of England and in a later clause it said "All the terms, provisions and conditions of the Australian Carriage of Goods by Sea Act, 1924, are to apply to the contract and if anything contained herein be inconsistent with the said Act to the extent of the inconsistency it shall be null and void. The defendants being domiciled in Australia the plaintiff obtained leave to serve a writ out of jurisdiction. S. 9 of the Act provided that "All parties to any bill of lading relating to the carriage of goods from any place in Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment and any stipulation to the contrary shall be null and void and of no effect." In an application to set aside the leave to serve the writ out of jurisdiction,

Held, that the provision that the contract is to be governed by English law, having been made by another part of the contract to be null and void, the Court had no jurisdiction to allow a writ to be issued out of the jurisdiction of the English Courts at the instance of the plaintiff. OCEAN S. S. CO. *v.* QUEENSLAND WHEAT BOARD. **(1941) 1 All.E.R. 158 (C.A.).**

———*Payment into Court—Withdrawal of whole or part by person paying in—When permissible.*

Where a defendant has paid money into Court he is not entitled to resile from that step as of right. He must show that there are good reasons, for instance discovery of further evidence which puts a wholly different complexion on the case or a change in the legal outlook brought about by a new judicial decision, etc., for his resiling. The Court should consider whether there is a sufficient change of circumstance since the money was paid in, to make it just that the defendant should have an opportunity of withdrawing or reducing his payment. CUMPER *v.* POTHECARY.

(1941) 2 All.E.R. 516 (C.A.)

———Reservation of right to reconsider a decision— Not to be treated as suggesting that decision was erroneous. *See* EASEMENTS—COLLATERAL SUPPORT.

(1940) A.C. 860.

———*Transfer of proceedings in County Court to Chancery Division of High Court—Proper procedure.*

The plaintiff is entitled to choose his own tribunal, and, if he chooses the County Court, the matter should not be removed therefrom except in his presence and after his submissions have been made to the Court. The

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proper course in the Chancery Division is to take out a summons, which is served on the respondent, and which in the first instance comes before the master. The master can, if he thinks it a proper case, and subject to the other party's rights, make an order to have it adjourned to the judge. Statement in *Annual Practice* in 1940, p. 2593 not approved. PORTMAN *v.* ROSKILL & SONS. **(1941) 1 All. E.R. 226 (Ch.D.).**

PRINCIPAL AND AGENT—*Principal if can recover money paid under illegal contract to agent not applied by him.*

Where a principal advances money to his agent to be employed in street betting contrary to law and also for making a fictitious bet on the race course to keep up the odds on a particular horse, the principal cannot recover the money handed to the agent who dishonestly used the money for his own purposes. The Court will not assist either party once the illegality of the transaction is brought to its notice. PARKER (HARRY), LTD. *v.* MASON. **(1940) 2 K.B. 590 = (1940) 4 All.E.R. 199 (C.A.).**

———*Promise to pay commission on completion of sale of principal's property—Willing buyer found—Principal refusing to complete sale—Agent's right to commission.*

The appellants were private companies and were the freeholders of the Luxor Cinema at Eastbourne and the Regal Cinema at Hastings respectively. The board of directors of each of the appellant companies was composed of the same individuals and one *W. B.* who was the managing director of both companies, held the majority of the issued shares. On the death of *W. B.* on 11—9—1935 his son *H. B.* became a director in his place. Prior to his death *W. B.* in the summer of 1935 had asked the companies' auditor *E.* to get an offer for the purchase of the two cinemas and *E.* said that he would approach his "client" meaning thereby the respondent. *W. B.* was alleged to have said that *E.* would have a commission. After *W. B.'s* death another director *G.* told *E.* after a directors' meeting that the directors had decided to sell the cinemas and that *E.'s* client should make the offer through the companies' solicitor who had authority to deal with the matter. *E.* told the respondent of this and the respondent shortly afterwards introduced to *E.* a prospective purchaser willing to negotiate for the properties. *E.* took the respondent to meet the companies' solicitor. Ultimately on 11—10—1935 after negotiations the solicitor's firm replied to *E.* confirming that on completion of the sale of the cinemas to the purchaser a procuration fee of £10,000 was to be paid to the respondent. At the directors' meeting held on 2—10—1935 to consider the offer, *H. B.* opposed the motion for accepting the offer. The sale was not proceeded with and the disposal of the cinemas ultimately took place by way of a sale of shares in the appellant companies to another party. In an action by the respondent for damages for not carrying through the sale, thereby preventing the respondent earning his commission,

Held, upon a true construction of the contract the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee and the respondent's claim must fail. An implied term that the principal will not refuse to go on with the sale cannot be inferred and as no binding contract was made between vendor and purchaser, the agent was not entitled to the commission. Decision of Court of Appeal, (1939) 4 All. E.R. 611, reversed. LUXOR (EASTBOURNE), LTD. (IN LIQUIDATION) AND OTHERS *v.* COOPER. **(1941) 1 All.E.R. 33 (H.L.).**

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PRIZE LAW — *Exchange of goods* in transitu—*Immediately before hostilities—Seizure—Effect.*

Where under a contract for the sale of goods made before the outbreak of war between an enemy seller and a neutral buyer a transfer of the property in the goods is made while the goods are still *in transitu*, the following propositions are clearly settled:—(i) If it is proved that the contract was made in the ordinary course of business, and not in contemplation of war, and was a *bona fide* transaction in the sense that there was no fraudulent or collusive reservation of interests to the seller, then although the buyer has not taken actual delivery before seizure, his claim is recognised in prize. (ii) If however the contract, though made *bona fide*, was made in contemplation of the outbreak of the war the buyer cannot establish his claim to the goods unless he has taken actual delivery before seizure. But in the case of a British buyer (*a*) no considerations founded on the comity of nations can apply and (*b*) a British claimant is subject as a neutral claimant is not, to the municipal law as to trading with the enemy so far as it affects the matter. THE GLENEARN.
(1941) 1 All.E.R. 371 (P.D.A.).

PUBLIC AUTHORITIES PROTECTION ACT—Limitation under—Applicability—Management of non-provided school—Whether public authority *See* TORT—INVITATION BY MANAGEMENT OF A NON-PROVIDED SCHOOL. **(1941) 1 All. E.R. 66 (H.L.).**

SALE OF GOODS—*Sale to finance company and hire purchase arrangement between finance company and ultimate purchaser—Breach of warranty of fitness——Purchaser not entitled to see the vendor to finance company.*

At the time of a supposed purchase the purchaser entered into a hire purchase agreement of quite a common kind with a finance company. The document recorded the relationship of hire purchase between the hirer and the owner in the form of an offer made by the hirer on a printed form signed by the hirer on May 11, 1938. On the same date a document purporting to be an invoice was signed by the dealer purporting to invoice the apparatus to the hirer. In an action by the hirer against the dealer alleging a breach of warranty of fitness of the apparatus it was contended that the transaction was a sale and not of hire and that the defendant was liable as vendor for the breach of warranty.

Held, that the contract was one of hire purchase and the issue of the invoice did not make it one of sale and the action must fail. DRURY *v.* BUCKLAND, LTD.
(1941) 1 All.E.R. 269 (C.A.).

SOLICITORS — Personal liability for costs. *See* COSTS—APPEAL BY NON-PARTY.
(1941) 1 All.E.R. 231 (C.A.).

STOCK EXCHANGE—*Broker's right to indemnity from vendors repudiating their contract.*

Where the vendors repudiated their contract the brokers are bound to produce other stock which could be registered in the name of the buyer and the brokers are entitled to be indemnified by the vendors in respect of the liability they have incurred to produce other stock. HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON AND SONS. **(1941) 1 All.E.R. 562 (K.B.D.).**

———*Vendor repudiating contract—Duty to broker—Company refusing to register transfer on account of caveat from original owner—Broker if bound to replace shares—Broker if entitled to indemnity.*

A broker for sale of shares even if acting as principal, has performed all his duties when he hands over to agents acting for the transferee, a duly executed transfer

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together with the certificate. He is under no duty to procure the registration of the transfer and if the buyer wishes to protect himself he must see that registration is guaranteed. Accordingly where the company refuses to register a transfer by reason of a *caveat* from the transferor, the broker is under no duty to buy other shares and replace the stock and he cannot claim indemnity from the vendor of the shares. (1941) 1 All.E R. 562, reversed. HICHENS & CO. *v.* JACKSON & SONS

(1941) 2 All.E.R. 704 (C.A.).

TORT—*Aerial traffic—Obstruction near aerodrome causing accident to pilot—Contributory negligence—Effect—Obstruction when a trap.*

Under his licence the proprietor of an ærodrome is bound to observe the condition of the licence that no obstruction in the line of flight beyond the perimeter and within half a mile of the aerodrome subtends at the nearest point of the perimeter a greater angle than 5o 30' (approximately 1 in 10). Owing to an obstruction in the vicinity of the aerodrome in the shape of trees a pilot was injured by crashing into the trees. In a claim for damages, it was contended that the plaintiff was guilty of contributory negligence as he knew of the existence of the trees he was in fault in hitting them.

Held, (*i*) that the owner of the aerodrome was liable on account of the breach of the statutory condition in the licence. (*ii*) Even under common law the trees constituted a trap and so the plaintiff was entitled to damages. (*iii*) The knowledge of the plaintiff as to the existence of the trees was not sufficient to constitute contributory negligence. HESKETH *v.* LIVERPOOL CORPORATION.

(1940) 4 All.E.R. 429 (K.B.D.).

———Damages — Fatal Accidents Act — Rights under—How far affected by award of damages under Law Reform Act. *See* FATAL ACCIDENTS ACT.

(1941) 1 All. E.R. 278 (C.A.).

———*Defamation—Damages—Trial Court awarding small sum as damages—Appellate Court's power of review.*

It is to be remembered that in a libel action the damages awarded are, for the most part, often entirely without any real connection with any pecuniary loss at all. One is considering the injury which the plaintiff has suffered, which may or may not be capable of pecuniary valuation. When dealing with a type of damages upon which there can be a very wide divergence of opinion without either of the two extremes falling into what may be described as 'an entirely erroneous estimate". And what an appellate Court must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge below. ROOK *v* FAIRRIE.

(1941) 1 All.E.R. 297 (C.A.).

———*Dog known to be dangerous—Injury by—Liability of owner.*

A licensee of a public house who has a dangerous dog, ought to take steps to see that that dangerous dog is kept away from customers of his inn behaving reasonably and without negligence. The owner of the animal ought to see that it is so secure that it cannot attack some one who is on his premises or who mistakenly steps one or two yards through an opengate. Where through the owner's failure of such duty the plaintiff is injured by the dog, the owner is liable. GOULD *v.* MCAULIFFE. **(1941) 1 All.E.R. 515 (K.B.D.).**

———*False imprisonment—Steward of ship suspected to harbour uncustomed goods—Detention by customs officer—Liability—Customs Consolidation Act* (1876), S. 186

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S. 186 of the Customs Consolidation Act made it an offence for any person to knowingly harbour, keep or conceal any uncustomed goods and empowered the customs officer to detain an offender. Where a customs officer detained a ship's steward merely on suspicion that he was harbouring uncustomed goods but not in fact guilty of the offence,

Held, per *Scott and Clauson, L. JJ.* (*Mackinnon, L. J.*, dissenting) that the person so detained is entitled to recover damages for false imprisonment. The statute empowers only detention of "offenders" and not suspects. GORMAN *v.* BARNARD AND ANOTHER.

(1940) 2 K.B. 570 (C.A.).

———*Invitation by management of a non-provided school—Injury to invitee by collapse of floor due to want of repair—Liability—Public Authorities Protection Act—Limitation under.*

A non-provided school's building was nearly 100 years old. The headmaster with the authority of the managers invited among others the plaintiff whose son was a pupil at the school to attend an exhibition on the premises. Owing to the want of repair the flooring collapsed and the plaintiff having been injured sued the managers for damages. It was found as a fact that those who were charged with the duty of keeping the premises in repair had not taken reasonable care to discharge that duty. It was the duty of the manager to keep the premises in good repair out of voluntary subscriptions or donations and in some cases, trust funds or endowments The action was commenced 22 months after the accident and the managers claimed that it was barred under Public Authorities Protection Act, S. 1.

Held, that the managers authorised the exhibitions in the course of carrying on the public elementary school and the managers can avail themselves of the protection of the Public Authorities Protection Act and the action not having been commenced within 12 months was barred. Decision of the Court of Appeal, (1939) 2 All. E.R. 76, Affirm. GRIFFITHS AND ANOTHER *v.* SMITH AND OTHERS. **(1941) 1 All. E.R. 66 (H.L.)**

———*Negligence causing death—Damages for "loss of expectation of life"—Assessment—Considerations.*

In an appeal against the award of £1,200 as damages for loss of expectation of life of a boy aged 2½ years in a motor accident,

Held, that the damages in fact is incapable of being measured in coin of the realm with any approach to real accuracy. The assessment of damages is not to be made by applying the statistical or actuarial test. Such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. Before damages are awarded in respect of the shortened life of a given individual under this head it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, to a positive measure of happiness. The question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life not of loss of future pecuniary prospects. The uncertainty about the childs future must also be considered. In assessment of damages under this head a very moderate figure should be chosen. The damages awarded was reduced to £200 in view of the fact that the circumstances of the infant

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were most favourable. (1940) 1 All. E.R. 275, reversed. BENHAM *v.* GAMBLING. **(1941) 1 All. E R 7 (H.L.).**

———*Negligence—Pedestrian's duty while using road during black out—Collision with bus—Rights.*

In a black out the position of a pedestrian in the road is different (particularly if he is wheeling a bicycle, and quite apart from the regulation compelling the carrying on the bicycle of a rear light) from what it is in time of peace when motor cars have full head lights and when the conditions of difficulty caused by the black out do not exist. In black out conditions, there is imposed on a person in the road the new duty of bearing in mind the difficulty which the driver of an on-coming vehicle will have of seeing a person or a vehicle bearing no light and of realising that it is his duty as a person in the road to take all reasonable steps to minimise such difficulty. FRANKLIN *v.* BRISTOL TRAMWAYS & CARRIAGE CO., LTD. **(1941) 1 All. E.R. 188 (C A.).**

———*Negligence—School boys allowed to volunteer for work on farms on holidays—Injury while so working—Headmaster if liable for damages for not providing proper supervision.*

Some boys including the infant plaintiff from a school volunteered for farm service on a half holiday at a farm near the school. They were not accompanied by any master to supervise or control them. They were to receive 6*d*. per hour for their work, the wages being paid to the school for them. After starting work, when the farmer was absent the boys began playing the fool by throwing potatoes at each other and continued their ragging for 30 or 40 minutes. One boy uttered something opprobrious to another boy, which angered the latter, who replied by throwing a lump of earth at his insulter. who ducked his head and escaped the missile which unfortunately hit the infant plaintiff gravely injuring one eye which had to be removed. In an action by the father of the plaintiff for damages against the headmaster of the school,

Held, that the duty of the headmaster being that of an ordinary careful parent, there was no breach of duty in allowing the boys to work on the farm. No headmaster is obliged to arrange for constant and perpetual watching out of school hours. CAMKIN *v.* BISHOP.

(1941) 2 All.E.R. 713 (C.A.).

———*Nuisance—Slate on roof rendered insecure by enemy action—No proof that owner knew of unsafe condition—Plaintiff injured by falling of slate—Defendant not liable for continuing the nuisance.*

Plaintiff was injured by the falling of a slate from the roof of defendant's premises. It was found that the insecurity of this slate which caused the defendant's premises to become a nuisance arose from enemy action. In an action for damages, *held*, on the evidence, that it could not be said that with the exercise of reasonable care and skill the defendants ought to have known that their roof had been rendered unsafe and therefore there was no wrongful act in continuing the nuisance. CUSHING *v.* WALKER AND SONS.

(1941) 2 All.E.R. 693 (K.B D.).

———*Nuisance—Snow storm—Accumulation of snow on roof of house adjoining highway—Fall of snow injuring passer-by—Liability of occupier of premises for not abating the nuisance or warning the public.*

The plaintiff was injured by a mass of snow which fell upon her while on the highway from the sloping roof of the defendant's leasehold premises in Leicester, and she commenced an action for damages alleging nuisance, or, alternatively, negligence. The accumulation of the snow was the result of a series of snow storms. No steps were taken by the defendant to remove the snow, no

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warning was given to the plaintiff and others using the street and no step was taken by the defendants to prevent the public from walking or standing under the roof in question. There was a covenant for repair by owners.

Held, (1) that the covenant for repairs by the owner did not affect the liability as the injury was caused not by want of repair but by the fall of the snow, and the occupier was liable for nuisance as in the case the defendant having had an opportunity failed to remove the snow and abate the nuisance. There was a duty on the part of the defendant to warn the public. SLATER *v.* WORTHINGTON'S STORES.

(1941) 1 All. E.R 245 (K.B.D.).

———*Riparian owner erecting wall to protect his land and agreeing with local authority to maintain the wall to protect highway—Demolition and re erection of wall leaving gaps—Damage by flooding to adjoining owner—No liability for.*

The lessees of certain land on the banks of a river in agreement with the local authority erected a wall along the river bank to prevent flooding and to protect their land and the highway. While re-erecting the wall with the permission of the owners, gaps through which workmen passed materials were left at either end. The river rose rapidly and the adjoining owner's premises was damaged by the water which overflowed through the gaps. In an action for damages based on negligence,

Held, that the defendants owed no duty to the plaintiffs to maintain the wall and therefore were not guilty of negligence or nuisance and the defendants were not liable. THOMAS & EVANS, LTD., MID-RHOMDDA *v.* CO OPERATIVE SOCIETY, LTD

(1940) 4 All. E R. 357 (C.A.).

———*Sea wall—Repair by statutory authority—Negligence in—Damage to plaintiff's land due to innundation of salt water—Liability.*

As the result of the defendant's negligence in the exercise of their powers to repair (failure to properly repair a sea wall which had collapsed) the plaintiff's pasture land was inundated by salt water. In a claim for damages,

Held, (reversing the majority view of the Court of Appeal Lord Atkin dissenting) that a Catchment Board which is under no statutory duty to landowners within its area is never liable to one of them either for total neglect to exercise its statutory powers or (if no more is proved) for exercising them with a lack of efficiency or with too little zeal or dispatch. KENT *v.* EAST SUFFOLK CATCHMENT BOARD.

(1941) 1 All.E.R. 527 (H.L.)

WILLS—*Annuities free of income-tax—Date for valuation.*

It is a general rule that where the valuation of annuities is necessary, it should be made at the date of the order and where annuities are bequeathed free of income-tax the rate of income tax prevailing on the date of the order must be taken into account. When the annuities have been so valued then the legacies and the amounts of such valuations must be paid in full and in case the estate is insufficient they must be abated *pari passu*. *Re* TWISS : BARCLAYS BANK, LTD. *v.* PRATT AND OTHERS. **(1941) 1 All. E.R. 93 (Ch.D.)**

———*Bequest for educational or charitable or th gious purposes for Roman Catholics in the B Empire.*

A bequest was made to the Archbishop of Westminster or other head of the Roman Catholic Archin

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England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit.

Held, that it was a good charitable gift and was not void for uncertainty. *Re* WARD : PUBLIC TRUSTEE *v.* BERRY. **(1941) 2 All.E.R. 125 (C.A.).**

———*Bequest—Gift during widowhood—Beneficiary remaining spinster—Effect on gift.*

The testator had a wife and another woman *D.M.L.* with whom he had co-habited. In his will he directed his trustees to allow *D.M.L.* to enjoy "during her widowhood" certain dwelling house and also pay her 25s. per week during her widowhood for a period of twelve years. *D.M.L.* though she had children by the testator was never married to him. On a construction of the will,

Held, that the gifts failed as the period for which provision was made could never exist. *Re*, GALE, GALE *v.* GALE AND ANOTHER.

(1941) 1 All.E R. 329 (Ch.D.).

———*Bequest of income to widow for life free of all taxes and duties—Widow living abroad and having to pay foreign income-tax—Whether foreign income-tax also to come out of the testator's estate.*

Where the testator did not contemplate his widow living abroad directs the trustees to pay to her for life an amount per annum free of all taxes (including income-tax) and duties, it can refer only to taxes and duties payable in England. The foreign income-tax payable by reason of the widow living in Kenya cannot be an incidence on the testator's estate. *Re* FRAZER, FRAZER *v.* HUGHES. **(1941) 2 All E.R. 155 (Ch D.)**

———*Bequest of "one house to each of my nephews and nieces and to N. H., one to F. K. and one to my sister and one to my brother"—Allotment of the houses.*

A will provided : "I give and bequeath my estate as follows: . . . . . one house to each of my nephews and nieces and one to Nellie Hird, one to Florence Knapton, one to my sister, one to my brother. . . . ."

Held, that the devises are valid and the choice is to be given to the several devisees in the order in which they are named including the nephews and nieces. If they cannot agree the choice must be determined by lot. *In re* KNAPTON. **(1941) 2 All. E.R. 573 (Ch.D.).**

———*Bequest of residue of the estate "for such charitable institution or institutions or other charitable or benevolent object or objects as the executors in their absolute discretion may select"—Validity.*

A testator after bequeathing other legacies gave the residue of his property to his executors who were to apply it "for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select and to be paid to or for such institutions and objects if more than one, in such proportions as my executor or executors may think proper". Construing the will,

Held, that the words are to be construed in their natural and grammatical sense unless there was something the context of the will read as a whole, which imposed a different meaning upon them. In the present case the voluntary gift for "charitable or benevolent objects" was void for uncertainty. *Re* DIPLOCK : WINTLE *v.* DIPLOCK. **(1941) 1 All E.R. 193 (C.A.).**

———*Bequest to trustees of parish church for any purpose permitted by trust deed—Void for uncertainty where there was no trust or trust deed for the parish church.*

A bequest was made to the trustees of a parish church to be used in their discretion for any purpose permitted by the trust deed. There being no such trust deed or trustees for the parish church,

Held, that there was no general charitable intention and the gift was void for uncertainty. (1868) L.R. 6 Eq. 419, followed. LAWTON, *In re*: LLOYDS BANK, LTD *v.* LONGFLEET ST. MARY'S PAROCHIAL CHURCH COUNCIL. **(1940) 1 Ch. 984.**

———*Condition for forfeiture of legacy on "Marriage with a person who is not of Jewish parentage and Jewish faith"—Validity of condition.*

A condition in a will for forfeiture in the case of the marriage of the testator's daughter to a person not of the Jewish faith is void for uncertainty. (1940) 1 Ch. 385, followed though doubted. *Re* SAMUEL : JACOBS *v.* RAMSDEN. **(1941) 1 All.E.R. 539 (K.B.D.).**

———*Executors—Personal liability in respect of leaseholds—Right to indemnity from estate.*

Executors are at liberty to retain out of the estate a fund by way of indemnity against their personal liability in respect of leaseholds in the possession of the testator at his death vesting in them *In re* OWERS.

(1941) 2 All.E.R. 589 (Ch.D.).

———*Option to purchase conferred by will—If can be exercised by executor of donee after donee's death.*

Per *Scott and Clauson, L.JJ.* (*Luxmoore, L.J.*, dissenting).—In the absence of a contrary intention shown in the will an option to purchase given by a will to a named person is personal to him and does not pass to his executors or confer a transmissible interest. (1940) 1 Ch. 490 ; (1940) 2 All. E.R. 492, affirmed. SKYES *In re* : YOUNGHOUSE *v.* SYKES.

(1940) 4 All. E.R. 122 (C.A.).

———*Order of application of assets—Direction in will—Effect.*

A will contained *inter alia* the following provision: "Subject to the payment of my funeral and testamentary expenses, death duties including estate duties, etc., and debts and legacies bequeathed under the will and the legacy duty on legacies bequeathed free of duty I devise and bequeath the residue to *A* and *B* in equal shares. *B* predeceased the testator and his share of the residue lapsed.

Held, that the provision in the will amounted to a charge for the items specified (funeral testamentary expenses duties, debts and pecuniary legacies) and is inconsistent with the payment of those items out of the lapsed share of *B* in the residuary estate. The specified items should be paid out of the entire residuary estate. *Re.* HARLAND RECK, HERCY *v.* MAYGLOTHLING.

(1940) 4 All. E R. 347 (C.A.)

———*Religious trust for benefit of missionaries holding certain beliefs—Validity.*

A trust was created for the benefit of missionaries. A clause in a will provided that "no person shall be eligible for any benefit under the trust unless he or she shall be a protestant in religion and a whole hearted believer in the deity of Christ and the full inspiration of scripture.

Held, that the clause differed from a forfeiture clause and as it was possible for the trustees by inquiries to ascertain whether a particular person was suitable the condition was not impossible to fulfil and the gift was not void for uncertainty. (1940 Ch. 385 = 1940 (1) All. E.R. 632 Dist.) *Re*, MYLNE, POTTER *v.* DOW.

(1941) 1 All.E.R. 405 (Ch D.).

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———*Trust for sale and conversion with power to postpone—Residue to be divided into two parts—Proper date for valuation.*

A testator after devising various pecuniary legacies bequeathed all his real and personal estate to his trustees upon trust to sell the real estate and to sell, call in and convert into money so much of his personal estate as should not consist of money with a power to postpone, for so long as his trustees should think fit, the sale calling in and conversion of any part of his real and personal estate. The clause also contained a declaration that the income of his personal estate shall from his death be treated as income. The will further provided that the residuary estate shall be held upon trust to be divided into two parts in such a way that the value of the one exceeded the other by £30,000 and each part was to be held in trust for a named person.

Held, that the valuation of the estate was to be made as at the date of the testator's death when the estate was distributable. ORAM, *In re*: ORAM *v.* ORAM.

(1940) 1 Ch. 1001 = (1940) 2 All. E.R. 161 (Ch.D.)

WORKMEN'S COMPENSATION—*Form of order treating partial incapacity as total incapacity.*

In a case where the partial incapacity of the injured workman was treated as total incapacity the County Court Judge's order awarding compensation was in the following form: "I order that the incapacity of the said applicant (if and so long as he remains unemployed) shall be treated as total incapacity resulting from the said injury subject to the condition that such order shall cease to be in force if the said applicant receives unemployment benefit and to no other conditions. On appeal,

Held, that the condition should be worded "if and so long as he remains unemployed, or until weekly payments hereinafter directed shall be ended, diminished, increased or reduced in accordance with the provisions of the above-mentioned Acts, and that the words "and to no other conditions" must be deleted. DAN AND STONE, LTD. *v.* LENNARD.

(1941) 1 All.E.R. 101 (C.A.)

———*Payment of compensation to workman suffering from industrial disease with knowledge that he made a false statement that he did not suffer previously from such disease—Implied agreement to pay compensation—If can be avoided on the ground of misstatement made by workman on entering service.*

A workman on entering the employment represented that he had not previously suffered from nystagmus. The representation was false and it was found to have been made wilfully. During his employment the workman again contracted nystagmus and obtained the necessary medical certificate to enable him to compensation. On a medical examination on behalf of the employers it was discovered that the workman had previously suffered from the disease. The employers without further question, paid to the workman compensation at the full rate for total incapacity till a certain date when the employers ceased to pay the compensation on the ground that the workman was disentitled to it because of the false statement he made on entering their service.

Held, that when a workman claims compensation and in the case of an industrial disease produces the necessary medical certificate and when the employer, without saying that he does so without prejudice or pending further inquiry, or the like, thereupon pays, and continues to pay, the full amount for which the Act provides, and offers no evidence as to why he makes these payments, the only inference which can be drawn,

WORKMEN'S COMPENSATION ACT (1925), S. 1

is that the payment involves a recognition of liability and an implication that the employer agrees that the workman is entitled to it. The employers cannot subsequently say that the agreement to pay is vitiated by any misstatement made on entering service. PEASE AND PARTNERS LTD. *v.* BIRCH.

(1941) 1 All.E.R. 343 (C.A.)

———*Permitted act done in manner contrary to regulations—Effect.*

A workman was employed in the defendant's colliery as an engine plane man. While riding on the limber of a set of full tubs in the colliery the tubs overturned and the man was badly crushed and he eventually died. In a claim by his widow for compensation, it was found that at the time of the accident the man was properly going out bye but was doing it in an improper way which was forbidden and dangerous,

Held, that the case falls entirely within *Seviour's case*, (1940) 1 All. E.R. 649 and the accident occurred in the course of employment and the widow was entitled to recover compensation. RILEY *v.* WAEARMOUTH COAL CO.

(1940) 4 All. E.R. 342 (C.A.).

———*Physical disfigurement of workman—No impediment to physical ability to do work—Rights.*

Incapacity due to physical disfigurement which does not in fact prevent a man from performing his actual work is of precisely the same character and weight in deciding whether a declaration of liability should be granted as is a physical disablement which impedes a man in the actual physical execution of his work. COLE *v.* UNITED DAIRIES, LTD.

(1940) 4 All. E.R. 318 (C.A.).

———*Various Industries Scheme (Silicosis, 1931)—Breaking of furnace lining of bricks containing silica for repairing—If included in "Crushing silica bricks" in the process of manufacture.*

Various Industries (Silicosis) Scheme (1931) made in accordance with the Workmen's Compensation Act provided *inter alia* for compensation for workmen employed in "The process specified and those processes only" in the trades thereunder mentioned and in the case of works engaged in the manufacture of steel or in steel foundaries the specified processes are thus described "crushing or grinding of silica rock, or any handling of incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica. A work man was engaged in such works and performing the following duties—He built and repaired smelting furnaces and ladles, and, while engaged on the former, handled bricks containing more than 80 per cent. of silica. He had to break down old layers of bricks in the inside of the furnace and build up new layers. The process required use of crowbars to break them down and new bricks often had to be chipped to shape. These involved the creation of large quantities of silica dust which the workman had to inhale and in consequence contracted silicosis. In a claim for compensation,

Held, that the work amounted to "crushing bricks containing more than 80 per cent. of silica" under the scheme and the workman was entitled to compensation. "Crushing" does not necessarily mean crushing to powder. (1940) 1 All. E.R. 235, reversed. FORESTER *v.* LLANELLY STEEL CO.

(1941) 1 All. E.R. 1 (H.L.).

WORKMEN'S COMPENSATION ACT (1925), S. 1 (i)—*Domestic servant taking master's tea to fields—Returning back to farm on horse back—Injury by horse bolting—If accident "arising out of employment."*

WORKMEN'S COMPENSATION ACT (1925) S.1.

A girl of 15 to 16 years of age was employed as a domestic servant by a farmer. One day she was asked by the farmer's wife to take a can of tea to the farmer, who was working two miles away in a field. She took the tea to the farmer and waited until he had consumed it, when it was her duty to take the empty can back to the farm. One of the horses in the field was going back to the farm. She asked the man in charge of the horse if she might ride the horse and he let her do so as she was accustomed to riding. The horse was startled and the girl fell off and injured herself.

Held, that as it was not an obviously reckless or dangerous way of returning to the farm and the accident arose out of her employment within the terms of the Act she was entitled to recover compensation. SCOTT *v.* SEYMOUR **(1941) 2 All.E.R. 717 (C.A.).**

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